NATION TAX MARKET

: : आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा करऔरकेन्द्रीय 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

रजिस्टर्ड डाक ए.डी.द्वारा: -

DIN-20220764SX000000DFFC

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/53/GDM /2021	32/JC/2020-21	19-03-2021

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

KCH-EXCUS-000-APP-41-2022

आदेश का दिनांक / Date of Order:	28.07.2022	जारी करने की तारीख / Date of issue:	29.07.2022

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 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 A.N.Electricals, Room No. 11, 2nd Floor, Vandana Commercial Centre, Plot No. 280, Ward 12/B, Gandhidham

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 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-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 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 सार्वजिनक 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 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 सार्वजिनक 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,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.

(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 होगे।/
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 इकाई, 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 outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट 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 आदेशो 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 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.

(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 लगी 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. A.N. Electricals, Gandhidham (hereinafter referred to as "Appellant") has filed Appeal No. V2/53/GDM/2021 against Order-in-Original No. 32/JC/2020-21 dated 19.3.2021 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST, Gandhidham Commissionerate (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', 'Works Contract Service' etc. and was registered with Service Tax Department having Registration No. AADFA9240MST001. During search carried out by the Officers of Preventive Branch, CGST, Gandhidham at the premises of the Appellant on 25.3.2017, it was revealed that the Appellant had provided various taxable services and had charged and collected service tax from their clients during the period from F.Y. 2014-15 up to June, 2017 but had not deposited / short deposited the same in Government Exchequer. It was further revealed that they had filed ST-3 returns only for F.Y. 2014-15. The Appellant had filed ST-3 Return for F.Y. 2015-16 on 18/19.9.2017 but failed to file ST-3 Returns for the period from April, 2016 to June, 2017 and failed to discharge service tax. It appeared that the Appellant had paid service tax totally amounting to Rs. 69,77,193/- during the said period against their service tax liability of Rs. 1,74,31,644/-.

2.1 On culmination of investigation, Show Cause Notice No. SCN/3/CEP/ Kutch/2019-20 dated 13.11.2019 was issued to the Appellant calling them to show cause as to why service tax amounting to Rs. 1,74,31,644/- should not be demanded and recovered from them under proviso to sub-Section (1) of Section 73 of the Finance Act,1994 (hereinafter referred to as 'Act') along with interest under Section 75 of the Act and service tax amounting to Rs. 69,77,193/- deposited by the Appellant should not be appropriated against total service tax liability and Rs. 5,08,345/- against demand of interest. The notice also proposed imposition of penalty under Sections 70, 76, 77 and 78 of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order wherein he confirmed demand of service tax amounting to Rs. 1,74,31,644/- under proviso to Section 73(1) of the Act, along with interest under Section 75 of the Act and appropriated service tax amount of

Rs. 69,77,193/- deposited by the Appellant against confirmed demand and Rs. 5,08,345/- against recovery of interest. The adjudicating authority imposed penalty of Rs. 1,74,31,644/- under Section 78 of the Act and Rs. 1,40,000/- under Section 70 of the Act read with Rule 7 of the Service Tax Rules, 1994 and Rs. 10,000/- under Section 77 of the Act.

3. Being aggrieved, the Appellant preferred the present appeal contending that the adjudicating authority erred in confirming service tax demand of Rs. 1,74,31,644/- under Section 73(1) of the Act and also erred in imposing penalty under Sections 70,77 and 78 of the Act.

4. Hearing in the matter was scheduled in virtual mode through video conferencing on 14.7.2022. Shri Abhishek Doshi, Chartered Accountant, appeared on behalf of the Appellant. He stated that quantification of demand is on higher side and that they had discharged tax liability for F.Y. 2014-15 and F.Y. 2015-16 and filed ST-3 Returns. He further stated that he would make a written submission regarding quantification of demand based on which the case may be decided.

4.1 In additional written submission filed at the time of hearing, it has, *inter alia*, been contended that,

(i) The service tax liability for years 2014-15 and 2015-16 has been wrongly arrived at in the impugned order considering Form 26AS ignoring the figures of audited profit and loss account and invoices issued by them. They have duly paid the service tax and also filed service tax returns for the years 2014-15 and 2015-16. It is very well established legal principle that Show Cause Notice cannot be issued just based on form 26AS. The SCN was issued on the basis of data of Form 26AS without any establishment of any element of service in such transactions. It is stated that no SCN can be issued merely on an assumption that the activity appears to be 'service' and relied upon case law of Kush Constructions - 2019 (24) GSTL 606 (Tri - All).

(ii) As per their Audited Profit & Loss for the F.Y. 2014-15, they earned income of Rs. 3,23,61,837/- towards taxable service and income of Rs. 5,99,450/- towards supply of goods. They had reported taxable income of Rs. 3,24,08,883/- in ST-3 Returns for the F.Y. 2014-15. Similarly, in F.Y.

2015-16, they earned income of Rs. 3,41,86,261/- towards taxable service and income of Rs. 78,000/- towards supply of goods. They had reported taxable income of Rs. 3,41,89,819/- in ST-3 Returns for the F.Y. 2015-16. Thus, in both years, they had paid service tax on higher income as compared to income shown in their P&L account and there was no demand outstanding for these two years.

(iii) They could not make full payment of service tax for the years 2016-17 and 2017-18 (Apr-Jun) due to liquidity crunches and various personal medical problems. However, the demand for the years 2016-17 and 2017-18 has been wrongly calculated on higher side without considering the facts and merits of the case. The demand has been again calculated based on value as per form 26AS and ignoring the value as per audited P&L Account. Considering their audited P & L account, their gross service tax liability was Rs. 54,34,663/- for F.Y. 2016-17 and Rs. 12,45,365/- for F.Y. 2017-18 (Apr-Jun). So, for both these years, their service tax liability comes to Rs. 66,80,028/- as against Rs. 81,21,927/- as confirmed in the impugned order. Further, Rs. 17,79,177/- has also been discharged towards service tax liability for the years 2016-17 and 2017-18.

(iv) That they are eligible for substantial Cenvat credit in the years 2016-17 and 2017-18. Their accounting staff has changed so it will take some time to reconcile said details.

(v) The Show Cause Notice issued under Section 73(1) of the act on 13.11.2019 is barred by limitation. The investigation against them was carried out for the years 2008-09 to 2012-13 and for the year 2013-14 also. So, the Department was very well aware of the activities of the assessee and facts of the case. The present notice is subsequent notice and allegations of fraud, collusion, wilful mis-statement can not be made. Further, the show cause notice does not have any evidence to show that the assessee has suppressed any information with an intention to evade payment of service tax. Further, the SCN has been issued based on form 26AS which are very well available from the respective year itself and there are number of judgements that in notices based on form 26AS, the extended period can not be invoked.

(vi) As it is a question of interpretation of law, there can be no question of suppression on the part of the appellant, extended period of limitation not applicable and no penalty can be imposed. As a result, demand requires to be restricted for the period within the normal period of limitation and accordingly to be re-quantified.

(vii) The assessee has properly discharged the service tax and there is no demand outstanding for the year 2014-15 and 2015-16. Therefore, when there is no outstanding demand, the question of penalty does not arise for the years 2014-15 and 2015-16. Further, for the year 2016-17 and 2017-18, most of the demand have been paid, the assesse and demand pending is mainly on account of financial liquidity crunch and personal medical problems.

5. I have carefully gone through the facts of the case, the impugned order, the grounds raised in Appeal Memorandum and additional written submission as well as oral submission made at the time of hearing. The issue to be decided in the present appeal is whether the impugned order confirming service tax demand of Rs. 1,74,31,644/- under proviso to Section 73(1) of the Act, along with interest under Section 75 and imposing penalty under Sections 70, 77 and 78 of the Act 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 evasion of service tax. Investigation carried out by the officers of Preventive Branch, CGST, Gandhidham revealed that the Appellant had rendered various taxable services and had charged and collected service tax from their clients during the period from F.Y. 2014-15 up to June, 2017 but had not deposited / short deposited service tax in Government Exchequer. The Appellant had failed to file ST-3 Returns for the period from April, 2016 to June, 2017. The Show Cause Notice was issued to the Appellant for demanding service tax totally amounting to Rs. 1,74,31,644/-. The adjudicating authority confirmed service tax demand of Rs. 1,74,31,644/- under Section 73(1) of the Act along with interest under Section 75 and appropriated service tax amount of Rs. 69,77,193/- deposited by the Appellant against confirmed demand and Rs. 5,08,345/- against recovery of interest. The impugned order also imposed penalty under Sections 70, 77 and 78 of the Act.

7. I find that the Appellant has not disputed the charge that they had short

paid/ not paid service tax charged and collected from their service recipients into Government exchequer and that they had failed to file ST-3 Returns for the period from April, 2016 to June, 2017. The Appellant has contested that the demand is calculated on higher side and requires re-quantification. It is contended that the service tax liability for years 2014-15 and 2015-16 has been wrongly arrived at in the impugned order by considering Form 26AS, ignoring the figures of audited P & L account and invoices issued by them. The Appellant further contended that they had earned income towards supply of goods amounting to Rs. 5,99,450/- and Rs. 78,000/- in F.Y. 2014-15 and F.Y. 2015-16, respectively, on which no service tax was payable. That in both years, they had paid service tax on higher income as compared to income shown in their P & L account and there was no demand outstanding for these two years. In this regard, it is observed that the service tax liability for the F.Y. 2014-15 and F.Y. 2015-16 was arrived upon by comparing income reported in ST-3 Returns with income reflected in Form 26AS, since the Appellant had failed to provide invoices, income ledgers, audited Balance Sheets etc. of the said period, despite several letters written to the Appellant during investigation, as recorded in the impugned order. The Appellant has produced audited P & L account for the said years before me as part of additional written submission. On comparing income reflected in P & L account with income reported in ST-3 Returns of respective period, it appears that the Appellant had earned higher income than what is reported in ST-3 returns for the F.Y. 2014-15 and F.Y. 2015-16. The Appellant has defended that differential amount is towards supply of goods, on which no service tax was payable. The Appellant has not produced copies of relevant invoices showing supply of goods. So, it is not possible to arrive upon any conclusion. The Appellant is, therefore, directed to produce the relevant documents before the adjudicating authority for verification.

8. The Appellant has contended that their gross service tax liability was Rs. 54,34,663/- for F.Y. 2016-17 and Rs. 12,45,365/- for F.Y. 2017-18 (Apr-Jun) considering their audited P & L Accounts for the respective years, as against Rs. 81,21,927/- confirmed in the impugned order. I have gone through the calculation sheet submitted by the Appellant for the F.Y. 2016-17 and F.Y. 2017-18 (Apr-Jun) in additional written submission. The Appellant has claimed to have rendered 'Maintenance & Repair Service', 'Supply of Tangible Goods Service' and 'Works Contract Service', on which service tax is calculated after applying

different service tax rates. The Appellant has calculated Service Tax @5.8% and @6% on 'Works Contract Service' after availing abatement. The Appellant has also shown to have earned non-taxable income pertaining to supply of goods. However, the Appellant has not produced copies of relevant contract/work order, invoices, ledger accounts etc. for the said period. The Appellant had failed to produce said documents during investigation or before the adjudicating authority, as recorded in the impugned order. In absence of any documentary evidences, it is not possible to verify the correctness of the service tax liability for the F.Y. 2016-17 and F.Y. 2017-18 (Apr-Jun) arrived upon by the Appellant. I, therefore, find it fit to remand the matter to the adjudicating authority for limited purpose of re-quantification of demand on the basis of relevant contract/work order, invoices, ledger accounts etc to be produced by the Appellant.

9. The Appellant has pleaded that they are eligible for substantial Cenvat credit in the years 2016-17 and 2017-18. Their accounting staff has changed so it will take some time to reconcile said details.

9.1 I find that Rule 9(1) of the Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004') prescribed documents on the basis of which Cenvat credit can be availed. Further, Rule 9(5) and Rule 9(6) of CCR, 2004 mandated that every manufacturer and output service provider to maintain proper records of receipt and consumption of inputs and input services, respectively. 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 utilize the same against discharge of their service tax liability on output service. I find that the Appellant had admittedly not filed ST-3 Returns for the period from April, 2016 to June, 2017. If the Appellant had availed Cenvat credit of input services in their books of accounts in terms of CCR, 2004 during the said period, then they are eligible for adjustment of unutilized Cenvat credit against confirmed demand. The Appellant has not produced any documentary evidence before me, and hence, it is not possible to arrive at any conclusion. I, therefore, consider it appropriate to remand this issue to the adjudicating authority to verify and grant benefit of Cenvat credit to the Appellant for F.Y. 2016-17 and F.Y. 2017-18 (April-June), if Cenvat credit was availed within prescribed time limit and by fulfilling conditions prescribed under Rule 9 of CCR, 2004. The Appellant is also

directed to produce relevant documents like attested copies of Cenvat invoices, Cenvat credit ledgers, Balance sheet of relevant years showing Cenvat credit in balance etc. before the adjudicating authority in support of their claim. Needless to mention that principles of natural justice be adhered to in remand proceedings.

10. The Appellant has contended that the Show Cause Notice issued under Section 73(1) of the Act on 13.11.2019 is barred by limitation. The investigation against them was carried out earlier for the period from 2008-09 to 2012-13 and for the year 2013-14 also. So, the Department was very well aware of the activities of the assessee and facts of the case. The present notice is subsequent notice and allegations of fraud, collusion, wilful mis-statement can not be made. Further, the Show Cause Notice does not have any evidence to show that the assessee has suppressed any information with an intention to evade payment of service tax.

10.1 I find that the Appellant in the present case had charged and collected service tax from their clients but did not deposit/ short deposited the same in Government exchequer during the period from F.Y. 2014-15 up to June, 2017, which was unearthed during investigation carried out against them. The Appellant had also not filed ST-3 returns for the period from April, 2016 to June, 2017. The Appellant filed ST-3 Returns for the F.Y. 2015-16 on 18.9.2017 i.e. after initiation of investigation against them. Thus, this is a clear case of suppression of facts with intent to evade payment of service tax. Further, offence cases were booked against them for evasion of tax for earlier period also as per their own submission. Thus, the Appellant is a habitual offender indulged in evasion of service tax. After considering the facts of the case, I am of the opinion that the adjudicating authority was justified in invoking extended period of limitation on the grounds of suppression of facts.

11. As regards penalty imposed under Section 78 of the Act, the Appellant has pleaded that since there was no suppression of facts, no penalty can be imposed upon them under Section 78 of the Act. I have already upheld invocation of extended period of limitation on the grounds of suppression of facts as per discussion in para *supra*. Hence, 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.),

wherein it is held 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, hold that the Appellant was liable to 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 7 to para 9.1 *supra*.

12. The Appellant has contended that they had properly discharged service tax for the years 2014-15 and 2015-16. Therefore, when there is no outstanding demand, the question of penalty under Section 78 does not arise for the years 2014-15 and 2015-16.

12.1 I find that the Appellant had filed ST-3 Returns for F.Y. 2014-15 on 15.10.2015 and 5.3.2016 i.e. prior to initiation of investigation on 25.3.2017 and had also discharged service tax amount of Rs. 39,19,666/- for the said year, as recorded in Para 6 of the impugned order. However, Show Cause Notice was issued for demanding service tax of Rs. 1,74,31,644/-, which also included service tax of Rs. 39,19,666/- deposited prior to initiation of investigation. Under the circumstances, the Show Cause Notice should have been issued only for differential service tax amount and service tax of Rs. 39,19,666/- paid prior to initiation of investigation cannot form part of demand. I, therefore, set aside confirmation of demand of Rs. 39,19,666/- under Section 73(1) and imposition of penalty of Rs. 39,19,666/- under Section 78 of the Act. As regards F.Y. 2015-16, it is observed that ST-3 Returns for the said year were filed on 18.9.2017 and 19.9.2017 i.e. after initiation of investigation, and service tax was also deposited on various dates after initiation of investigation. The impugned order has correctly included service tax amount pertaining to the said year for demanding duty under Section 73(1) and for imposition of penalty under Section 78. I, therefore, discard this contention as being devoid of merit.

13. 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 failed to assess correct service tax liability and did not pay service tax in accordance with Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994. I concur with the findings of the adjudicating authority and uphold imposition of penalty of Rs. 10,000/- under Section 77 of the Act.

14. Regarding penalty of Rs. 1,40,000/- imposed under Section 70(1) of the Act read with Rule 7 of the Service Tax Rules, 1994, I find that the adjudicating authority has imposed penalty for late filing of ST-3 Returns for the period from April, 2014 to March, 2016 and for non-filing of ST-3 Returns for the period from April, 2016 to June, 2017. I concur with the findings of the adjudicating authority and uphold imposition of penalty of Rs. 1,40,000/- under Section 70 of the Act.

15. In view of above, I partially allow the appeal and set aside the impugned order to the extent of confirmation of service tax demand of Rs. 39,19,666/- under Section 73(1) and imposition of penalty of Rs. 39,19,666/- under Section 78 of the Act and remand the matter to the adjudicating authority for re-quantification of demand, as per findings given in Para 7 to Para 9.1 above. The remaining portion of the impugned order is upheld.

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

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

सत्यापित.

विपुल शाह
अधीक्षक (अपील्स)

(AKHILESH KUMAR)
Commissioner (Appeals)

28 July, 2021

By RPAD

To, M/s. A.N. Electricals, Room No. 11, 2nd floor, Vandana Commercial Centre, Plot No. 280, Ward 12/B, Gandhidham.	सेवा में, मैसर्स ए. एन. इलेक्ट्रिकल्स, कमरा नंबर 11, दूसरी मंजिल, वंदना कमर्शियल सेंटर, प्लॉट नंबर 280, वार्ड 12/बी, गांधीधाम।

प्रतिलिपि :-

1) 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, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
3) संयुक्त आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।