NATION TAX MARKET

: : 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-20220764SX0000444AE8

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIONo.	दिनांक/ Date
	V2/240/RAJ/2021	04/JC(RSS)/2021-22	19-04-2021
	V2/241/RAJ/2021	04/JC(RSS)/2021-22	19-04-2021

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

RAJ-EXCUS-000-APP-194 TO 195 -2022

आदेश का दिनांक / Date of Order: **30.06.2022** जारी करने की तारीख / Date of issue: **15.07.2022**

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. Den Rajkot City Communication Pvt. Ltd., 3rd floor, Rameshwar Complex, Mangala Main Road,Manhar Plot Street No. 4,Rajkot- 360 001

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, BhaumaliBhawan, 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 रजिस्ट्रार 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 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 नियमावली, 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 रजिस्ट्रार 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 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/-.

(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) मीमा 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" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- 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 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 मे 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 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.

(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 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 समयावधि 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 या 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 की 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, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) 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 ::

The below mentioned appeals have been filed by the Appellants (*hereinafter referred to as* "Appellant No. 1 and Appellant No. 2"), as detailed in Table below, against Order-in-Original No. 04/JC(RSS)/2021-22 dated 19.04.2021/20.04.2021 (*hereinafter referred to as* 'impugned order') passed by the Joint Commissioner, Central GST and Central Excise, Rajkot (*hereinafter referred to as* 'adjudicating authority'):-

Sl. No.	Appeal No.	Appellants	Name & Address of the Appellant
1.	V2/240/RAJ/2021	Appellant No.1	M/s Den Rajkot City Communication Pvt Ltd, 3rd floor, Rameshwar Complex, Mangala Main Road, Manhar Plot Street No. 4, Rajkot - 360001.
2.	V2/241/RAJ/2021	Appellant No.2	Shri Nitinbhai S. Nathwani, Director, M/s Den Rajkot City Communication Pvt Ltd, 3rd floor, Rameshwar Complex, Mangala Main Road, Manhar Plot Street No.4, Rajkot - 360001.

2. The facts of the case, in brief, are that the Appellant No.1 was having service tax registration for providing "cable operator services". They were also having Multi System Operator (MSO) registration issued by the Ministry of Information and Broadcasting (MIB) under Section 4 of the Cable TV Networks (Regulation) Act, 1995. Based on the intelligence that the Appellant No.1 was engaged in evasion of service tax by (i) Non-payment of amount equal to proportionate cenvat credit towards reversals in respect of Set-Top-Boxes (STBs) and (ii) non-payment of service tax on legal consultancy services, security services, repair-maintenance service under reverse charge mechanism, the proceedings were initiated against them by the officers of Directorate General of GST Intelligence, Zonal unit, Ahmedabad (DGGSTI). The proceedings culminated into the issuance of SCN to the Appellant No.1 wherein it was proposed:

(i) To demand an amount of Rs. 1,73,44.224/- in respect of cenvat credit taken on capital goods, which was required to be paid under Rule 3(5A)(ii) of the Cenvat Credit Rules, 2004(CCR, 2004) under Rule 14 of CCR, 2004 read with proviso to Section 73 of the Finance Act, 1994("the Act") and read with Section 142 and 174 of the CGST Act, 2017;

(ii) To demand interest on above amount under Rule 14 of CCR, 2004 read with Section 75 of the Act and read with Section 142 and 174 of the CGST Act, 2017;

(iii) To demand service tax amount of Rs. 2,65,514/- which was payable under

reverse charge mechanism for Security Services and Legal Consultancy Fees in terms of the proviso to Section 73(1) of the Act and read with Section 142 and 174 of the CGST Act, 2017 along with interest under Section 75 of the Act;

(iv) To demand service tax amount of Rs. 3,36,565/- under Reverse Charge Mechanism for "Repair and Maintenance service" received by them under proviso to Section 73(1) of the Act and read with Section 142 and 174 of the CGST Act, 2017 along with interest under Section 75 of the Act;

(v) To impose penalty under Section 76, Section 77 and / or Section 78 of the Act read with Section 142 and 174 of the CGST Act, 2017;

(vi) To impose penalty under Rule 15(3) of CCR, 2004 read with Section 76 and / or Section 78 of the Act and read with Section 142 and 174 of the CGST Act, 2017 in respect of demand at Sl No.(i) above;

2.1. The above SCN also proposed imposition of penalty under Section 78 A of the Act upon the Appellant No. 2.

3. The SCN was adjudicated vide the impugned order by the adjudicating authority wherein he has confirmed the demand against Appellant No. 1 and has

(i) Ordered for recovery of Rs. 1,73,44,224/- along with interest towards proportionate cenvat credit taken on capital goods (Set Top Boxes) under Rule 3(5A) (ii) of CCR, 2004;

(ii) Imposed a penalty of Rs. 1,73,44,224/- under Rule 15(3) of CCR, 2004 read with Section 78 of the Act ;

(iii) Ordered for recovery of service tax amount of Rs. 3,36,565/- along with interest under reverse charge mechanism on the services of repair and maintenance procured by them;

(iv) Imposed a penalty of Rs. 3,36,565/- under Section 78 of the Act;

(v) Dropped the demand of service tax of Rs. 2,65,514/- on legal services and security services under reverse charge mechanism;

(vi) Imposed a penalty of Rs. 10,000/- under Section 77(1) of the Act.

3.1. The adjudicating authority has vide the impugned order also imposed a penalty of Rs. 50,000/- upon Appellant No. 2 under Section 78A of the Act.

4. Being aggrieved, the Appellants have preferred the present appeals contending, *inter-alia,* as under:

Appellant No.1:-

(i) The first question framed by the Adjudicating Authority viz. "whether the Appellant was required to follow the four Tariff options given under Tariff Order, 2013" is totally misconceived and misplaced. The Adjudicating Authority does not have any jurisdiction or the authority to decide on an issue relating to Regulations made under TRAI (Telecommunication Regulatory Authority of India), which is a separate Statutory Body. The Adjudicating Authority cannot sit in judgement for the violations, if any, under the TRAI Regulations;

(ii) The Adjudicating Authority has failed to appreciate that all that was to be decided in the present case was whether the Appellant was required to reverse the cenvat credit under Rule 3(5A) of the CCR, which would come into play when the capital goods are removed after being put to use. It is undisputed that the STBs are not sold by the Appellant to the subscribers and consequently, there is no removal of STBs after being put to use. In such a scenario, assuming that the four tariff options ought to have been followed, in terms of which at the end of the 3rd year the title/ownership in the STBs stands transferred to the subscribers, the said event has not happened as the subscribers did not follow the four tariff options but the customized tariff option offered by the Appellant. The jurisdiction to question this lies only with TRAI and insofar as the service tax department is concerned, the fact remains that the capital goods are not sold. When the capital goods are not sold in the facts of the present case, Rule 3(5A) of the CCR does not become applicable. This is without prejudice to the contention that transfer of ownership is not a relevant criterion to determine the applicability of Rule 3(5A) of the CCR as long as the capital goods are available and are used in rendition of output service;

(iii) The Appellant had imported the STBs on payment of custom duties, which was thereafter given to the LCOs who ultimately supplied the same to the subscribers for provision of cable TV service. For supplying the STBs, the Appellant charged one time activation fee from the LCOs and discharged service tax on the same. The Appellant had availed cenvat credit of the CVD paid on importation of STBs, which was capitalised in its books of accounts and used for rendition of taxable output service (i.e. cable TV service). The Adjudicating Authority does not dispute the fact that the STBs were not sold by the Appellant to its subscribers. The fact that the STBs remained the exclusive property of the Appellant at all times and ownership was never transferred to the subscribers, in terms of the contract entered with the subscribers is an accepted position;

(iv) The Adjudicating Authority however, has proceeded on an erroneous premise that the Appellant in terms of the Fifth Tariff Order was mandatorily required to offer only standard tariff packages specified in the schedule, for supply and installation of STB for Cable TV service. The rental schemes prescribed under said schedule provides that after the end of 3 years from the date of installation of the STBs, no rent would be charged and the STBs shall become the property of the subscriber except smart card/viewing card. Therefore, as per the Adjudicating Authority, even though there was no actual sale of the STBs between the Appellant and the subscribers, by operation of law (i.e. schedule to the Fifth Tariff Order), the title/ownership stands automatically transferred to the subscribers at the end of the third year and the Appellant was liable to reverse cenvat credit to the extent of 70% availed on the STBs in terms of Rule 3(5A)(a) of the CCR;

(v) It is submitted that when the Tariff Orders issued by TRAI categorically provides that the MSOs are free to offer their own schemes to the subscribers, the Adjudicating Authority has no authority or jurisdiction to undermine the same and hold that the Appellant had to offer the STBs to subscribers only as per the four options prescribed under the schedule to the Fifth Tariff Order.

(vi) Clause 2 of the Fifth Tariff Order provides that the said Order shall be applicable to cable TV services provided to the subscribers through digital addressable systems, throughout the territory of India. Clause 4 of the said Order relates to tariff for supply and installation of set top boxes. Clause 4(1) of the said Order in categorical terms provides that the standard tariff package for supply and installation of STBs as per the schedule is required to be extended to every ordinary subscriber without prejudice to the provisions of the Fourth Tariff Order. Further, Clause 4(2) of the Fifth Tariff Order, provides that in addition to the option available under the Fourth Tariff Order, the subscriber shall have the ***option*** to acquire the set-top box at the rate and the terms and conditions provided in the Schedule and it is only on receipt of such a request from the subscriber that the MSO shall be bound to supply and install the set-top box in terms of the standard tariff package provided in the Schedule to the Fifth Tariff Order.

(vii) The Adjudicating Authority has erred in holding at Para 28.5.1 of the impugned order that the heading of the Fourth Tariff Order is "Addressable System Tariff Order" whereas the heading of Fifth Tariff Order is "Digital Addressable Cable TV System Tariff Order" and therefore, in the Appellant's case the provisions of Fourth Tariff Order is inapplicable. It is submitted that the said finding is erroneous inasmuch as the regulator while making applicable the Fifth Tariff Order to the whole of India has consciously and deliberately provided that the provisions relating to tariff for supply and installation of STBs are without prejudice to the provisions of Fourth Tariff Order and the subscriber will have the option to acquire the STBs at the rate and the terms and conditions provided in the Schedule to Fifth Tariff Order in addition to the options available under the Fourth Tariff Order.

(viii) The Appellant in the above frame of reference relies on the judgement of the Hon'ble Supreme Court in the case of Commissioner of Central Excise vs. Universal Ferro & Allied Chemicals Ltd., reported in 2020 SCC OnLine SC 314.

(ix) Without prejudice to the above, the Appellant submits that even otherwise, Clause 4(2) of the Fifth Tariff Order in no uncertain terms provides that an ordinary subscriber shall have option to acquire the set top box at the rate and the terms and conditions specified in the Schedule, in addition to the option available under the Fourth Tariff Order and the multi system operator shall, on receipt of request from the ordinary subscriber, supply and install the set top box at the premises indicated by the subscriber. Therefore, Clause 4(2) of the Fifth Tariff Order gives an option to the subscribers to acquire the STBs at the rate and the terms and conditions specified in the Schedule. However, as per the Adjudicating Authority the STBs can be compulsorily acquired only as per the rate and the terms and conditions specified in the schedule and there is no option available with the subscribers to avail any customized tariff package offered by the MSOs or the options under the Fourth Tariff Order, which is clearly against what the Fifth Tariff Order had envisaged.

(x) The Adjudicating Authority has failed to appreciate that the Explanatory

Memorandum to the Fifth Tariff Order has clearly provided that - "in addition to the standard tariff packages prescribed by the Authority, operators are free to offer their own schemes for supply of STB to its subscribers in accordance with their business plan and within the existing Regulations/ Tariff Orders. Subscribers shall have option to choose from the standard tariff package prescribed by the Authority and the alternative schemes offered by the operators". Further, the Press Release issued by the TRAI on 27.05.2013 in connection with the implementation of Fifth Tariff Order, also clarifies that the service providers can also offer alternative schemes/ packages for supply of STBs/ CPEs.

(xi) The Adjudicating Authority at para-28.5.7 of the impugned order has erred in holding that – "the Explanatory Memorandums relied upon by the Appellant only give details of how the standard tariff packages have been formulated and they cannot replace the provisions of Tariff Orders. The Explanatory Memorandum explains only the objects and reasons". It is submitted that the said finding is erroneous and baseless. When the Explanatory Memorandum explains the objects and reasons of the Fifth Tariff Order and under the same clearly provides that in addition to the standard tariff packages prescribed by the Authority, the operators are free to offer their own schemes for supply of STB to its subscribers, to take a view that the Explanatory Memorandum issued by TRAI is to be jettisoned and the understanding of the Adjudicating Authority is to be adopted, is clearly untenable in law. The Explanatory Notes read along with Clause 4 clearly provides that the subscribers have the option to acquire the STBs at the rate and the terms and conditions specified in the Schedule and this does not bar the MSOs from offering their own customised schemes for supply of STBs. It is a settled legal position that Explanatory Notes to a Statute are aids to construction and interpretation of the provisions made thereunder.

(xii) The Adjudicating Authority at para-28.5.4 of the impugned order has erred in holding that Clause 4(1) of the Fifth Tariff Order uses the word "shall" for making offer as per the package specified in the schedule and therefore, the Appellant was required to follow the same and is excluded from the Fourth Tariff Order. In this regard it is submitted that the Adjudicating Authority has erred in reading the Fifth Tariff Order in isolation without taking into account all the Clauses, in particular Clause 4(2) of the Fifth Tariff Order. It is submitted that though Clause 4(1) of the Fifth Tariff Order provides that every MSO shall without prejudice to the Fourth Tariff Order extend Standard Tariff Package for supply and installation of set-top box as provided in the Schedule to the said Order, the provisions of Clause 4(2) of the Fifth Tariff Order goes on to provide that it is the subscriber who shall have the option to acquire the set-top box at the rates and terms and conditions provided in the Schedule and it is only on receipt of such a request from the subscriber that the MSO shall be bound to supply and install the set-top box in terms of the standard tariff package provided in the Schedule to the Fifth Tariff Order. Therefore, reading only the provisions of Clause 4(1) of the Fifth Tariff Order in isolation without considering the provisions of Clause 4(2) is incorrect. The impugned order is therefore, liable to be set-aside.

(xiii) The impugned order has failed to appreciate that in the Appellant's case the customers had opted only for the customised package prevalent in the Industry and none of them had opted for the scheme in terms of the Fifth Tariff Order. Therefore, in the present case, the manner of acquiring the STBs has in no way infringed the provisions of the Fifth Tariff Order inasmuch as, as stated above,

the provisions of the Fifth Tariff Order itself categorically gives the subscribers ***option*** to acquire the STBs. Even under the Fourth Tariff Order, there was no one mandatory scheme for acquiring the STBs and it was for the subscribers to decide what suited them best and opt for it. This position was further clarified under para-45 of the Explanatory Memorandum to the Fourth Tariff Order that it was mandatory on the part of the service providers to make the CPEs available to the subscribers through ***at least*** 3 options viz., outright purchase, hire-purchase or under a rental scheme, thereby meaning that the option was always available to the service providers to offer their customised scheme.

(xiv) With reference to the above, it is submitted that the Adjudicating Authority has obfuscated the entire issue by incorrectly interpreting the options available under Clause 7 of the Fourth Tariff Order and the constituents of scheme that is required to be made thereunder in terms of sub-clause (a) & (b) of Clause 7. It is submitted that insofar as offering to the subscribers at least 3 options (i.e. a minimum of 3 options) viz., outright purchase basis or hire purchase basis or rental basis, there is no dispute. However, all that the sub-clause (a) and (b) of Clause 7 provides is that the options made available under the said clause should be as per the scheme, if any, made by the Authority or if no such scheme is made, then as per the scheme made by the service providers which should necessarily provide for (i) the terms and conditions on return of the CPEs; (ii) refund of security deposit or advance payments, if any, after appropriate and reasonable adjustments towards depreciation in case of return of CPE by a subscriber to the service provider; and (iii) replacement and repair of faulty CPEs acquired.

(xv) The Adjudicating Authority has failed to appreciate the above aspect and has proceeded on an erroneous premise that four types of schemes have been provided in the Schedule to the Fifth Tariff Order and therefore, the Appellant cannot use the option given under the Clause 7 of the Fourth Tariff Order. The Appellant submits that under Clause 7 the service providers are free to offer their own customized package and it is not mandatory that option made available under Clause 7 of the Fourth Tariff Order shall be only in terms of one of the schemes made under the schedule to Fifth Tariff Order.

(xvi) The Adjudicating Authority at para-28.5.3 of the impugned order has held that the DAS implementation in India had started in phases and in phase II, effective from 31.03.2013, more cities were brought under DAS including **Rajkot, Surat, Ahmedabad, Vadodara**. Therefore, as per the impugned order it is very much clear that after 31.03.2013, the Fourth Tariff Order is not applicable to a MSO providing cable services in Rajkot. The Appellant submits the Fifth Tariff Order issued on 27.05.2013 under Clause 4(1) and 4(2) clearly provides that the tariff provisions for supply and installation is without prejudice to the provisions of the Fourth Tariff Order. The Adjudicating Authority has failed to point out any exception under Rule 4(1) and 4(2) stating that the provisions of Fourth Tariff Order are inapplicable wherever DAS was implemented w.e.f.31.03.2013. This being the case and in the absence of any exception in this regard, it is improper to hold that the option under Fourth Tariff Order are not available after the implementation of DAS. In any case, it undisputed that in terms of the Fifth Tariff Order read with the Explanatory Note and the Press Release issued by TRAI itself the MSOs are free to offer their own customized schemes.

(xvii) The Adjudicating Authority at para-28.5.3 and 28.5.8 of the impugned order held that it has not submitted any documentary evidence regarding the scheme

offered by it to the subscribers, is incorrect and against the facts on record. It is submitted that the customised scheme made available by the Appellant was known to the subscribers at the very outset when the contract by way of CAF was filled up and signed by the subscribers. In terms of the customised scheme offered by the Appellant and made known to the subscribers, they were agreed to be charged only one time STB activation and registration fees and no rent for the STBs was charged thereafter. However, insofar as the ownership of the STBs was concerned it was made clear that the same shall remain the exclusive property of the Appellant. The sample copies of CAF and the activation service invoice with relevant terms and conditions was furnished by the Appellant to the Adjudicating Authority as annexure to its reply dated 13.10.2020 and therefore, findings in the impugned order that the documentary evidence regarding the scheme offered by the Appellant was not furnished is factually incorrect.

(xviii) The Adjudicating Authority at para-28.5.8 of the impugned order has erred in holding that the CAF cannot be termed as a scheme and ongoing through the copy of CAF, there is no indication that the customer had opted for customized package. The Appellant submits that the said finding is baseless and is premised on lack of understanding regarding the Appellant's business and the prevalent industry practice. Assuming without admitting for the sake of argument that the STBs installed at the customer premises are not as per the tariff order of TRAI, it is the prerogative of the TRAI, which is the regulatory body, to initiate any action against the Appellant. So far, no such notice or objection has been issued/raised by the TRAI. The practice of offering customized scheme and entering into agreement under a CAF is also prevalent as the Industry/Trade practices, which is widely accepted across the industry, customers and TRAI as well. The impugned order is therefore, untenable in law and liable to be dismissed.

(xix) Assuming without admitting that the CAF is not an independent scheme floated by the MSO as empowered under clause 7 of the Fourth Tariff Order, but it is the only a written contract between the MSO/LCO and the subscriber, where all the 'terms and conditions' are expressly mentioned. Such signed contract *inter alia* becomes the basic document for collection of one-time activation fees against the STBs installed by the MSO at the premises of the Subscriber on which service tax was duly discharged. DGGI is an investigating agency and yet failed to record any evidence to challenge such CAF or that the subscribers were at any time under the impression that they will be the owner of the STB post 3 years of installation. Therefore such contract in the form of CAF needs to be duly recognized. Revenue cannot impose any condition of their own other than that agreed by the service provider and service recipient.

(xx) The Appellant submits that a person who is not a party to contract cannot enforce any right under the contract. The law in this regard has been laid down by the Hon'ble Supreme Court in the case of M. C. Chacko vs. State Bank of Travancore, AIR 1970 SC 504. Therefore, in the facts of the present case when the Appellant has entered into contract with the subscribers for supply of STBs without parting with the ownership, the Department cannot impose any condition other than what is agreed between the parties. Similarly, in the case of Union of India vs. Mahindra and Mahindra Ltd., 1995(76)ELT481(S.C.), the Supreme Court has held that when the agreement entered between the parties is clear, it is not open to the revenue to construe it differently by reading into it something which is not there.

(xxi) The Appellant submits that it in its reply to SCN it had referred to Regulation 17(7) (b) of the Standards of Quality of Service (Digital Addressable Cable TV Systems) Regulations, 2012 (QOS Regulations for short) which provides that every multi-system operator or its linked local cable operator, as the case may be, shall publicize the salient feature of various schemes available for outright purchase or rent or hire purchase of Set Top Boxes from it, in addition to the scheme as regards pricing, hire purchase or renting of Set Top Box, if any, specified by the Authority. The said provision was relied upon in support of its contention that the MSOs were always free to offer their own customised schemes by publicising the salient features of various schemes made available by it.

(xxii) The impugned order at para-28.5.6 has proceeded to reject the said submission on the ground that the QOS Regulation speaks about the standard of quality of service and has nothing to do with Tariff Order. Further, the Adjudicating Authority holds that the Fifth Tariff Order has been implemented in year 2013 and therefore, the standard of quality issued in 2012 cannot have an impact on the Fifth Tariff Order of 2013. The Appellant submits that the said Regulations are applicable to Digital Addressable Systems as apparent from the heading of the Regulation itself. Further, as held by the impugned order, the DAS implementation had started in the 2011 itself. The impugned order is therefore, incorrect in holding that the Regulations are relating to quality of STBs and not tariff, when the said Regulation clearly provides that various schemes can be offered by the service providers in addition to the ones made by the Authority. In any case, the said Regulations are no different either from the Fourth Tariff Order or the Fifth Tariff Order when it comes to making available various options to the subscribers while acquiring the STBs.

(xxiii) Without prejudice to the above, the Appellant submits that the applicability or otherwise of the Tariff Orders issued by the TRAI is only of academic importance in determining whether cenvat credit availed on STBs is liable to be reversed under Rule 3(5A) of the CCR. However, the entire case of the Revenue is premised on the ground that at the end of the three years the ownership/title in the STBs is automatically transferred to the subscribers inasmuch as, the ownership of the STBs is the relevant criterion for determining the applicability of Rule 3(5A) of the CCR and the use of STBs even thereafter for rendition of taxable output service is immaterial and irrelevant.

(xxiv) In para 29.4 of the impugned order the Adjudicating authority has erroneously assumed that as per the four options under the tariff order, the ownership of the STBs is transferred to the subscriber which in other words can be treated as removal of STB to the premises of the subscriber after 3 years from the date of installation. The Adjudicating Authority has failed to appreciate that there is neither any deeming provision of any kind under Rule 3(5A)(a) of the CCR to deem transfer of ownership as removal of goods nor is it factually correct as the STBs were installed at the subscriber's premises right from day one and was used to provide output service, without transfer of ownership, whatsoever.

(xxv) The Adjudicating Authority has erred in demanding cenvat credit to the extent of 70% on the premise that the STBs (i.e. capital goods) on which credit was taken is removed after being put to use. On reading the above provisions it is clear that in terms of Rule 3(5) of the CCR, any input or capital goods on which cenvat credit is taken is removed as such from the premises of the provider of output service, then the provider of output service shall pay an amount equal to the credit availed in respect of such inputs or capital goods. The said Rule deals

with a situation where input or capital goods on which cenvat credit is taken is removed "as such" from the premises of the provider of output service and no longer available for rendering of output service.

(xxvi) The proviso to Rule 3(5) of the CCR provides that the reversal is not required to be made where inputs or capital goods are removed outside the premises of the service of output service for providing the output service. This proviso clearly lays emphasis on the "usage" of the capital goods for rendering the output service inasmuch as, reversal of credit is not required even if the service provider removes the capital goods from his premises for rendering output service.

(xxvii) The Rule 3(5A) of the CCR deals with situations where capital goods on which cenvat credit has been taken are **removed after being used**, by providing that in such cases cenvat credit taken on capital goods is required to be paid reduced by certain percentage points. Therefore, in either of the situations covered under Rule 3(5) and 3(5A) of the CCR, the question of reversal of cenvat credit taken on capital goods arise, only when the capital goods are no longer available for providing output service. Proviso to Rule 3(5) of the CCR, further makes it clear that reversal is credit is not warranted as long as the capital goods/inputs removed from the premises by the service provider is used for rendering of output service.

(xxviii) The Adjudicating Authority has failed to appreciate that in the facts of the present case, there is no removal of STBs after being used and the STBs supplied by the Appellant remain at the premises of the subscribers and are used by it to provide output services. In such a scenario, the proviso to Rule 3(5) of CCR, is attracted and no reversal of credit is warranted under Rule 3(5A) of the CCR.

(xxix) The Adjudicating Authority has failed to appreciate that CENVAT credit on STBs, which are capital goods, is available to the Appellant as long as such STBs are continued to be used at the premises of the subscribers for reception and decryption of signals. It is submitted that Rule 3(5) and 3(5A) of CCR should be read together and the proviso to Rule 3(5) in this context categorically provides that payment shall not be required to be made where any inputs or capital goods are removed outside the premises of the provider of output service for providing the output service. The Adjudicating Authority has also failed to appreciate that the STBs will always be the property of the Appellant, though the same were installed at the premises of the subscribers and STBs are continuously used to provide services even after 3 years.

(xxx) The Adjudicating Authority has failed to appreciate the judgement of the Hon'ble Tribunal relied upon by the Appellant in the case of ***Dish TV India Limited vs. the DGCEI, Final Order No. 50878/2019 dated 11.07.2019***, The above case has been followed by the Hon'ble Tribunal in the case of ***Videocon D2H Ltd vs Commissioner of Central Excise, Customs & Service Tax, Final Order No. A/85341/2020 dated 26.02.2020*** In both the judgements of the Hon'ble Tribunal it has been categorically held that Rule 3(5A) covers situations where goods are cleared after being put to use. When the goods are not removed after being used and still continued to be used for rendering the output service, the provisions of Rule 3(5A) are not attracted. The ratio of the above quoted decisions is squarely applicable to the present case as STB's are used to provide output services to the subscribers, and also no goods have been removed after use.

(xxxi) The Adjudicating Authority at para-29.10 has erred in holding that the ratio of the above judgements are not applicable to the Appellant's case as the same are on are on different set of facts and have been issued for DTH service providers and not for cable operators. The Appellant submits that the said finding is fallacious inasmuch as in both the cases, the STBs and equipments for rendering output service were supplied and installed by the service providers at the customers premises and the dispute was with regard to the applicability of Rule 3(5) and 3(5A) of the CCR.

(xxxii) The Adjudicating Authority at para-29.4 of the impugned order has erred in holding that in all options from I to IV of the schedule to Fifth Tariff Order, the STBs issued to the subscribers automatically become the property of the subscribers after a period of three years from the date of installation, which is to be treated as removal of STBs to the subscribers after 3 years from the date of installation. The Adjudicating Authority has failed to appreciate that in its case, the subscribers have opted only for the customised package prevalent in the Industry and not for the standard tariff package provided under the schedule to the Fifth Tariff Order. Therefore, the question of automatic transfer of owner/title to the STBs in favour of the subscribers do not arise. As per the CAF, which is a contract entered with the subscribers setting out the terms for supply of STBs, clearly provides that the STBs shall always remain the exclusive property of the MSO and it nowhere provides for transfer of property in the set-top box either after three years or at any subsequent point in time. The Appellant and its subscribers are bound by the terms and conditions mentioned on the CAF and the Department cannot introduce/impose any other clause or condition that is not part of this CAF.

(xxxiii) The Adjudicating Authority has failed to appreciate that the SCN has gone beyond the scope of CAF while hypothesizing that the STBs become the property of the subscribers after 3 years from the date of subscription. It is undisputed fact that the STBs are the sole property of the Appellant even after the expiration of 3 years as can be seen from the terms of CAF and 'Activation Service Invoice'.

(xxxiv) The Adjudicating Authority has failed to appreciate that the Department cannot go beyond the scope of the agreement that existed between the Appellant and the subscribers, to allege that there was transfer of title in the STBs. In the facts of the present case, the Appellant had never sold the STBs to its subscribers and the Appellant never parted with such ownership rights.

(xxxv) The entire case of the Department is based on the premise that it has sold the STBs to the subscribers at the end of the third year in terms of the Fifth Tariff Order and the evidences produced by the Appellant in support of the fact that no transfer of ownership/title in the STBs has been discarded, without rendering any finding. The Adjudicating Authority at para-29.7 of the impugned order has erred in holding that the present dispute is about the ownership of capital goods after 3 years from the date of installation of the same and continued use of STBs at the customers premise, without it being deployed elsewhere for providing the output service is not in challenge.

(xxxvi) The Appellant submits that above finding is a result of incorrect interpretation of the provisions of Rule 3(5) and Rule 3(5A) of the CCR. The Adjudicating Authority has failed to appreciate that under the provisions of CCR the ownership of the capital goods was not determinative of an assessee's eligibility to avail Cenvat Credit. As long as the capital goods were used by the service

provider for rendering services, irrespective of the ownership of the same, Cenvat Credit in respect of the same was available.

(xxxvii) The Adjudicating Authority has failed to appreciate the judgements of the Hon'ble Tribunal in the case of German Remedies Ltd., and Modernova Plasyles Pvt. Ltd., in support of its contention that ownership was not determinative of the assessee's eligibility to avail Cenvat Credit. The Adjudicating Authority at para-29.11 of the impugned order has held that the judgements relate to modvat era and therefore, declined to follow the same thereby violating the principles of judicial discipline.

(xxxviii) From the above judgements it clearly comes out that when the capital goods i.e. set-top box are being used for providing output services, then irrespective of who holds the title to such goods and irrespective of the premises where the same are being used, there is no provision of law which requires reversal of Cenvat Credit, as long as they are being used for provision of output service. Reversal of credit is required only in case where the capital goods are removed from the premises of the provider of output service as such [in terms of Rule 3(5) of CCR] or after being put to use [in terms of Rule 3(5A) of CCR]. Infact the proviso to Rule 3(5) of CCR provides that payment of tax shall not be required to be made even if any inputs or capital goods are removed outside the premises of provider of output service, if they are removed for the purpose of providing the output service, which is the position in the present case. Further, Rule 3(5A) is inapplicable in the facts of the present case as the capital goods continue to be used for provision of output service and are not removed after being put to use.

(xxxix) **As regards the Service Tax under RCM on repair and maintenance services,** the Adjudication Authority has proceeded on an erroneous premise that the expenses, recorded by it in the books under the nomenclature of repairs and maintenance, is a works contract service received by it, liable for discharge of service tax under RCM. The Department in this regard has presumed that the services received by it are inclusive of materials, only because its books of accounts do not reflect any procurement of materials.

(xl) As per the Department it had accounted for repair and maintenance expenses of Rs.62,96,569/- on which it was liable to discharge service tax under RCM. The detailed breakup of the expenses provided furnished by the Appellant is extracted below –

Sr. No.	Particulars	Amounts (Rs.)	Remarks
1	Purchase of Imported Goods & Services	3,78,896/-	RCM is not applicable on purchase of goods
2	Purchase of other goods	2,10,772/-	
3	Set Top Box repair charges	45,23,586/-	Normal repair services not covered under RCM
4	Cable Line maintenance charges	6,60,938/-	
5	AC repair charges	59,150/-	
6	Other Misc Repair charges	4,63,227/-	
	Total	62,96,569/-	

From the above table, it is very clear that all the expenses are purely in the nature of repair and maintenance work done by the vendor on the property of the Appellant. There is no transfer of property in goods leviable to VAT/sales tax in the above-mentioned transaction. In the absence of any transfer of property in

goods, these repair and maintenance charges do not qualify the basic conditions prescribed in the definition of Works Contract as defined in section 65B (54) of the Finance Act, 1994, and therefore service tax is not liable to be paid under RCM.

(xli) The Adjudicating Authority has failed to appreciate the definition of works contract defined under Section 65B(54) of the Finance Act, 1994 in its proper perspective. The Appellant submits that on going through the above definition it is clear that works contract means a contract wherein transfer of property in goods is involved in its execution, and such transfer of property in goods is leviable to tax as sale of goods (such as sales tax, VAT or WCT, etc.). Further such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

(xlii) From the copies of invoices furnished by it to the Adjudicating Authority and tabulated at para-31.1 of the impugned order, it comes out that the twin conditions viz. that there must be transfer of property in goods and such transfer of property is leviable to VAT/sales tax under the relevant State tax is not satisfied. It is clear that the service provider has not charged any VAT as the work involved there was pure service and not a works contract. The said invoices and the declaration given by the vendors to the effect that there was no transfer of property in goods in the course of rendition of services by them forms a part of the reply/additional submissions made by the Appellant and it is prayed that the same be taken as a part and parcel of this appeal.

(xliii) The finding at para-32 of the impugned order is illogical and baseless. The Adjudicating Authority therein holds that the Repair and Maintenance services received by Appellant involved use of goods in receiving such services and there was nothing shown at any time by Appellant that the goods purchased by them had been supplied to the service provider for receiving those services. Further, it holds that it was also not coming out that service provider had purchased the goods on behalf of Appellant, and used the same in providing services and also the copies of invoices do not support the contention that there was no transfer of property in goods in the said transactions. The Appellant in this regard submits that when the transactions were one involving pure service inasmuch as no transfer of property in goods was involved, the Appellant cannot be asked to produce evidence relating to purchase of goods. The Adjudicating Authority has failed to appreciate that the burden of proof in this case that the activity involved is one of works contract is squarely on the Revenue, which it has failed to discharge. All that the investigation has done is that it has picked up the expenses under repair and maintenance heading and made bald allegations that the same constitutes works contract, without adducing any evidence in its support.

(xliv) The Adjudicating Authority by holding that the repair and maintenance services invoices furnished by it do not support the contention that there was no transfer of property in goods in the said transactions is infact asking the Appellant to prove the negative. The impugned order is therefore, bad in law and liable to be dismissed.

(xlv) **Limitation:** Without prejudice to the above, it is submitted that the Show Cause Notice is dated 31.08.2020 and demands service tax for the period 01.10.2014 to 30.06.2017 which is beyond the normal period of limitation of 30

months (18 months prior to 14-5-2016) specified in Section 73(1) of the Finance Act 1994 and is therefore to that extent is barred by time.

(xlvi) The Appellant submits that the Department had previously scrutinized and investigated all the records, transactions, ledgers, book of accounts and business modules undertaken by the Appellant before the SCN dated 31.08.2020 was issued to it. Furthermore, the Department had also carried out the audit of the Appellant's transactions and therefore, the activities relating to the Appellant's business was very well within the knowledge of the Department. In such a scenario to allege wilful suppression of facts is incorrect and contrary to the facts on record.

(xlvii) Without prejudice to the above, the Appellant submits that the larger period of limitation of five years specified in the proviso to Section 73(1) of the Finance Act 1994 is inapplicable in the present case since the non-payment of service tax, if any, to the extent of non-reversal of cenvat credit under Rule 3(5A) of the CCR is not by reason of wilful suppression of facts with intent to evade tax.

(xlviii) Without prejudice to the above, the Appellant submits that the Department cannot invoke extended period claiming suppression, when all primary facts, inferential facts and legal inferences are made known to the Department. The Appellant in this frame of reference relies on the following judgements of the Hon'ble Apex Court and submits that the case for invoking the longer period does not arise –

(a) Calcutta Discount Co. Vs. ITO, (1961) 41 ITR 191 (SC),

(b) Parashuram Pottery Works Co. Ltd. v. ITO, (1977) 106 ITR 1 (SC),

(xlix) Without prejudice to the above, the Appellant submits that in any case it was under a bonafide belief and even now hold such a belief that it was not liable to reverse any credit under Rule 3(5A) of the CCR as the STBs installed at the subscriber's premises were used for rendition of output service and at no given point the same was sold to the subscribers. Further, the Appellant entertained a bonafide belief that title/ownership of the capital goods is not the criterion for reversal of credit in terms of Rule 3(5A) as long as the capital goods are used for providing output services as held by the Hon'ble Tribunal in the case of German Remedies Ltd., and Modernova Plastyles Pvt. Ltd. It is settled law that when non-payment of tax is on account of a bonafide belief and view held by the assessee in respect of interpretation of the provisions of law, it cannot be said that the non-payment of tax was on account of fraud, collusion, willful misstatement or suppression of facts or intent to evade tax and accordingly the larger period of limitation cannot apply. Reliance in this regard is placed on the decision of Steelcast Ltd v CCE- 2009 (14) STR 129 upheld in CCE v Steel Cast Ltd – 2011 (21) STR 500 (Guj).

(l) The Hon'ble Supreme Court in the case of CCE v. Chemphar Drug and Liniments, 1989 (40) ELT 276 (SC), in para-8 of the decision held that – 'In order to make a demand under Section 11A of the Central Excises and Salt Act for beyond a period of six months and upto a period of five years, something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise is required to be established. Where Department had full knowledge about the facts and the manufacturer's action or inaction is based on the belief that they were required or not required to carry out such action or inaction, the period beyond six months cannot be made applicable'.

(li) The Department was all along aware of all the fact regarding availment of Cenvat Credit by the Appellant as the same was duly reflected in the ST-3 returns filed by it and also the nature of its business activities relating to supply and installations of STBs at the subscribers premises. Since the Department had knowledge about the facts the action or inaction on the part of the Appellant cannot be attributed to suppression and intention to evade tax.

(lii) It is well settled that the burden of proof that various omissions and commissions envisaged in proviso to Section 11A/ Section 73 have been committed by the assessee is squarely on the Revenue, which has not been discharged in the Appellant's case. The extended period of limitation is therefore inapplicable. The Appellant in this frame of reference, rely on the decision in TN Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC) and New Decent Footware Industries v. UOI, 2002 (150) ELT 71 (Del.) wherein it was held that "When the central excise officer takes recourse to proviso to section 11A, then he must bring on record, sufficient material to prove existence of jurisdictional facts referred to therein. It was further held that for invoking the extended period of limitation, the burden of proof of applicability of proviso to section 11A rests on the Department". The Appellant submits that the show cause notice has not brought any material/ evidence on record save a bald allegation of suppression. The burden of proof has thus not been discharged by the Department.

(liii) The Department has not appreciated the purport and legal significance of the expression *suppression*. The meaning of the word "suppression" has been expounded by the Hon'ble Supreme Court in Continental Foundation Joint Venture v. CCE, 2007 (216) ELT 177 (SC), wherein it was held that "*the term suppression used under proviso to section 11A has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it is deliberate to stop payment of duty. Suppression means failure to disclose full information with intent to evade payment of duty. There cannot be suppression of fact which is not willful and yet constitute a permissible ground for the purpose of proviso to section 11A*". The Appellant submits that when the ST-3 returns filed for the period clearly denotes the availment of cenvat credit and also regular audits of the business activity of the Appellant is undertaken, the finding of suppression is without any substance and hence, the impugned order is liable to be dismissed.

(liv) The term 'intention to evade payment of duty' has been explained by the Hon'ble Apex Court in Tamil Nadu Housing Board V. CCE, 1994 (74) ELT 9 (SC), As per the above ratio, for invoking the extended period of limitation, not only suppression must be alleged and proved but in addition, it must also be proved that such suppression was intentional, deliberate and not simpliciter non-payment of tax.

(lv) Reliance is also placed upon the he Hon'ble Apex Court judgment in the case of Cosmic Dye Chemical vs. CCE, 1995 (75) ELT 721 (SC) It is submitted that no material/evidence has been adduced by the Department in the show cause notice in support of their claim of suppression, whereas the fact regarding availment of cenvat credit on STBs was clearly brought out by the Appellant in the ST-3 Returns filed by it with the Department. The impugned order is thus clearly untenable in law and hence liable to be dismissed.

(lvi) Assuming without admitting that the Appellant was liable to discharge service tax under RCM on works contract services, then the service tax so paid was

available as cenvat credit. When the entire amount was available as Cenvat Credit, there could be no intention on its part to evade payment of service tax. Reliance is placed in this behalf on the following judgments which hold that when the tax/duty demanded was available as Cenvat Credit, the situation is revenue neutral and there could be no intention to evade the tax and hence larger period of limitation is inapplicable.

(i) Reliance Industries Ltd v CCE -2016 (44) STR 82
(ii) Jet Airways (I) Ltd v CCE – 2016 (44) STR 465
(iii) Mafatlal Industries Ltd v CCE – 2009 (241) ELT 153 Upheld in CC v Mafatlal Industries Ltd- 2010 (255) ELT A77 (SC).

(lvii) **Penalty and interest** The imposition of mandatory penalty under Section 78 of the Finance Act, without any specific findings on presence of various omissions or commissions envisaged in Section 78 of the Finance Act, is untenable as held by the Honorable Supreme Court in UOI v. Rajasthan Spinning & Weaving Mills, 2009 (238) ELT 3 (SC) wherein in para-19 of the decision, it was held that penalty under Section 11AC of the CEA (i.e. pari materia with Section 78 of the Finance Act) is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the Section. It is submitted that the ingredients envisaged in Section 11AC have to be proved by the Revenue before the mandatory penalty can be fastened. There is nothing in the present case discharging the above burden on the part of the Department before imposing the mandatory penalty.

(lviii) The Show Cause Notice is time barred for the submissions made in the foregoing paragraphs. When the extended period of limitation is not applicable to the facts, then the provisions of Section 78 of the Finance Act would also automatically fail. In Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC) it was held that no penalty under Section 11AC is imposable if the extended period of limitation is not available to the Revenue. Further, reliance is placed on the judgment of the Hon'ble Supreme Court in CCE v. Damnet Chemicals Pvt. Ltd., 2007 (216) ELT 3 (SC) and also in Devans Modern Breweries Ltd. v. CCE, 2006 (202) ELT 744 (SC).

Appellant No.2

(i) There has been no evasion of service tax by Den Rajkot, as is evident from the submissions made by it, the main appellant in the appeal filed by it. Appellant submits that all grounds urged by Den Rajkot (i.e. the company) in its appeal are being adopted by the Appellant and are not being reiterated herein for the sake of brevity.

(ii) A perusal of the grounds urged by Den Rajkot in its appeal would show that there has been no violation of the provisions of CCR or the TRAI guidelines and consequently, the evasion of service tax whatsoever by Den Rajkot and accordingly, there has been no contravention on part of the Appellant so as to warrant any imposition of penalty on him.

(iii) The impugned order has held that the Appellant has violated the TRAI orders as also Rule 3(5A)(a) of the CCR inasmuch as he was aware of all the procedures related to service tax as well as the TRAI orders and the guidelines applicable to their business but continued to declare the STBs as their assets and claimed depreciation even after three years of installation with clear intention to evade payment of tax. In this regard, it is submitted that the Den Rajkot who has procured the STBs had only placed the same at the subscriber's premises for

rendering output service and the same was not sold to the subscribers at any given point of time. This fact has been even mentioned by the Appellant in his statement dated 02.04.2019 as answer to question no.7.

(iv) In terms of the Fifth Tariff Order there is an option available to the MSOs in terms of which customised tariff packages for supply and installation of STBs can be offered to the customers. The subscribers accordingly had opted for the customised package offered by the Company in terms of which one time activation fee is charged on supply of STBs and the same remains the property of the Company. Therefore, when the STBs were not infact sold, the Company has correctly shown the same in its Balance Sheet as assets and claimed depreciation on the same. The finding in the impugned order that there is violation of the TRAI guidelines is incorrect.

(v) Under the provisions of Rule 3(5A) of the CCR, when capital goods after being put to use are removed, the reversal of credit is warranted and consequential, disclosure of this fact in the ST-3 return. However, when the capital goods are not removed and continued to be used for providing output service, nowhere the Rules contemplate the disclosure of this fact. Therefore, the finding in the impugned order that the Appellant had not disclosed the fact regarding treating the STBs as their property is untenable in law and baseless.

(vi) The Adjudicating Authority has failed to appreciate that the power to adjudicate the case is derived by it from the Finance Act 1994. The Adjudicating Authority cannot sit in judgement for the violations, if any, of the regulations made under the TRAI, which is a separate statutory body. The finding in the impugned order that at the end of 3 years the STBs automatically becomes the property of the subscribers, when in fact there is no such provisions under the TRAI regulations and no action of any kind being initiated by the TRAI, it is improper on the part of the Adjudicating Authority to hold that the Appellant has violated the TRAI Regulations. The impugned order therefore deserves to be dropped.

(vii) Assuming without admitting for the sake of argument that the company was required to offer to the subscribers only the standard tariff packages in terms of which at the end of 3 years, the ownership in the STBs is transferred to the subscribers, the fact remains that the company had offered the customised tariff package to the subscribers in terms of which the STBs remain the exclusive property of the company and the contract in this regard has been entered with the subscribers. Therefore, when the STBs are not sold by it to the subscribers, the violation if any, could be of the TRAI Regulations and only TRAI is empowered to decide on the issue relating to the same. However, from the perspective of the service tax laws, the fact remains that the STBs are not sold to the subscribers and therefore, the STBs are not removed after being put to use. It is imperative to mention here that even under the provisions of Rule 3(5A) of the CCR, the transfer of ownership of the capital goods is not a criterion to determine the applicability of the said Rule as along as the capital goods are used for rendering the output service.

(viii) Non-payment of service tax under reverse charge mechanism on works contract service in the facts of their case does not arise as the service received by them do not involve any transfer of property in goods and are pure service contracts. Therefore, when the services received by it do not qualify to be works contract service, the payment of service tax under RCM does not arise.

(ix) The judgement in the case of Tulsi Intermediates & Sh. Ashokbhai B. Patel [2010 (256) ELT 281 (Tri-Ahmd)] and Gajjadhar Jhanwar [2014 (307) ELT 337 (Tri-Del)] are incorrectly relied upon by the Adjudicating Authority as the same are not applicable to the facts of the Appellants case. The issue in both the judgements is concerning clandestine removal of goods from the factory and the Revenue had proved beyond reasonable doubt the role of the employees therein. Further, the statements given by the employees also admitted their role. The personal penalty on the employees was thus imposed.

(x) In the statement given by him before the investigating officer, there is no admission of any wrong doing inasmuch he has stated the fact relating to STBs not sold to the subscribers. The issue therefore, only relates to interpretation of the provisions of the Cenvat Credit Rules and the TRAI Regulations. This being the case, when the issue pertains only to interpretation of the provisions of law where two views are possible, the question of imposing personal penalty does not arise. The Hon'ble CESTAT in the case of Sundaram Finance Ltd., vs. CCE 2018 (11) GSTL 305 (T) has categorically held that when the issue interpretation of law where possibility of two views cannot be ruled out, neither penalty is imposable nor invocation of extended period.

(xi) The Adjudicating Authority has nowhere pointed out any act of the Appellant which could even suggest, let alone establish that the Appellant was knowingly concerned with the alleged contravention. In the absence of there being any finding or evidence to this effect, penalty under Section 78A cannot be sustained.

(xii) No suppression of facts or contravention of the provisions can be attributed to the Appellant, even if it is assumed that there has been some misstatement the same cannot become the basis for imposition of penalty on the Appellant under the provisions of Section 78A. Penalty under section 78A can only be imposed if a person 'at the time of such contravention was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention'. It is submitted that Department has failed to adduce any evidence that the Appellant was knowingly concerned with any contravention, when in fact the entire issue pertains to interpretation of the provisions of CCR and the TRAI Regulations. Further, the non-reversal of credit on STBs is also supported by various judgements of the Hon'ble Courts which the Company has relied upon in its appeal.

(xiii) It has not withheld any information or made any incorrect submissions in respect of the information sought at the time of investigations. However, for the sake of argument, even assuming without admitting the same to be true, this by itself is no ground for imposing penalty under Section 78A as for imposition of penalty under the said section, it is imperative to establish that there was evasion of tax by the company and the person being penalised was, at the time of such evasion, was in-charge and responsible for the conduct of business and had knowingly concerned himself with such contravention. There was neither any allegation in the notice to this effect, nor any finding in the impugned order and consequently the impugned order deserves to be quashed and set aside on this ground alone.

(xiv) On reading para-40 and 40.1 of the impugned order where findings relating to the Appellant's role are given, nowhere it comes out that the Appellant has made any misstatement or misrepresentation while giving his statement before

the Department. It only the inferences that the Department draws from its limited understanding of the TRAI Regulations.

(xv) The Department has failed to adduce any evidence that the Appellant was involved in any alleged contravention of the provisions of CCR or the TRAI regulations or had knowingly directed his employees to act in defiance of law.

(xvi) No information whatsoever was withheld or suppressed from the Department in the statement given by the Appellant. Further, in his answer to the Q.No.11, the Appellant has categorically submitted that – "the Fifth Tariff Order issued by TRAI gives the Company an option which prescribes the standard tariff packages for STBs for Digital Cable TV subscribers, and that the service provider can also offer alternative schemes/packages for the supply of STBs. The company has recovered one time activation charges for the supply of STBs to local cable operators, who in turn has installed the same at the subscribers premises. The STBs always remains the exclusive property of the Company. Accordingly, I believe that our company is not required to pay back an amount equal to cenvat credit taken by reduced @ 2.5% per quarter by straight line method prescribed under the provisions of Cenvat Credit Rules". The Adjudicating Authority has failed to appreciate the statement given by the Appellant and has proceeded to decide the issue in light of its understanding of the TRAI Regulations, when he is not the competent authority to sit in judgement over the applicability of the TRAI Regulations.

(xvii) **No penalty leviable under Section 78A of the Finance Act,** 1994 Without prejudice to the above, Appellant submits that the Adjudicating Authority in the impugned order has imposed penalty on the Appellant under Section 78A of the Finance Act, 1994.

(xviii) The above section applies in a case where an offence is committed by an official of a company by way of evading service tax, issuing any document in contravention of the provisions of the Finance Act, availing or utilizing credit in violation of the rules or failing to pay an amount collected as service tax to the credit of the Government. The impugned order has however, sought to impose penalty under the said section, without pointing out the exact offence alleged to have been committed by the Appellant.

(xix) The company has not committed any of the aforesaid contraventions and that there can be no imposition of penalty. Further, there is no evidence which would even remotely suggest that the Appellant was responsible for any alleged wrong doing or it was under his directions that the alleged contravention, if any, had taken place. The Appellant respectfully submits that the Adjudicating Authority in the impugned order has not spelt out as to how a contravention under Section 78A has been committed in the present case and deserves to be set aside.

(xx) The penalty under Section 78A is leviable only in a case where any of the above offences have been committed knowingly by a person. It is respectfully submitted that even assuming that there has been a contravention, the same has not been done by the Appellant knowingly, and the Appellant did not have any knowledge of the same.

5. Personal hearing in the matter was conducted in virtual mode through video conferencing on 20.05.2022. S/Shri Kunal Verma and Parveen Agarwal, Authorized

Representatives, appeared on behalf of the Appellants. Shri Kunal Verma re-iterated submission made in appeal memorandum.

6. I have gone through the facts of the case available on records, the impugned order, and the submissions made by the appellants. I find that the issues to be decided in the present case is as to whether the impugned order passed by the adjudicating authority, in the facts and circumstances of the case, confirming the demand of Rs. 1,73,44,224/- against the Appellant No. 1 towards reversal of proportionate cenvat credit of capital goods (Set Top Boxes) under Rule 3(5A) (ii) of CCR, 2004 and Rs. 3,36,565/- as service tax under Reverse Charge Mechanism in respect of the services of repair and maintenance along with interest and imposition of penalty under Section 77 and 78 of the Finance Act, 1994 and imposing penalty of Rs. 50,000/- upon the Appellant No. 2 under Section 78A of the Act is legal and proper or otherwise.

7. As regards the demand in respect of cenvat credit amount of Rs. 1,73,44,224/-, it is observed from the records that the Appellant No. 1 is engaged in providing services as cable operator and was registered with Ministry of Information and Broadcasting (MIB) for operating as Multi System Operator (MSO) with effect from 29.05.2014. As an MSO, the Appellant No.1 was providing cable operator services by receiving programming services from broadcasters and retransmitting the same through one or more cable operators. For providing services as MSO, the Appellant No.1 required Digital Head End, Conditional Access System, Digital Addressable System, and Set Top Boxes (STBs). The STBs receives input from head end via optical and coaxial wires in RF format and provides Audio Video signal or HDMI (High Definition Multimedia Interface) signal as output. The STBs decodes the signal for viewing it on TV and is required to be installed at subscriber's premises. The Appellant No. 1 had procured total 1,40,816 STBs valued at Rs. 26,06,15,598/- during the period from March, 2013 to June, 2017 from M/s. Den Network Ltd., New Delhi. The Appellant No.1 is a subsidiary company of M/s. Den Network Ltd, New Delhi, as it held 51 % shares of the Appellant No.1. The Appellant No.1 had also availed cenvat credit of duty [CVD paid at the time of import] paid on these STBs treating them as capital goods in terms of Rule 3 of CCR, 2004.

7.1. During the course of investigation conducted by the officers of DGGSTI, it appeared that Standard Tariff for supply and installation of STBs was regulated by the Tariff Order, 2013 dated 27.05.2013 (Fifth Tariff Order or Tariff Order 2013) issued by TRAI and in all tariff packages under options I to IV provided under the said order, the STBs automatically became the property of the subscribers after a period of 3 years from

the date of installation. It further appeared that the Appellant No.1 continued to show STBs as their assets even after 3 years from the date of installation and not given effect to mandatory notification of TRAI to avoid payment of amount as per Rule 3(5A)(a) of CCR, 2004. Accordingly, vide the impugned SCN, it was proposed to recover proportionate cenvat credit to the tune of Rs. 1,73,44,224/- invoking provisions of Rule 3(5A)(a) of CCR, 2004 from the Appellant No. 1.

7.2. The adjudicating authority observed that the Appellant No.1 was mandatorily required to follow the options given under Tariff Order, 2013 (Fifth Tariff order) issued by TRAI. It was also observed by the adjudicating authority that though the Appellant claimed that there was customized scheme offered by them to their subscribers, but they could not submit documentary evidences of such scheme nor sample Customer Application Forms (CAF) furnished could be treated as a scheme. The adjudicating authority further observed that under all the four standard tariff packages (under Tariff Order, 2013), the STBs issued to the subscribers automatically become the property of the subscribers after a period of three years from the date of installation and thus the ownership of the STBs stood transferred to the subscribers after that period. The adjudicating authority observed that the above transfer of property in STBs to the subscribers has to be treated as removal of STBs after being put to use, and, accordingly, the Appellant No. 1 was liable to pay an amount equal to 70 % of cenvat credit taken on STBs as required under Rule 3(5A)(a)(ii) of CCR, 2004.

7.3 Against the above confirmation of the demand, the Appellant No.1 has contended that the first question formed by the adjudicating authority is legally not correct as the adjudicating authority does not have any jurisdiction or the authority to decide on an issue relating to Regulations made under TRAI, which is a statutory body.

7.3.1 It is also the contention of the Appellant No.1 that the STBs were not sold by them and there is no removal of STBs after being put to use. As per the submission of the Appellant, the STBs were given to the Local Cable Operators (LCOs) and one-time activations fee was charged from them on which service tax has already been paid. The Appellant further stated that these STBs were installed by the LCOs at subscriber's premises and the STBs remained exclusive property of the Appellant No.1.

7.3.2 It is the argument of the Appellant that as per the provisions of Fourth Tariff Order, 2010, Fifth Tariff Order, 2013 and relevant TRAI Regulations, it was not mandatory to follow the standard tariff packages offered under these provisions, and, the service

providers (MSOs) like the Appellant No.1 were free to offer their customized options to the subscribers. It is contended by the Appellant that their subscribers did not follow the standard tariff packages and instead opted for the customized option offered by them.

7.3.3 The Appellant has further contended that the signed contract (CAF) becomes the customized package and basic documents for collecting activation fees. It is also contended by the Appellant that no evidence was brought out during the investigation that post 3 years, property of STBs were transferred to subscribers. It is also the stand of the Appellant that the Revenue cannot impose any condition of their own other than agreed by subscribers and service provider by way of singed contract (CAF).

7.3.4. The Appellant has also argued that the question of reversal of credit under Rule 3(5) or 3(5A) of CCR, 2004 arise only in the cases where capital goods are no longer used for providing output service. The Appellant further claimed that the STBs remained in the premises of the subscribers and were used by the Appellant No.1 for providing output services and hence they were not required to reverse the proportionate cenvat credit as alleged in the SCN and confirmed by the impugned order. The Appellant have also relied upon various judicial pronouncements in support of their contentions.

7.4 At the outset, I find that the admissibility/availability of cenvat credit of duty paid in respect of the STBs, treating them as capital goods, has not been disputed in the SCN or in the impugned order. It is also observed that no reversal of cenvat credit has been demanded for initial removal these of STBs to the LCOs and subscribers premises. As per the conclusion arrived at by the adjudicating authority in the impugned order, the Appellant No.1 is required to pay proportionate cenvat credit under Rule 3(5A) of CCR, 2004 as the ownership of STBs stood transferred to the subscribers after 3 years from the date of installation, as mandated under the standard tariff packages offered under Tariff Order, 2013.

7.4.1. As regards the argument of the Appellant regarding question framed by the adjudicating authority, I find that the Appellant themselves in their written submission had discussed the applicability of various tariff packages/ tariff orders in their case. Hence, it is obvious that the adjudicating authority would frame the question accordingly and record his findings thereon. In any case, the adjudicating authority cannot be faulted in analyzing the impact of the provisions of the TRAI regulations from the cenvat credit point of view and it cannot be interpreted as an attempt to decide any issue relating to TRAI regulations.

7.4.2. The Appellant have claimed that these STBs remained their property as there is no sale to the subscribers and were continued to be used for providing output service hence there is no removal of STBs after being put to use. In support of the claim, the Appellant has furnished few sample copies of CAFs. In this regard, I find that the Appellant has availed cenvat credit in respect of total 1,40,816 STBs during the period under dispute. The removal and ultimate possession / property of these STBs cannot be conclusively established based on few CAFs. It also appears that most of these sample CAFs are pertaining to the supply of STBs to the LCOs and not to the final subscribers on whose premises these STBs were installed. It is the general perception that in majority of the cases the MSO, DTH operators or LCOs recover the cost of the STBs from the subscribers in the name of various charges and the STBs remain the property of the final subscribers. I find that though the Appellant has claimed that they had recovered only one time activation charges from the LCOs, but have not furnished any other financial records to prove that they have not recovered any amount over and above the activation charges from their subscribers towards cost of these STBs. Thus, in my opinion the evidences furnished by the Appellant are not sufficient to conclusively prove that the STBs remained their property in all the cases.

7.4.3. It has been vehemently argued by the Appellant that as per the provisions of the various Tariff Orders and TRAI guidelines, they were not mandatorily required to follow any standard tariff packages offered under tariff orders and relevant TRAI Regulations, and the service providers (MSOs), like the Appellant No.1, were free to offer their customized option. The Appellant further claimed that their subscribers had opted for the customized option under signed contract (CAF). On the other hand, the adjudicating authority has come to the conclusion that the Appellant was mandatorily required to offer four standard tariff packages given under the Tariff Order, 2013 and as mentioned in all the four packages the property of STBs was required to be transferred to the subscribers after 3 years from the date of installation. As per the allegations made in the SCN and findings recorded by the adjudicating authority, this transfer of property of STBs is required to considered as removal of capital goods after being used and proportionate cenvat credit under Rule 3(5A) of CCR, 2004 is required to be reversed by the Appellant.

7.4.3.1. I have gone through the copies of Tariff Orders, 2010 and 2013 and find that as per the reporting requirements of both the tariff orders i.e., Tariff Order 2010 [Part-VI-Para 9(5)] and Tariff Order 2013 (Part-III-Para-5), every MSO was under obligation to report to the competent authority of TRAI, the details of all tariff packages including the terms and condition for supply and installation of the Set Top Box (STBs). Under the circumstances,

I am of the opinion that instead of deciding as to which tariff options the Appellant has to follow and what is status of STBs under the said option, it is essential to ascertain what the Appellant have reported or declared to the TRAI authority. I further find that neither the Appellant has furnished any such documents before me nor before the adjudicating authority. I further find that so called signed contracts in the form of CAFs cannot be treated as customized options in absence of any documentary evidences showing that the same have been reported to and approved by the TRAI authority. Accordingly, I am of the considered opinion that the Appellant No. 1 is required to furnish all the relevant documents/reports filed before the competent authority of TRAI regarding the supply of STBs, so that a fair view may be arrived by the adjudicating authority. After examining these documents, the adjudicating authority may record his findings on the status/possession of the STBs and decide the issue of reversal of cenvat credit thereon by passing a speaking order. The Appellant is also directed to provide all the relevant documents as desired by the adjudicating authority in the matter.

7.4.4 The Appellant have also relied upon following judgments to support their stand:

(i) The decision of the Hon'ble Tribunals in the case of Dish TV India Limited vs. the DGCEI, Final Order No. 50878/2019 dated 11.07.2019;

(ii) Videocon D2H Ltd vs Commissioner of Central Excise, Customs & Service Tax, Final Order No. A/85341/2020 dated 26.02.2020.

(iii) German Remedies Ltd. Vs. CCE - 2002(144)ELT 606 (Tri. Mumbai) and

(iv) Modernova Plasyles Pvt. Ltd.-2015(323)ELT312(Bom).

It is observed that though the Appellant had also relied upon these judgments before the adjudicating authority, but, he has not analyzed the ratio of these judgments in proper perspective. Accordingly, I find that the impugned order is a non-speaking one in this regard and the adjudicating authority is required to consider these judgments afresh and pass a speaking order thereon.

8. As regards the demand of service tax amounting to Rs. 3,36,565/-, it has been alleged in the SCN that the repair and maintenance services received by the Appellant No. 1, involved use of goods by the service providers and hence these services appeared to be classifiable under the category of "Work Contract Services". It was also alleged that the Appellant, being a body corporate and recipient of such services, was liable to discharge service tax liability (@ 50 % of total service tax), on the value of these expenses under reverse charge mechanism as provided under Notification No. 30/2012-ST dated 30.06.2012 as amended.

8.1. The Appellant has argued that from the copies of invoices furnished by them to the Adjudicating Authority and as tabulated at Para-31.1 of the impugned order, it comes out that the twin conditions viz. that there must be transfer of property in goods and such transfer of property is leviable to VAT/sales tax under the relevant State tax is not satisfied. The Appellant further argued that the service provider has not charged any VAT as the work involved there was pure service and not a works contract. The Appellant also contended that the Adjudicating Authority has failed to appreciate that the burden of proof in this case that the activity involved is one of works contract is squarely on the Revenue, which it has failed to discharge.

8.2. I have gone through the table given at Para 31.1 of the impugned order and find that the information therein has been prepared on the basis of sample invoices made available by the Appellant. From the descriptions given therein, it is observed that in most of the cases the services provided are in the nature of set top box repairing charges with spare parts, while others are of cartridge repairing and Air Conditioner gas refilling and of toner refilling. Further, the adjudicating authority has in Para 31.3 of the impugned order has rejected all such documents regarding set top box charges as afterthought. It is observed that as per the definition of "work contract" given under Section 65(B)(54) of the Act, there should be a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property. It is further observed that there is nothing on record to suggest that the activities in question get covered under the definition of work contract. First of there is no such contract available on record. Further, how there is transfer of property involving sale of goods is also not forthcoming. Consumption of spares during repairs can by no stretch of imagination bring the activity under the ambit of works contract.

9. I find that the Appellant has also contested the demand of cenvat credit of Rs.1,73,44,224/- and service tax of Rs. 3,36,565/- on the grounds of limitation claiming that larger period of limitation of five years specified in the proviso to Section 73(1) of the Finance Act 1994 is inapplicable in their case. The Appellant have also relied upon catena of judgments in their support. I further find that similar arguments, quoting several judicial pronouncements, were raised by the Appellant before the adjudicating authority also. However, while passing the impugned order the adjudicating authority has not properly considered these submissions. The adjudicating authority has also not discussed in detail as

To, M/s Den Rajkot City Communication Pvt Ltd, 3rd floor, Rameshwar Complex, Mangala Main Road, Manhar Plot Street No.4, Rajkot:- 360001.	सेवा में, मेसर्स डेन राजकोट सिटी कम्युनिकेशन प्राइवेट लिमिटेड, तीसरी मंजिल, रामेश्वर कॉम्प्लेक्स, मंगला मेन रोड, मनहर प्लॉट स्ट्रीट नंबर 4 राजकोट: - 360001।
Shri Nitinbhai S.Nathwani, Director, M/s Den Rajkot City Communication Pvt ltd, 3rd floor, Rameshwar Complex, Mangala Main Road, Manhar Plot Street No.4, Rajkot:- 360001.	श्री नितिनभाई एस. नथवानी, निदेशक, मेसर्स डेन राजकोट सिटी कम्युनिकेशन प्राइवेट लिमिटेड, तीसरी मंजिल, रामेश्वर कॉम्प्लेक्स, मंगला मेन रोड, मनहर प्लॉट स्ट्रीट नंबर 4 राजकोट: - 360001।

प्रति:-

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

to how the judgments relied upon by the Appellant were applicable / not applicable in the present case. Accordingly, I find the impugned order a non-speaking one in this regard and hence limitation aspect of the case is also required to be considered by the Adjudicating Authority afresh.

10. In view of observations made in para supra issue of the demand of cenvat credit of Rs 1,73,44,224/- is required to be remanded back to the adjudicating authority for fresh consideration on the basis of merits and limitations. The adjudicating authority is also directed to re-consider the imposition of penalty under Sections 77, 78 of the Act upon the Appellant No. 1 based on the findings arrived during the remand proceedings.

10.1 Further, as per the findings recorded in para 8.2 above, I find that the demand of service tax of Rs. 3,36,565/- is not sustainable on merits, and, hence, the same is required to be dropped and appeal filed by the Appellant No.1 to that extent is allowed.

10.2 Since the proceedings initiated and penalty imposed upon the Appellant No.2 is linked with the proceedings initiated against the Appellant No. 1, the impugned order pertaining to imposition of penalty under Section 78-A of the Act upon Appellant No.2 is also required to be remanded for fresh consideration by the adjudicating authority. Needless to mention that principles of natural justice should be adhered to while passing *de novo* order.

11. In view of the above,

(1) I set aside the impugned order so far as the same relates to the confirmation of demand of Cenvat credit of Rs. 1,73,44,224/- and imposition of penalty under Sections 77 and 78 of the Act and allow the appeals by way of remand to the adjudicating authority. The impugned order imposing penalty under Section 78 A of the Act on the Appellant No. 2 is also remanded back to the adjudicating authority.

(2) I set aside the impugned order so far as same relates to the confirmation of demand of service tax of Rs. 3,36,565/- and allow the appeals filed by the appellants to that extent.

12. अपीलकर्ताओ द्वारा दर्जकी गई अपीलो का निपटारा उपरोक्त तरीके से किया जाताहै।

12. The appeals filed by the Appellants are disposed off as above.

सत्यापित / Attested

केतन देवे
Ketan Dave
अधीक्षक (अपील)
Superintendent (Appeal)

(Akhilesh Kumar)
Commissioner (Appeals)
30 June, 2022.