प्रधान आयुक्त का कार्यालय,
Office of the Principal Commissioner,
केंद्रीय जीसटी अहमदाबाद दक्षिण आयुक्तालय
Central GST , Commissionerate- Ahmedabad South,
अपराध और अधिनिर्णय खंड, छठी मंजिल, अम्बावाड़ी, GST भवन,अहमदाबाद ३८००१५.
6th Floor,O&A Section,GST Bhavan, Ambawadi 380015

DIN: 20220264WS00000517E5

निबन्धित पावती डाक द्वारा/ By REGISTERED POST A.D.
फा /.सं .F.No. STC/4-42/Pride Cars/O&A/2017-18
आदेश की तारीख/Date of Order : 11-02-2022
जारी करने की तारीख/Date of Issue:11-02-2022

द्वारा पारित/Passed by:- सुनील कुमार सिंह प्रधान ,आयुक्त
SUNIL KUMAR SINGH, PRINCIPAL COMMISSIONER

मूल आदेश संख्या / Order-In-Original No.: AHM-EXCUS-001-COM-019-21-22 Dated 11-02-2022.

1. जिस व्यक्ति उसे व्यक्तिगत प्रयोग के लिए ,को यह प्रति भेजी जाती है (यों)नि:शुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क , अ ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरणहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,सीमा शुल्क ,O-20, मेघाणीनगर 016 380-अहमदाबाद ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड ,को सम्बोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

3. उक्त अपील प्रारुप सं .एस .टी.-5 दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पद शुल्क (अपील) 2001 ,नियमावलीके नियम में विनिर्दिष्ट व्यक्त (2) के उप नियम 3ि◌यों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई होउसकी भी , । अपील से सम्बंधित (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए) उतनी ही प्रतियाँ संलग्न की जाएँ सभी दस्तावेज भी चार प्रतियाँ मे◌ं अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. S.T-5. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

.4 अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दा ,खिल की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई होउसकी भी उतनी ही प्रतियाँ संलगन की , ।(उनमें से कम से कम एक प्रमाणित प्रति होगी) जाएंगी
The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

.5 अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के विना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

.6 अधिनियम की धारा ,वी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है 35 न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. इस आदेश के विरूद्ध सीमा शुल्क उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण में शुल्क के , 7.5% जहां शुल्क अथवा शुल्क एवं जुरमाना का विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बारेमे विवाद है उसका भुकतान करके अपील की जा शकती है।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute".

8. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूचीके अंतर्गत निर्धारित किए अनुसार संलग्न 6 मद ,1- रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए। 1.00 किए गए आदेश की प्रति पर

The copy of this order attached therein should bear a court fee stamp of Rs. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

9. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।
Appeal should also bear a court fee stamp of Rs. 4.00.

विषय: –

Sub : Show Cause Notice No. F.No. STC/4-88/Prev/Gr-II/15-16 dated 31.10.2017 issued to M/s. Pride Cars Pvt. Ltd., (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahmedabad-380015)

BRIEF FACTS OF THE CASE

M/s Pride Cars Pvt. Ltd., 12 & 3 Sigma Ceejay Legacy, Near Panjarapole Cross Road, Ambawadi, Ahmedabad-380015 (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahmedabad-380015), were engaged in providing Services such as "Repair, Reconditioning, Restoration or Decoration or any other similar Service, of any Motor Vehicle and centrally registered with Service Tax Department having registration No AAGCP1917QSDOO2.

2. An Intelligence was gathered from ACES that M/S. Pride Cars Pvt. Ltd., Ahmedabad (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015) (hereinafter referred to as the said service provider" for the sake of brevity) had not filed ST-3 Returns for the period from October-March 2013-14 to April-September 2015-16 and were indulging in evasion of Service Tax by way of providing the said taxable services without paying Service Tax on the amount received by them for providing taxable services. The officers of the Service Tax Preventive, Ahmedabad had visited the Centralized premises of the said Service Provider on 04.01.2016 under Rule 5A of the Service Tax Rules, 1994 and gathered various documents like Balance Sheets, ST-3 returns and other financial documents and scrutinised the same. During the scrutiny of the documents i.e., Audited Balance Sheets of the assessee it was observed that the unit is registered with Service Tax department from 10.02.2012. The assessee had filed ST-3 returns only for the F.Y 2012-13 and 2013-14(April to September) and no returns were filed for subsequent periods. It was observed that the assessee had short paid/unpaid service tax liability for the financial years 2012-13.2013-14,2014-15 and 2015-16.

3. A statement of Shri Virendrasinh Narendrasinh Vaghela, Director of M/s. Pride Cars Pvt. Ltd., Ahmedabad (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015) of the assessee was recorded under section 14 of Central Excise Act, 1944 read with section 83 of Finance Act on 04.01.2016 in response to Summons issued vide F.No.STC/04-188/Prev/Gr.II/2015-16 dated 04.01.2016. On being asked he stated that he is the director of the said firm (now known as M/s. Rajarshi Cars Pvt. Ltd.) registered with the Service Tax Department from 10.02.2012 and looking after the business of the said firm. In his statement he further stated that his firm is one of the automobile dealers of Nissan Motor India Pvt. Ltd. which is engaged in selling and servicing of Motor Vehicle and providing Business Auxiliary Service. As the said service provider has not filed ST-3 Returns after September'2014, he was asked to provide the reason for not filing of Returns and non-payment of Service Tax. In reply to this question he stated that due to financial crisis they were not in a position to discharge Service Tax liability and consequently did not file Returns. During the course of recording his statement, he was asked that on scrutiny of audited Balance Sheet, ST-3 returns, ledgers and other necessary financial documents, it was observed that the Service Tax as per following table arose.

F.Y.	S.TAX PAID	CENVAT	S.TAX TO PAY	DIFFERENCE
2012-13	1904199	989532	4547678	1653947
2013-14	1904199	989532	2744569	-------
2014-15	1683006	306500	3064910	1075404
2015-16	0	187236	2693476	2506240
TOTAL SERVICE TAX				5235591

To the above question, the Director in his statement accepted the service tax liability of amount of Rs.35,81,644/- for the years 2014-15 and 2015-16. He requested for some time to check the outstanding liability of Rs.16,53,947/- for the year 2012-13 assured to pay any liability arising along with interest and penalty as per Service Tax Rules 1994. In his statement he further assed to provide documents on the basis of which cenvat credit has been availed within a week. On being asked about the amount shown under head of Nissan Claim income in the audited balance sheet for the FY 2012-13 and non payment of service tax on the said head, he deposed that they were getting the claim through mediator i.e. M/s Hover Automobiles Pvt Ltd., and service tax on it. But from F.Y 2013-14, no middle agency was

involved in the procedure and hence they have started to claim the same directly through Nissan and so no Service Tax liability comes on the same. He however agreed to provide the substantial documents in support of the above statement to bring more clarity on this issue. On being asked about names of any other companies or firms he was running and whether service tax in those companies were paid or not, he stated that there are two other firms namely M/s Pride PD Cars Pvt. Ltd (S.Tax Reg. No.AAHCP0704ESD001) and M/s Pride PD Wheels Pvt. Ltd (S.Tax Reg. No.AAHCP0825ESD001), and in both the companies they are paying service tax regularly, however, for the F.Y.2015-16, the unpaid service tax liability is Rs.2,65,067/- and Rs.3,15,700/- respectively. And the same will be discharged in two days time positively.

4. It appeared that the director of the said firm in his statement recorded on 04.01.2016 has accepted the Service Tax liability of Rs.35,81,644/- for the F.Y. 2014-15 and 2015-16 but had sought some time to check and quantify the liability of Rs.16,53,947/-for the F.Y. 2012-13. As no satisfactory clarification or written submission either from the director or his representative was received even after reasonable time and opportunity provided, the Summons bearing No.14/16-17 dated 06.05.2016 was issued to appear before the Superintendent on 23.05.2016 to give statement and submit relevant documents for the period 2012-13 to 2015-16 required for further investigation. Neither the director did appear to give statement nor provided the documents sought by the Superintendent. Also no written submission was submitted by the said firm in this connection. Thereafter, another Summons bearing No.47/2016-17 dated 12.08.2016 was issued to the said firm but none appeared either for giving statement alongwith relevant documents or written submission.

5. The Summons dated 12.08.2016 could not be served and returned on 22.08.2016. It was confirmed that the said firm is operating in the name of M/s. Rajarshi Cars Pvt. Ltd. from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahmedabad-380015. It appeared that the intimation for change of premises in the name of M/s. Rajearshi Cars Pvt. Ltd. operating at G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahmedabad-380015 was not given to Service Tax (Prev) Ahmedabad. Therefore, Summons bearing No.92 dated 10.10.2016 and Summons No.131/2016-17 dated 19.12.2016 were issued to the director at the new address directing him to remain present. However, the director did not appeared before the Superintendent for giving statement and submission of documents.. In reply to the said Summons dated 19.12.2016, the authorized signatory of the said firm vide letter dated 30.12.2016 has sought 15 days more time to submit details alongwith necessary documents on the ground of his absence in the city. Thereafter, the director or his representative did not contact the office nor submitted the documents even after lapse of one month period. Subsequently, a letter bearing No.STC/04-188/Prev./Gr.II/2015-16 dated 11.01.2017 had been sent to the director of the said firm by speed post requesting him to submit explanation / clarification with substantial proof in the form of documentary evidence that each income shown in their Balance Sheet for the F.Y. 2012-13 to 2015-16 is not liable to Service Tax. The reply of the said firm submitted in the form of explanation / clarification in response to the letter dated 11.01.2017 in respect each income shown in their Balance Sheet for the F.Y. 2012-13 to 2015-16 appeared unsatisfactory and inadequate for want of substantial proof regarding non-taxability of Service Tax. The detailed clarification / explanation of each income submitted by the said firm vide letter dated 13.02.2017 is described in Para-6 below. Thereafter, spot Summons No.157/2016-17 dated 09.03.2017 was issued at his business premises located at M/s. Rajarshi Cars Pvt. Ltd. G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahmedabad-380015. In response to the spot Summons No.157/2016-17 dated 09.03.2017, the authorised signatory of the director's firm namely Shri Pranav Doshi acknowledged the receipt of said Summons and given reply on behalf of the director of the said firm vide letter dated 09.03.2017 stating that the director of the company Mr. Virendrasinh N. Vaghela was not available due to some social reasons and assured to be present on 14.03.2017. However, the Director did not appear in office. From the discussion narrated hereinabove, it appeared that the director intentionally did not appear for giving statement neither taken keen interest for providing substantial documents required for further investigation. He also failed to intimate change of name and shifting of his business at new premises. The assessee was asked to produce copies of invoices on the basis of which cenvat credit was availed. But no such documents have been produced by the assessee. As a result of non-cooperative attitude of the director, the entire investigation proceedings for determination of correct Service Tax liability came to a stand still.

The outcome of the analysis of documents has been given below:

6. i) A plain reading of the Balance sheets for the F.Y. 2012-13, 2013-14, 2014-15 and 2015-16 reveal that the assessee had booked incomes under various heading which appeared to be income from the services provided and due to non filing of ST-3 Returns, initially the Service Tax liability was worked out to Rs.52,35,591/-.

ii) On analysis of the Balance Sheet there are certain heads of income on which the assessee received consideration such as. "(i) Warranty Labour (ii) Insurance Income –Customer (iii) Metallic Colour Charges (iv) Discount Income (v) Exchange Bonus Income (vi) Qualitative Incentive (vii) Free Service Claim (viii) Misc. Income i.e. Claim Income (ix) Free Checkup Claim (x) Misc. Claim at Workshop (xi) Discount RD Purchase (xii) Warranty Parts (Nissan Claim Workshop) (xiii) Incentive Claim (xiv) Cancellation Charges" . It appeared that such incomes are arising out of services provided and are taxable under the head Business Auxiliary Service prior to 1.7.2012 and under service income after 1.7.2012. Therefore, a letter dated 11.01.2017, addressed to the director of the said service provider was issued requesting him to submit with substantial proof / documentary evidence as to why these incomes are not liable to Service Tax.

iii) During the scrutiny of Cenvat ledgers, it has been observed that assessee has availed cenvat credit on various input services but no copies of invoices/challans or documents were submitted to verify the correctness and availability of cenvat credit. Hence it appeared that there is wrong availment of cenvat credit.

7. In reply to this office letter dated 11.01.2017, the said service provider vide their letter dated 13.02.2017 has submitted head-wise clarification which are reproduced here as under :-

1. **Warranty Labour** :- We are paying service tax on the same, the sale is included in labour sale while calculating service tax liability,
2. **Insurance Income (Customer)** :- In this particular income the amount of income is derived by way of differential amount of Amount payable to Insurance company and amount received from customer. Thus we are not paying service tax on the same.
3. **Metallic Colour Charges :-** The car model with some specific colours are charged extra from customers as Mettalic Colour Charges , this charges are included in invoice and we collect and pay VAT on the same. This is not a service, but we sell the car with special colours and for that we collect Metallic Colour Charges.
4. **Discount Income** : Discount income is a trade discount income which we get from suppliers.
5. **Exchange Bonus Income :** Exchange bonus income is a part of Nissan Claim income , wherein we pass on the discount to the customer and then get the claim amount reimbursed from Nissan company.
6. **Qualitative Incentive :** Qualitative incentive is a income in which we get incentive from our principal company NMIPL for better up keeping of Showroom and Workshop.
7. **Free Service Claim :** This is the reimbursement amount which we get for providing free services to the customers during free service period.
8. **Free Checkup Claim :** During the year the company Nissan organise Free checkup camp for its customers. The amount we incur as expense is claimed to Nissan for reimbursement and we account is as Free checkup claim.
9. **Discount on RD Purchase :-** the trade discount which we get from creditors is discount on RD purchase.
10. **Warranty Parts :-** The parts which are under warranty are replaced to customers for free of cost and then the cost of it is claimed to Nissan, which they reimburse in due course is part of this income.
11. **Incentive claim :** The incentive earned on achievement of targets is claimed to Nissan and is accounted under this head.
12. **Cancellation charges** :- After booking of the car, if any customer cancels his booking then a nominal part of booking amount is deducted while giving refund to the customer. This amount is cancellation charges.

Further, the said service provider in his above letter stated that Nissan Claim Income consists of various heads of income shown in balance sheet as different heads which are reproduced in their words as under :-

1. **Consumer Offer Claim :-** The amount of discount passed on to the Scustomer is claimed to Nissan for reimbursement and this claim is accounted as Retails sales claims.
2. **Whole Sales Claims :-** On achievement of monthly targets for purchase of vehicles from Nissan, we get special discount from Nissan, this amount is wholesales claims.
3. **Retails Sales Claims :-** On achievement of monthly targets of Retail sales to customers we get special offers from Nissan which is retails sales claims.
4. **Event Claim :-** During the year we undertook various marketing / promotional activities such as advertisement in news paper / radios, Exchange Mela, car display at good locations, mall etc. for this events we get reimbursements from Nissan, which we claim as event claim.

8. The said service provider further stated that this income are mainly reimbursements of expenses and trade discounts given by manufacturer in relation to trading activities only and thus not liable to service tax but no documents in support of the same have been provided. For the above explanations, no documentary evidence in support of their clarification has been submitted by assessee. The incomes shown under the head in the Balance Sheets viz Nissan Claim income, Warranty labour, Free service claim, Incentive claim, Miscellaneous income, Exchange Bonus Income, Cancellation charges, Insurance Income Customer are not income related to trading activities but appear to be service income.

Prior to the introduction of Negative list w.e.f 1.7.2012, the various services were classified according to the different categories of services. The said service provider has received substantial amount under the guise of different heads mentioned in the balance sheet as detailed above for the F.Y. 2012-13 to 2015-16 which actually appeared to be service income under the head of commission/incentive/remuneration etc. The said commission amount is taxable under provision of sub-section (19) of Section 65 of the Finance Act 1994 as amended under the category of Business Auxiliary Service for the period from April to June 2012 i.e. upto 01.07.2012.

After introduction of negative list with effect from 01.07.2012 'service' means any activity carried out by a person for another for consideration, and included a declared service & does not fall under negative list of services under Section 66D of the Finance Act. All the above heads of income are not falling under declared services but they do not fall under negative list also and as per above definition, the said service provider was liable to pay service tax on collection of the said incomes under guise of different heads for the FY 2012-13 to 2015-16 (from 1.7.2012).

9. This office had also sought CENVAT invoices for the period from 2012-13 to 2015-16 for verification of CENVAT but the said service provider failed to provide the same inspite of several reminders telephonically as well as by issuing above cited Summons. Therefore, in absence of Cenvat Invoices for the period from 2012-13 to 2015-16, the verification of Cenvat is not possible and could not be done. Therefore, the benefit of CENVAT credit if any admissible to the said service provider in the Financial Years 2013-14, 2014-15 and 2015-16 is not permissible in absence of invoices. In addition to that, the said service provider had not filed ST-3 Returns after September'2013. The last return the said service provider has filed is for the period April-Sept.'2013 only and thereafter did not file any ST-3 Returns. Only the amount shown in the returns can be allowed as cenvat credit subject to verification of cenvat invoices. In absence of verification of the cenvat invoices, the entire amount availed and utilised by the assessee becomes inadmissible.

10. It appeared that the said service provider did not produce any substantial documents as against their claim for seeking exemption from payment of Service Tax on numerous incomes appearing in their Balance Sheets for the financial years 2012-13, 2013-14, 2014-15 and 2015-16. In order to seek clarification from the taxability point of view on numerous income mentioned in the Balance Sheet for financial years 2012-13, 2013-14, 2014-15 and 2015-16, this office has followed the principle of natural justice by giving ample opportunity and time to the director of the said service provider to appear and give statement and clarify each income of their Balance Sheets with explanation /clarification with substantial proof / documentary evidence mentioning therein that these incomes are not liable to Service Tax.

11. Superintendent of Service Tax had issued following summons to the director of the said service provider (1) Summons No.14/16-17 dated 06.05.2016 to appear on 23.05.2016 (2) Summons No.47/16-17 dated 12.08.2016 to appear on 19.08.2016 (3) Summons No.92/16-17 dated 10.10.2016 to appear on 17.10.2016 (4) Summons No.131/16-17 dated 19.12.2016 to appear on 23.12.2016 (5) Summons No.157/16-17 dated 09.03.2017 issued on the spot at the director's office on 09.03.2017. In response to these summons' the director of the said service provider did not appear before the proper authority either to give statement or produce documents sought in these Summons. It appeared that this office has already issued five summons' to the director of the said service provider, despite this he did not bother to appear even on single occasion in total disregard to the law.

12. Prior to the introduction of Negative list w.e.f 1.7.2012, the various services were classified according to the different categories of services. It appeared that the said service provider was engaged in providing Business auxiliary Service. The said service provider has received substantial amount under the guise of different heads mentioned in the balance sheet as detailed above for the F.Y. 2012-13 to 2015-16 which actually appeared to be service income under the head of commission/incentive/remuneration etc. The said commission amount is taxable under provision of sub-section (19) of Section 65 of the Finance Act 1994 as amended under the category of Business Auxiliary Service. The Business Auxiliary Service was introduced with effect from 01.07.2003 vide Notification No.7/2003-ST dated 20.06.2003. The Business Auxiliary Service is defined under Section 65 of the Finance Act' 1994 is reproduced herein below:-

BUSINESS AUXILIARY SERVICE

(A) Date of Introduction:

01.07.2003 vide Notification No.7/2003-ST dated 20.06.2003.

(B) Definition and scope of service:

"Business Auxiliary Service" means any service in relation to, -

(i) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) Promotion or marketing of service provided by the client; or

[**Explanation** - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of change, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;]

(iii) Any customer care service provided on behalf of the client; or

(iv) Procurement of goods or services, which are inputs for the client; or

[**Explanation** - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) Production or processing of goods for, or on behalf of the client; or

(vi) Provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(a) **"Commission Agent"** person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person - means any

(i) Deals with goods or services or documents of title to such goods or services; or

(ii) Collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

"Taxable Service" means any service provided or to be provided to a client by any person in relation to business auxiliary service (Section 65 (105) (zzb) of the Finance Act, 1994)

13. After introduction of negative list with effect from 01.07.2012 'service' means any activity carried out by a person for another for consideration, and included a declared service & does not fall under negative list of services under Section 66D of the Finance Act. The incomes shown above do not fall under the list of declared services under Section 66E of the Finance Act, 1994 but they also do not fall under negative list of services. Therefore, the said service provider was liable to pay service tax on collection of the said incomes under guise of different heads for the FY 2012-13 to 2015-16 (from 1.7.2012).

Section 66 of the Finance Act, 1994 provides that there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a), (d) ..... (zzza) ..... and (zzzzw) of clause (105) of Section 65 and collected in such manner as may be prescribed.

Section 66B, inserted by the Finance Act, 2012, w.e.f. 1-7-2012 states that "There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

Section 66D Services covered under Negative list, defined in Section 66D (inserted by the Finance Act, 2012 w.e.f. 1-7-2012), comprise of the following services viz.,

(a) Service by the Government/Local Authority
(b) Service by RBI
(c) Service by Foreign Diplomatic Mission located in India
(d) Service in relation to agriculture
(e) Trading of goods
(f) Manufacture of goods
(g) Selling of space/time for advertisement
(h) Services by access to road or bridge on a payment of Toll charges
(i) Betting, gambling or lottery
(j) Admission to Entertainment Events & Amusement Facilities
(k) Transmission or distribution of electricity
(l) Educational Services
(m) Renting of Residential dwelling for use as residence
(n) Financial services by way of extending deposits, loans or advances and inter se sale or purchase of foreign currency
(o) Transportation of Passenger with or without accompanied belongings
(p) Transportation of goods.
(q) Mortuary/Funeral services

Section 67 of Finance Act, 1994 as amended by the Finance Act, 2006 (w.e.f. 18-4-2006) reads as:

(1) where service tax is chargeable on any taxable service with reference to its value, then such value shall, -
(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such services provided or to be provided by him";

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration ;
(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive e of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

Rule 3 of Service Tax (Determination of Value) Rules, 2006 provides that subject to the provisions of section 67, the value of taxable service, where such value is not ascertainable, shall be determined by the service provider in the following manner:

> *(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;*
> *(b) Where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service.*

14. From the Balance Sheets of F.Y 2012-13, 2013-14, 2014-15 & 2015-16 it appeared that the said service provider has earned various incomes mentioned in the worksheet. It appeared that the service provider vide their letter dated 11.01.2017 has only submitted his clarification in respect of the income shown in his balance sheets but did not produce any valid documents substantiating that these incomes are not taxable to Service tax. Accordingly, based upon the incomes mentioned in the Balance sheets of FY 2012-13, 2013-14, 2014-15 & 2015-16, a worksheet showing the income and liability of service tax thereon has been worked out year-wise. The worksheet below shows the income earned by the said service provider and outstanding service tax payable thereon. The service tax liability for the financial year 2012-13 works out to Rs.26,40,869/-. Likewise, the service tax liability for financial years 2013-14,2014-15 and 2015-16 works out to Rs.3902033/-, Rs.6893788/- and Rs.7960354/- respectively. Thus, it appeared that total outstanding service tax liability against the said service provider worked out to Rs.2,13,97,044/- as detailed in Annexure-A, Annexure-B, Annexure-C and Annexure-D to the show cause notice.

The summary of the Annexure is below:

Period	Total head-wise income shown in the Balance Sheet liable for Service Tax	Taxable Income	S. Tax Rate (Incl. cess)	S. Tax Payable	Service Tax paid by the assessee		Net Difference of S. Tax payable
					Cash	Cenvat	
2012-13	46985677	46985677	12.36%	5807430	1904229	1262332	**2640869**
2013-14	43838901	43838901	12.36%	5418488	1213114	303341	**3902033**
2014-15	55774980	55774980	12.36%	6893788	0	0	**6893788**
2015-16	54898996	54898996	14.50%	7960354	0	0	**7960354**
Total	201498554	201498554		26080060	3117343	1535373	**21397044**

15. From the above table, it appeared that the assessee utilized an amount of Rs.12,62,332/- during the year 2012-13 and Rs.3,03,341/- during the period April to September 2013 91st half) for payment of service tax liability. As per Rule 9 of Cenvat Credit Rule, 2004, a manufacturer or output service provider can take cenvat credit of input service on the basis of documents like invoice, subsidiary challan which includes challan, bill of entry etc. This office had also requested to the said service provider to produce input CENVAT invoices for the financial year 2012-13 to 2015-16 in order to carry out verification and substantial documentary evidence with clarification in respect of each income shown in their Balance Sheets. It appeared that the said service provider did not produce input CENVAT invoices for the financial year 2012-13 to 2015-16 to carry out verification inspite of repeated reminders telephonically as well as by issuing summons. Consequently, the verification of

CENVAT invoices could not be carried out and hence the benefit of CENVAT for payment of Service tax for the FY.2013-14, 2014-15 and 2015-16 could not be extended to the said service provider for want of verification. In absence of verification of correctness of the documents, cenvat credit cannot be admissible and is liable for reversal/recovery under Rule 14 of Cenvat Credit Rules 2004. The assessee has also not filed ST-3 return after the period of October 2013 till date. The ST-3 return has been filed for 2012-13 and 1st half i.e. April to September 2013. Hence the amount of Rs.12,62,332/- utilized in the year 2012-13 and Rs.3,03,341/- utilized in the year 2013-14 totaling to Rs.1565573/- becomes inadmissible and liable for reversal/recovery under rule 14 of CCT 2014.

16. In view of the facts discussed in foregoing paras and material evidence available on record, it appeared that the said service provider has escaped the assessment and not furnished the actual value while discharging service tax liability. Further, it appeared that the service provider has not disclosed these facts to the service tax department in their ST-3 returns and discontinued filing of ST-3 returns since October 2013 i.e. October-March 2013-14 onwards and thus as per Section 73 of the Finance Act, 1994 as amended, short payment of service tax amounting to Rs.2,13,97,044/- (including Education cess and S & H Edu. Cess) for the period from 2012-13 to 2015-16 is required to be recovered. The service provider has contravened the provisions of Section 66 of the Finance Act, 1994, Section 68 of the Finance Act, 1994 as amended read with Rule 6 of the Service Tax Rules, 1994 and Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they have failed to determine, collect and pay the service tax amounting to Rs.2,13,97,044/- (including Cesses) for the period from **2012-13 to 2015-16** as detailed above within the stipulated time limit; they have failed to declare value of taxable service in their service tax returns to the department in the prescribed return in form ST-3 and thus suppressed the amount of charges received by them for providing taxable services as detailed above. Thus it appeared that the said assessee has failed to discharge the service tax liability of Rs.2,13,97,044/- (including Education cess and S & H Edu. Cess) for the period from 2012-13 to 2015-16 and therefore, service tax is required to be demanded/recovered from them under Section 73(1) of the Finance Act 1994 read with Section 68 of the Finance Act 1994 along with interest as per Section 75 of the Finance Act 1994. Further since no documents have been provided to verify cenvat credit of Rs.15,65,573/- for the period April 2012 to September 2013 as shown in the ST-3 return filed becomes inadmissible as no documents produced for verification of cenvat by assessee.

17. Whereas from the facts mentioned in the foregoing paras, it appeared that the said service provider has contravened the provisions of:

(a) **Section 66** of the Finance Act, 1994 in as much as they have failed to pay the service tax as detailed above, to the credit of Central Government.

(b) **Section 67** of the Finance Act, 1994 in as much as they failed to pay appropriate service tax on the gross value amount charged by them in respect of the taxable services provided by them.

(c) **Section 68** of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, in as much as they have failed to determine and make payment of proper Service Tax in full as Rs.2,13,97,044/- (including Education cess and S & H Edu. Cess) for the period from **2012-13 to 2015-16** under the category of "Business Auxiliary Services" and **w.e.f. 1-7-2012, engaged in providing taxable services which are not falling under Negative list of services as defined under Section 66D of the Finance Act, 2012,** to the credit of the Government within the statutory time-limit prescribed at the relevant time-period.

(d) **Section 70** of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994, in as much as they have failed to self-assess the Service Tax on the Taxable value for the period from 2012-13 to 2015-16 within the stipulated time limit, resulting into non-payment of Service tax. As per the provision of Section 70, every person liable to pay the service tax shall himself assess the tax due on the services provided by him.

(e) As per Rule 6 of the Service Tax Rules 1994, the service tax shall be paid to the credit of the Central Government by 5th of the month, immediately following the said calendar month in which the payments are received, towards the value of taxable service. Rule 7 of the Service Tax Rules 1994 stipulates that the assessee shall submit their service tax returns in the

form of ST-3 with the prescribed time. The assessee has violated Rule 6 as well as Rule 7 of the Service Tax Rules, 1994.

18. Whereas it appeared that the said service provider has contravened the provisions of **Section** 77 of the Finance Act, 1994 in as much as they have failed to appear before the Central Excise Officer to give evidence and produce documents against five Summons issued viz (1) Summons No.14/16-17 dated 06.05.2016 to appear on 23.05.2016 (2) Summons No.47/16-17 dated 12.08.2016 to appear on 19.08.2016 (3) Summons No.92/16-17 dated 10.10.2016 to appear on 17.10.2016 (4) Summons No.131/16-17 dated 19.12.2016 to appear on 23.12.2016 (5) Summons No.157/16-17 dated 09.03.2017 either to give statement for clarification of various income shown in different heads of Balance Sheets for F.Y. 2012-13 to 2015-16 or produce documents sought in these Summons thereby rendered themselves liable to a penalty which may extend to ten thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance. Therefore, it appeared that there was a malafide intention of the director as he failed to appear before the Superintendent on five occasions for giving his statement against five summons mentioned above which appropriately rendered him liable for penalty under **Section** 77 of the finance Act, 1994 for all the contraventions and violations made by them.

19. From the balance sheet of the period concerned it appeared that the said service provider had not taken into account properly the assessable value while discharging service tax for all the incomes received by them for rendering taxable services for the purpose of payment of service tax and thereby not fulfilled their tax liabilities. The deliberate efforts leading to non-payment of the correct amount of service tax in utter disregard to the requirements of law and breach of trust deposed on them. The said service provider was liable to pay the Service tax of Rs.2,13,97,044/- (including Education cess and S & H Edu. Cess) for the period from **2012-13 to 2015-16** on the taxable value of the services provided for the period from 2012-13 to 2015-16 in accordance with the provisions of Section 68 read with Rule 6 of Service Tax Rules, 1994 but failed to pay the same. Such outright act in defiance of law appeared to have rendered them liable to penal action as per provisions of **Section 78** of the Finance Act, 1994 for non-furnishing the amount of Service Tax paid against the value of taxable service and for suppression or concealment of taxable service with intent to evade payment of service tax.

20. Over and above, during the course of investigation, the director of the said service provider namely Shri Virendra N. Vaghela did not appear before the Superintendent of Service Tax against Summons viz (1) Summons No.14/16-17 dated 06.05.2016 to appear on 23.05.2016 (2) Summons No.47/16-17 dated 12.08.2016 to appear on 19.08.2016 (3) Summons No.92/16-17 dated 10.10.2016 to appear on 17.10.2016 (4) Summons No.131/16-17 dated 19.12.2016 to appear on 23.12.2016 (5) Summons No.157/16-17 dated 09.03.2017 either to give statement for clarification of various income shown in different heads of Balance Sheets for F.Y. 2012-13 to 2015-16 or produce documents sought in these Summons. Thus it appeared that the director of the said service provider paid no attention to five summons and did not brother to appear even on single occasion in utter disregard of the law. Form the discussion narrated hereinabove, it appeared that the director intentionally did not appear for giving statement neither taken keen interest for providing substantial documents required for further investigation. Thus it appeared that there was malafide intension of director of the said service provider with intent to thwart the entire investigation proceedings for determination of correct Service Tax liability by his non cooperative attitude. Therefore, it appeared that the said assessee is liable for penalty under Section 78 of the finance Act, 1994 for all the contraventions and violations made by them. Whereas, the company viz., M/s Pride Cars Pvt. Ltd., 12 & 3 Sigma Ceejay Legacy, Near Panjarapole Cross Road, Ambawadi, Ahmedabad-380015 (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015) has committed contraventions, namely evasion of service tax & failure to pay amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due apart from failure to intimate change of name and shifting of business at new premises functioning at present in the name of M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015 as required under sub rule (5A) of Rule-4 of Service Tax Rules, 1994. Shri Virendra N. Vaghela, as a Director of M/s Pride Cars Pvt. Ltd., 12 & 3 Sigma Ceejay Legacy, Near Panjarapole Cross

Road, Ambawadi, Ahmedabad-380015 (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015) who 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, has thus, made himself liable to a penalty under **Section 78A** of the Finance Act, 1994.

21. It appeared that the assessee had not paid the Service tax on the amount of service income received against the services they had provided to their clients. In other words, they had failed to fulfil the provisions of Service Tax Rules framed under the Finance Act, 1994 as amended, by them and suppressed the facts from department to avoid the payment of Service Tax, as and when payable by them.

22. They are also liable to pay interest at the appropriate rates for the period from due date of payment of Service Tax till the date of actual payment as per the provisions of Section 75 of the Finance Act 1994.

23. All the above acts of contravention on the part of the said service provider appear to have been committed by way of suppression of facts/contravention of the provisions of Section 66, 68 & 70 of the Finance Act, 1994 read with Rule 6 & 7 of the Service Tax Rules 1994 with an intent to evade payment of Service Tax thereby rendering themselves liable for penalty under the provision of **Section 77 and 78** of the Finance Act, 1994 as amended from time to time.

24. As per rule 9 of CENVAT Credit Rules 2004, the CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the prescribed documents. In the instant case the said assessee has failed to produce the documents in respect of CENVAT credit, and thus wrongly availed and utilized the CENVAT credit for the payment of Service Tax for the period from April 2012 to September 2013 and thereby violated the proviso of Rule 9 of CENVAT Credit Rules 2004 rendering them liable for penalty under Rule 15 of CCR, 2004.

25. Whereas the said service provider has not disclosed full, true and correct information about the value of the services provided by them. Thus, it appeared that there is a deliberate withholding of essential and material information from the department about service provided and value realized by them. It appeared that all these material information have been concealed from the department deliberately, consciously and purposefully to evade payment of service tax. Therefore, in this case all essential ingredients exist to invoke the extended period in terms of **Section 73(1)** of the Finance Act, 1994 to demand the Service Tax not paid. It appeared that the said service providers considered as well-organized entity. The Finance Act, 2005 provides for payment of Service Tax on the amount of Taxable value received for services provided. The said assessee has to deposit the Service tax in full in the Government Account. However, their approach appeared to be unsustainable, unsupportive in discharging their duty of Service Tax liability.

26. The Government has from the very beginning placed full trust on the service provider so far service tax is concerned and accordingly measures like Self-assessments etc., based on mutual trust and confidence are in place. Further, taxable service provider is not required to maintain any statutory or separate records under the provisions of Service Tax Rules as considerable amount of trust is placed on the service provider and private records maintained by them for normal business purposes are accepted, practically for all the purpose of Service tax. All these operate on the basis of honesty of the service provider; therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on the service provider.

In the self assessment era, the service providers are required to be proactive in declaring their activities to the department and getting themselves registered and fulfil their tax obligations. Service Tax being an indirect tax requires the service provider only to collect the same from the service receiver and remit it to the Government. Not abiding by this basis tenet itself points towards a deliberate intention to evade the provisions of the Act and payment of the Tax thereof. Hence, the extended period of limitation appeared to be invokable in terms of proviso to sub-section (1)of Section 73 of Finance Act, 1994 for the period mentioned above.

27. Therefore, the said service provider was issued show cause notice F.No.STC/04-188/Prev/Gr-II/15-16 dated 31.10.2017 calling upon to show cause to the Principal **Commissioner**, CGST, Ahmedabad South having office at 7th Floor, Central Excise Bhavan, Near Panjrapole, Ambawadi, Ahmedabad – 380015,as to why:-

i. Service Tax not paid against the services rendered by them which are classified and considered as taxable services falling under the category of "Business Auxiliary Services", as defined under Section 65 of the Finance Act, 1994, as amended and w.e.f. 1-7-2012, engaged in providing taxable services which are not falling under Negative list of services as defined under Section 66D of the Finance Act, 2012, worked out as the **Service Tax of Rs.2,13,97,044/- (Rupees two Crore thirteen Lakhs ninety seven Thousand forty four Four only)** should not be considered service tax payable amount, (as per Annexure A,B,C,D attached) thereon for the period from **2012-13 to 2015-16** should not be **demanded and recovered** from them **under proviso to Section 73(1)** of the Finance Act, 1994;

ii. the CENVAT credit of Rs.15,65,673/- (Rupees fifteen lakhs sixty five thousand six hundred seventy three only) availed by them for the FY 2012-13 and April-September 2013 should not be demanded and recovered from them under rule 14 of CENVAT Credit Rules 2004 read with Section 73(1) of the Finance Act 1994 as discussed above by invoking the extended period of five years as the said assessee has failed to produce the relevant invoices on which CENVAT credit of Rs.15,65,673/- was availed (as per ST-3 returns) during the period from 2012-13 and April-September 2013.

iii. **Interest** as applicable on the **entire Service Tax liability of Rs.2,13,97,044/-** for the period from 2012-13 to 2015-16 and on the cenvat credit amount of Rs.15,65,673/- as mentioned and discussed in this SCN, should not be recovered from them for the delay in making the payment, **under Section 75** as amended of the Finance Act, 1994;

iv. **Penalty** should not be imposed upon them **under Section 76** of the Finance Act, 1994 for the failure to make the payment of Service Tax payable by them within prescribed time limit;

v. **Penalty** should not be imposed upon Shri Virendra N. Vaghela, being Director of the company viz., M/s Pride Cars Pvt. Ltd., 12 & 3 Sigma Ceejay Legacy, Near Panjarapole Cross Road, Ambawadi, Ahmedabad-380015 (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015) under Section 77(1)(c) of the Finance Act, 1994 for failure to appear before the Central Excise Officer to give evidence and produce documents against five Summons issued viz (1) Summons No.14/16-17 dated 06.05.2016 to appear on 23.05.2016 (2) Summons No.47/16-17 dated 12.08.2016 to appear on 19.08.2016 (3) Summons No.92/16-17 dated 10.10.2016 to appear on 17.10.2016 (4) Summons No.131/16-17 dated 19.12.2016 to appear on 23.12.2016 (5) Summons No.157/16-17 dated 09.03.2017

vi. **Penalty** should not be imposed upon them **under Section 77(2)** of the Finance Act, 1994, as amended, as they have failed to assess and pay appropriate Service Tax and did not file Service Tax Returns as required under the provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 ;

vii. **Penalty** should not be imposed upon them under the provision of **Section 78(1)** ibid for contravening of the provisions and not disclosing the amount of Service Tax for taxable service provided by them with an intent to evade the payment of Service Tax ;

viii. **Penalty** should not be imposed upon them under **Section 70** of the Finance Act, 1994, as amended, as they have failed to file ST-3 Returns, for the period from F.Y. 2013-14 to 2015-16(Except for the period from F.Y. 2012-13 & 2013-14 i.e. April-Sept.'2013) ;

ix. **Penalty** should not be imposed upon Shri Virendra N. Vaghela, being Director of the company viz., M/s Pride Cars Pvt. Ltd., 12 & 3 Sigma Ceejay Legacy, Near Panjarapole Cross Road, Ambawadi, Ahmedabad-380015 (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance

Petrol Pump, Ambawadi, Ahjmedabad-380015) under Section 78A of the Finance Act, 1994, as amended.

DEFENCE SUBMISSION

28.1 The assessee, vide letter dated 29.11.2018, has filed reply wherein they submitted that as per the policy of the Company NISSAN MOTOR INDIA PVT. LTD they were getting claim by way of reimbursement in respect of Sale made by the Company. The claim income is nothing by an incentive in the form of trade discount and hence could not be termed as any provision of service rendered by them to NISSAN MOTOR INDIA PVT. LTD. They submitted that they had entered into an agreement with NISSAN MOTOR INDIA PVT LTD for buying vehicles on principal to principal basis. They purchased the product and sold them to the Customers and got incentive for selling certain quantity of product and not for sales promotion.

28.2 The assessee submitted that they are the owner of the vehicle and sold them on their own right and received discount and discount cannot be considered as commission which requires discharge of service tax. They received incentive from t heir principal supplier based on the quantum of off-take, early bird incentive and other target achievement incentive of purchase of cars and spares which is in the nature of discount and not linked to any service but were part of the sale transactions. They submitted that trading of goods is not taxable as the said activity is included in the negative list. They submitted copy of communication from MIPL Bulletin No.NI20151101 dated 03.11.2015 which stated that it is only incentive. They have also enclosed Bulletin No.NI20150501 dated 03.05.2015 in regard to the customer discount and support for NISSAN and DATSUN which is more particularly in respect of wholesale incentive scheme.

28.3 They submitted that in the case of *Commercial Auto (Dehradun) (P) Ltd-CCE & ST* that '*As assessee was doing business on principal to principal basis, most of the receipts like, incentives, commission etc received from manufacturer were in nature of trading receipts and thus, assessee was not liable to pay service tax under Business Auxiliary Services.*'

28.4 The assessee submitted that in the case of LMJ Services Ltd it is held that '*Since incentives received by the assessee from MUL were related to sale and purchase of cars and they were having different nomenclatures for the same like loyalty discount/claim/incentive, therefore assessee was not liable to service tax as there was no evidence that such amount related to Business Auxiliary Services rendered by assessee'.*

28.5 The assessee further submitted that it was held in the case of *Pratap Singh and Sons Vs CCE that 'Marketing Activities carried out by distributor in relation to the Goods which he has purchased from the manufacturer cannot be construed as services rendered by him to such manufacturer and hence the special discount granted by the manufacturer to such distributor cannot be charged to service tax.*

28.6 The assessee submitted that the expression 'Contract of Sale' includes both a sale where the seller transfers the ownership of the goods to the buyers and agreement to sale where the ownership of goods is to be transferred at a future time or subject to some conditions to be fulfilled later on. They contended that in order to constitute to sale it is necessary that the goods sold passes to the buyer at the time of contract. Once the distributor has purchased the products from manufacture, the ownership is transferred to the distributor and the goods ceases to be in ownership of manufacturer and any promotional activity undertaken by the distributors is in their own personal interest and such an activity cannot be construed as service.

29. The assessee relied upon the following judgments:

1. *Tata Motors Insurance Services Ltd Vs. CST (CESTAT-BANG)*
2. *Shreenath Motors (P) Ltd Vs. CST (CESTAT-MUM)*
3. *Kiran Motors Ltd Vs.CCE (CESTAT-AHD)*
4. *Polard Traders Pvt. Ltd Vs CST (CESTAT-AHD)*

DISCUSSION AND FINDINGS

30. I have carefully gone through the SCN, the relevant case records and the written submissions made by the assessee.

31. I find that personal hearing was held before my predecessor on 30.11.2018 when Shri Shailesh Shah, Chartered Accountant appeared and reiterated the written submissions filed. Thereafter the case was transferred to call book on the ground that in identical matter the department has filed appeal before CESTAT vide Appeal No.238 of 2012. As the said case was dismissed by Tribunal on monetary limits, the notice was taken out of call book for adjudication. Due to change in the adjudicating authority, fresh opportunity for personal hearing was granted to the assessee on 08.04.2021. The assessee, vide letter dated 07.04.2021, has requested for adjournment of hearing due to COVID-19 pandemic situation prevailed at that time. in the case. Thereafter virtual personal hearing in the matter was scheduled on 26.10.2021 and 09.12.2021, but the letter was returned undelivered by the postal authorities with the remark 'left'. The letter was mailed to the assessee in the available e-mail id - infoservice@rajarshi.net also. A final opportunity for personal hearing was granted on 21.01.2022. The communication was also sent by above mentioned email along with link to attend the hearing in virtual mode. But nobody attended the meeting. The assessee did not communicate the change of address to this office. It is also noticed that the assessee has not intimated the change of address and change in the name of the company to the department and not appeared before the investigating officer to give his statement and to submit the documents called for. Therefore, I have left with no option but to proceed with the adjudication of the case as the matter cannot be kept pending. As the personal hearing was held before my predecessor and the Chartered Accountant has only reiterated the written submissions, principles of natural justice has been followed and I proceed to decide the case on the basis of the facts available on record and the written submission made by the assessee.

32. It has been alleged in the show cause notices that the assessee had received various sales incentives as per the income booked in their books of account as well as in the profit and loss account. Service tax has been sought to be demanded on such sales incentives under the category of Business Auxiliary services (for the period upto 30.6.2012) and Services as defined under Section 65B(44) [for the period 1.7.2012 onwards]. It has been contended by the assessee that the transaction between them and Nissan Motor have been purchase and sale of motor vehicles on a principal-to-principal basis. Though no documentary evidence has been submitted by the assessee to establish that they have purchased motor vehicles, I would like to examine the claim of the assessee on the basis of available records. Since it has been claimed by the assessee that they have purchased motor vehicles, it follows that M/s Nissan Motors have sold the motor vehicles to the assessee. The term 'sale' has not been defined under Chapter V of the Finance Act, 1994 and thus recourse has to be taken to Sec. 4(3) of the Sale of Goods Act where sale has been defined as under:

> *Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.*

In view of the above it transpires that 'sale' is the point where the property in goods is transferred from the seller to the buyer. In the instant case, though the assessee has contended that the sales incentive is connected to the activity of purchase and sale, they have failed to produce any evidence whatsoever to establish the same. The assessee has primarily failed to co-relate as to which purchase activity culminated into such quantity discount. Further, they have also failed to provide any documentary evidence, such as purchase invoices, purchase ledgers, etc. to establish that purchases had been effected against such purchase activity which they are claiming attracted sales incentives. The assessee has merely advanced a blank argument that the Sales Incentives are in lieu of the quantity discount. I find that the assessee, through its Director Shri Virendra N. Vaghela, was asked to produce the documents before the investigating officer and to give statement. However, they have failed to appear before the investigating officer and also failed to produce the documents in support of their claim that the income booked in their books of account is in related to trade discount. In absence of any

documents indicating that the said amount has been accrued against an activity connected to purchase of goods and evidence regarding transfer of title of such goods, the argument of the assessee cannot be merely accepted on its face value.

33. The assessee has contended that the sales incentive had been given as a discount upon purchase of certain number of vehicles during the period of incentive scheme. At the first instance, it is to mention that the theory of quantity discount comes into play only in transactions involving sale and purchase of goods. As already discussed above, the assessee has failed to establish that the present transaction is pertaining to purchase of goods and as such the theory of quantity discount does not hold true. Secondly, even for the sake of argument the contention of quantity discount is considered it is not understood that why an organized company of the status of M/s Nissan Motors India P. Ltd. should use a wrong nomenclature like 'Sales Incentives' for 'Discount'. This appears all the more strange since the term 'discount' is not something new and is a prevalent trade practice. It is also worthwhile to mention that organized companies are very particular about the narration and the heads under which they book the expenses with a view to analysis their financial performances. It is also not a case where the supplier is an unorganized sector where the firms are not so particular about the narration of the expenses incurred. Thus, it is not palatable that M/s Nissan Motors India P Ltd had given 'Discount' in the name of 'Sales Incentives'. Even otherwise, the assessee has failed to provide any evidence to establish that they had been given discount. In absence of any evidence, the nomenclature as appearing in the available documents has to be given due credence and it has to be concluded that the assessee is in receipt of Sales Incentives from M/s Nissan Motors India P. Ltd.

34.1 From the copy of communication from MIPL in the form of Bulletin No.NI20151101 dated 03.11.2015 and Bulletin No.NI20150501 dated 03.05.2015, it transpire that M/s Nissan Motors have given monthly target of sale to the assessee and upon achieving the target they have given incentive to the assessee as per the scheme. Thus, it is evident that incentive is given for promoting the sale of the vehicles manufactured by M/s Nissan Motors India P. Ltd and not a trade discount as contended by the assessee. Such an act of promotion/ marketing/ sale of goods produced or provided by M/s Nissan Motors India Pvt. Ltd is covered under the definition of Business Auxiliary Services as defined under Sec. 65(19) of the Finance Act, 1994 of which the relevant text reads as under:

> *"business auxiliary service" means any service in relation to, —*
>
> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*

34.2 Effective from 1.7.2012, the provisions of Section 65 of the Finance Act, 1994 were no longer applicable by virtue of proviso to Section 65 read with Notn. No. 20/2012 ST dated 5.6.2012. For the period effective from 1.7.2012, the term 'service' has been defined at Section 65B(44) of the Finance Act, 1994 as under:

> *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
> *(a) an activity which constitutes merely,—*
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
> *(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or*
> *(iii) a transaction in money or actionable claim;*
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
> *(c) fees taken in any Court or tribunal established under any law for the time being in force.*

In the instant case, the assessee have engaged themselves in the activity of promoting, marketing and sale of the goods produced/ provided by M/s Nissan Motors India Pvt Ltd and towards the said activity they are in receipt of consideration in the name of Sales Incentives.

Such activity is squarely covered under the ambit of the term 'service'. Further, the said activity is not covered under the exclusion limb of the definition of 'service'. Therefore, the activity undertaken by the assessee is a service and the consideration received towards such activity is liable to be charged to service tax.

35.1 In the case of LMJ Services Ltd-2017 (3) G.S.T.L. 263 (Tri. - Del.) relied upon by the assessee, there was documentary evidence to prove that the Maruti Udyog Ltd has given loyalty discount, demo claim, expenses claim and so on. In the present case, the assessee has failed to produce any evidence in support of their claim that the incentives are in the nature of trade discount. The documentary evidence in the form of Bulletin produced by the assessee proved that incentives are given for promoting the sales. Hence the said case law is not squarely applicable to in the instant case.

35.2 The assessee has not submitted copy of the decision in respect of Pratap Singh and Sons Vs CCE and also not given any citation. Therefore I am unable to go through the contents of the said decision and take a decision as to whether the said case law is squarely applicable in the present facts and circumstances of the case.

35.3 The assessee has placed reliance upon the case laws of *Shreenath Motors (P) Ltd Vs. CST (CESTAT-MUM), Kiran Motors Ltd Vs.CCE (CESTAT-AHD) and* in support of their submission that service tax would not be leviable on sales incentives. In the case of Shreenath Motors (supra) I find that there was documentary evidence to prove that M/s Hyundai Motors India Ltd have given trade discount. Similarly, in the case of Kiran Motors Ltd (supra) there was documentary evidence to prove that the Maruti Udyog Ltd has given discount,. In the present case, the assessee has failed to produce any evidence in support of their claim that the incentives are in the nature of trade discount. The documentary evidence in the form of Bulletin produced by the assessee proved that incentives are given for promoting the sales. Hence the said case law is not squarely applicable to in the instant case.

35.4 The case laws of of *Commercial Auto (Dehradun) (P) Ltd-CCE & ST* -2017 (50) S.T.R. 40 (Tri. - Del.), *Polard Traders Pvt. Ltd Vs CST (CESTAT-AHD)* 2010 (20) S.T.R. 100 (Tri. - Ahmd.) *Tata Motors Insurance Services Ltd Vs. CST (CESTAT-BANG),-2008 (9) STR.176 (Tr-Bang)* relied upon by the assessee are stay orders and principles of binding precedence cannot be applied to such orders as held by Hon. Supreme Court in the case of *Empire Industries*-1985 (20) E.L.T. 179 (S.C.)

> *53. Good deal of arguments were canvassed before us for variation or vacation of the interim orders passed in these cases. Different courts sometimes pass different interim orders as the courts think fit. It is a matter of common knowledge that the interim orders passed by particular courts on certain considerations are not precedents for other cases may be on similar facts.*

35.5 Also in the case of *Optho Remedies (P) Ltd*-2012 (276) E.L.T. 327 (All.) Hon. High Court of Allahabad has held that;

> *"13. It may also be recorded that the Hon'ble Supreme Court of India in the case of Vishnu Traders (supra) in paragraph-3 has held that in the matter of interlocutory orders, principle of binding precedent cannot be said to apply. As a matter of fact there is no binding precedent applicable in the facts of the present case. ...."*

35.6 To sum up, the assessee has failed miserably in establishing their submissions, by supporting facts and evidences, that the incentive received by them were in the form of trade discount. It was incumbent upon the assessee to have at least furnished the relevant documents so as to establish that nature of the payments made by M/s Nissan Motors India (P) Ltd. They were given ample opportunity for providing documentary evidences at the time of investigation as well as at the time of adjudication by giving summon and personal hearing. Having failed to do so, I have no option but to proceed on the basis of the facts available on record.

36. The above discussions indicate that M/s Nissan Motors had paid incentive to the assessee to promote and increase sales, to stimulate demand. These payments were made only because the assessee promoted, marketed and eventually sold vehicles which were manufactured and provided to the assessee by M/s Nissan Motors. The assessee has failed

miserably to establish that such incentive was in the nature of trade discount or price deduction given by M/s Nissan Motors or related to the activity of sale and purchase of vehicles. On the contrary, the Bulletin provided by the assessee himself proves beyond doubt that the M/s Nissan Motors have given incentive and not trade discount and thus the claim of the assessee that they were given trade discount is fallacious. In absence of any contrary evidence forthcoming from the assessee, I come to the conclusion that the Sales Incentive was paid to the assessee solely on account of providing services for promotion and marketing of vehicles produced and provided by M/s Nissan Motors. Thus, service tax is liable to be charged and recovered along with interest on such services provided by the assessee.

37.1 I find that the assessee has failed to declare the correct taxable value in their ST-3 returns in as much as they have not declared the gross billed value towards the services rendered by them and thereby indulged in suppression of the taxable value. Section 70 of the Finance Act, 1994 stipulates that every person liable to pay the service tax shall himself assess the tax due. The Government has introduced self-assessment system under a trust based regime which casts the onus of proper assessment and discharging of the service tax on the assessee. The definition of "assessment" available in Rule 2(b) of Service Tax Rules, 1994 is reproduced as under:

> *"assessment" includes self assessment of service tax by the assessee, re-assessment, provisional assessment, best judgment assessment and any order of assessment in which the tax assessed is nil; determination of the interest on the tax assessed or re-assessed.*

In the instant case the assessee has failed to properly assess the service tax liability and also failed to reflect the correct information in the ST-3 returns. Thus, they have resorted to suppression of material facts by not reflecting the taxable income in their ST-3 returns.

37.2 Further, it is noticed that during the material period the assessee has neither discharged their Service Tax liability properly nor have furnished any material information to the Department relating to provision or receipt of such taxable services, either in their ST-3 returns, or otherwise. Had the revenue officers of not intervened and unearthed the material facts, the short payment/ non-payment of service tax would have not seen the light of the day resulting in revenue loss to the Government. I find that the assessee has suppressed their taxable income for the above mentioned period and contravened the various provisions of Finance Act 1994 and rules made thereunder as they have failed to properly assess their Service Tax liability within the time frame as prescribed under the law despite the fact that they were in possession of relevant facts/documents/records. Thus, I find that the assessee has short-paid/ not-paid service tax by resorting to suppression of facts and contravention of the provisions of law with intent to evade payment of tax. Therefore, extended period of limitation as envisaged in the proviso to **Section 73(1)** of the Act is correctly invokable in the instant case for recovery of unpaid Service Tax alongwith interest u/s 75 of the Finance Act 1994.

38.1 Now coming to the issue of availing of CENVAT credit, I find that the assessee has availed CENVAT credit of Rs.15,65,673/- in the FY. 2012-13 and April-September 2013. The Conditions for allowing CENVAT credit are as under:

> ***RULE 4. Conditions for allowing CENVAT credit.*** *— (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service [or in the premises of the job worker, in case goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be] :*

38.2 As per rule 9 of CENVAT Credit Rules 2004, the CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the prescribed documents. The documents prescribed under Rule 9 of Cenvat Credit Rules 2004 are as under:

RULE 9. Documents and accounts. *— (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-*

(a) an invoice issued by -

(i) [a manufacturer or a service provider for clearance of -]

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made thereunder with intent to evade payment of duty.

Explanation. *- For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or*

[(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax; or]

(c) a bill of entry; or

(d) a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; [or, as the case may be, an Authorized Courier, registered with the Principal Commissioner of Customs or the Commissioner of Customs in-charge of the Customs airport,]

[(e) a challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax; or]

(f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004; or

[(fa) a Service Tax Certificate for Transportation of goods by Rail issued by the Indian Railways; or]

(g) an invoice, bill or challan issued by an input service distributor under Rule 4A of the Service Tax Rules, 1994.

38.3 In order to ascertain the correctness of CENVAT credit availed by the assessee, they were asked to produce the documents as prescribed under rule 9 ibid by issuing summons under Section 14 of Central Excise Act 1944 as made applicable to Service Tax matters vide Section 83 of the Finance Act 1994. The relevant provisions are as under:

> ***SECTION 14. Power to summon persons to give evidence and produce documents in inquiries under this Act.*** *— (1) Any Central Excise Officer duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.*
>
> *(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required :*
>
> ***Provided*** *that the exemptions under Sections 132 and 133 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to requisitions for attendance under this section.*
>
> *(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (45 of 1860).*

> ***SECTION 83. Application of certain provisions of Act 1 of 1944.*** *— The provisions of the following sections of the [Central Excise Act, 1944], as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise :-*
>
> *[[sub-section (2A) of section 5A, sub-section(2) of section 9A], 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, [12E, 14, [15, 15A, 15B] 31, 32, 32A to 32P, 33A, 35EE, 34A, 35F]], [35FF,] to 35O (both inclusive), 35Q, [35R,] 36, 36A, 36B, 37A, 37B, 37C, 37D [38A] and 40.*

38.4 As per the provisions of Section 14 of Central Excise Act 1944 read with Section 83 of the Finance Act 1994 the assessee was bound to attend before the officer and to produce the required documents. In the instant case, I find that, the assessee failed to appear before the inquiry officer and also failed to produce the documents under which they have availed the CENVAT credit. I find that the inquiry officer has issued five such summons and the assessee or his authorized representative has not attended before the office to give eividence. Even in the reply to the show cause notice, they have not produced even a singly photocopy of the documents on the strength of which the CENVAT credit has taken. They have produced only a ledger of Cenvat credit, but the admissibility of credit or validity of the documents cannot be verified from the ledger.

38.5 Since the assessee failed to produce the documents under which the CENVAT credit taken by them, the amount of Rs.15,65,673/- is to be disallowed and recovered from them under the provisions of Rule 14 of Cenvat Credit Rules 2004 in as much as it is to be considered that they have availed such credit without having valid document prescribed under rule 9 of Cenvat Credit Rules 2004. Accordingly I disallow the cenvat credit of Rs.15,65,673/- and confirm the demand under Rule 14 of Cenvat Credit Rules 2004 along with applicable interest.

39. Now coming to the proposition to impose penalty, I find that the assessee has short-paid/ not paid service tax by reason of suppression of facts with intent to evade payment of service tax. Their intention to evade tax is very much evident from the fact that they have not co-operated with the investigation being carried out by the department. Had their intention been clean, they should have appeared before the investigating officer to give statement and

produce the documents of availing cenvat credit and other documents related to the receipt of incentive as shown in their books of account. They have also failed to file statutory returns. Thus, I find that, the assessee has suppressed the facts from the department and rendered themselves liable to penalty in terms of the provisions of Section 78 of the Finance Act, 1994.

40.1 In SCN simultaneous penalty has been proposed under Section 76 as well as Section 78 of the Finance Act, 1994. The amended provisions of Section 76 and 78 will be applicable in the present case in terms of the provisions of Section 78B of the Finance Act, 1994 which reads as:

(1) Where, in any case,—

(a) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and no notice has been served under sub-section (1) of section 73 or under the proviso thereto, before the date on which the Finance Bill, 2015 receives the assent of the President; or

(b) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and a notice has been served under sub-section (1) of section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of section 73, before the date on which the Finance Bill, 2015 receives the assent of the President,then, in respect of such cases, the provisions of section 76 or section 78, as the case may be, as amended by the Finance Act, 2015 shall be applicable.

40.2 I find that penalty under Section 76 and 78 of the Finance Act, 1994 are mutually exclusive and the penalty under Section 76 is imposable in case of non-payment of service tax for any reason, other than the reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax. In the instant case, I find that the act of non-payment is owing to reason of suppression of facts and contravention of the provisions of law with intent to evade payment of tax and I have already come to the conclusion that penalty under Section 78 of the Finance Act, 1994 is imposable, therefore, the penalty under Section 76 will not be imposable in the present case.

41. In the show cause notice, penalty has been proposed under Section 77 of the Finance Act, 1994 for failure to file correct service tax returns under the provisions of Section 70 of the Finance Act, 1994.

42. Section 77(2) of the Finance Act, 1994 provides for imposition of penalty in cases where no other penalty has been separately provided for under the law. In the instant case, the assessee has failed to properly self-assess their service tax liability and have failed to reflect the correct taxable value in their ST-3 returns. No penalty for such failure and contravention of law has been separately provided for. Thus, I find that the assessee has rendered liable to penalty under the provisions of Sec. 77(2) of the Finance Act, 1994.

43. Section 70 of the Finance Act 1994 stipulates that the every person liable to pay service tax shall assess the tax due and furnish return and with late fee for delayed furnishing of return as may be prescribed. Rule 7C of the Service Tax Rules 1994 provided for charging late fee for delayed filing of returns. The relevant provisions are as under:

SECTION [70. Furnishing of returns. *— [(1)] Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency [and with such late fee not exceeding [twenty thousand rupees,] for delayed furnishing of return, as may be prescribed.]*

RULE [7C. Amount to be paid for delay in furnishing the prescribed return. *— [(1) Where the return prescribed under rule 7 is furnished after the date prescribed for submission of such return, the person liable to furnish the said return shall pay to the credit of the Central Government, for the period of delay of -*

(i) fifteen days from the date prescribed for submission of such return, an amount of five hundred rupees;

(ii) beyond fifteen days but not later than thirty days from the date prescribed for submission of such return, an amount of one thousand rupees; and

(iii) beyond thirty days from the date prescribed for submission of such return an amount of one thousand rupees plus one hundred rupees for every day from the thirty first day till the date of furnishing the said return :

***Provided** that the total amount payable in terms of this rule, for delayed submission of return, shall not exceed the amount specified in section 70 of the Act :*

In this case, I find that, the assessee has failed to furnish the returns for the period October 2013 to March 2014, April 2014 to September 2014, October 2014 to March 2015, April 2015 to September 2015 and October 2015 to March 2016. Therefore, I hold that the assessee is liable for penalty of Rs.20,000/- each for failure to furnish five returns for the above mentioned periods as per rule 7C of the Service Tax Rules 1994.

44. I find that Shri Virendra N. Vaghela, being Director of the company viz., M/s. Pride Cars Pvt. Ltd., 12 & 3 Sigma Ceejay Legacy, Near Panjarapole Cross Road, Ambawadi, Ahmedabad-380015 (Now known as M/s. Rajarshi Cars Pvt. Ltd. and operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015) has failed to appear before the Central Excise Officer to give evidence and produce documents in spite of issuing five Summons issued viz. (1) Summons No.14/16-17 dated 06.05.2016 to appear on 23.05.2016 (2) Summons No.47/16-17 dated 12.08.2016 to appear on 19.08.2016 (3) Summons No.92/16-17 dated 10.10.2016 to appear on 17.10.2016 (4) Summons No.131/16-17 dated 19.12.2016 to appear on 23.12.2016 (5) Summons No.157/16-17 dated 09.03.2017 and, therefore, he is liable for penalty under Section 77(1)(c) of the Finance Act, 1994.

45.1 Regarding the proposition in the show cause notice to impose penalty under Section 78A of the Finance Act 1994 on Shri Virendra N. Vaghela, being Director of the company viz., M/s Pride Cars Pvt. Ltd., I find that he was at the helm of the affairs of his company during which the aforesaid acts of omission and commission have occurred and played a decisive role to play in the present evasion of service tax. Section 78A reads as under:

***SECTION 78A. Penalty for offences by director, etc., of company.-** Where a company has committed any of the following contraventions, namely :—*

(a) evasion of service tax; or

(b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of this Chapter; or

(c) availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due, then any director, manager, secretary or other officer of such company, who 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, shall be liable to a penalty which may extend to one lakh rupees.

45.2 Since Shri Virendra N. Vaghela, being Director of M/s Pride Cars Pvt. Ltd., was at the helm of the affairs of his company during which the aforesaid acts of omission and commission have occurred, I hold that he is liable for penalty under Section 78A ibid.

46. Consequent to the issue of the Notification No.12/2017 Central Excise (NT), No.13/2017 Central Excise (NT) and 14/2017 Central Excise (NT) all dated 09.06.2017,

appointing the officers of various ranks as Central Excise officers reallocating the jurisdiction of the Central Excise Officers, and Trade Notice No. 001/2017 dated 16.06.2017 issued by the Chief Commissioner, Central Excise & Service Tax, Ahmedabad Zone, the assessee is now covered under the Jurisdiction of the Ahmedabad South Commissionerate, Central Goods and Service Tax.

47. The provisions of omitted Chapter V of the Finance Act, 1994 and the rules made thereunder as well as the repealed Central Excise Act, 1944 and the rules made thereunder have been kept in force in the by virtue of the saving clause under Sections 142 & 174 of the Central Goods and Service Tax Act, 2017.

48. In view of my above findings, I pass the following order:

ORDER

(a) The incentive income received by them is considered as taxable service under the category of "Business Auxiliary Service" as defined under section 65 of the Finance Act 1994 as amended. Hence I confirm the demand of service tax amounting to Rs.2,13,97,044/- (Rupees two crore thirteen lakh ninety seven thousand forty four only) on such value and order recovery of the same in terms of the provisions of Section 73(1) of the Finance Act, 1994 by invoking the extended period of limitation.

(b) I disallow the CENVAT credit of Rs.15,65,673/- (Rupees fifteen lakhs sixty five thousand six hundred seventy three only) availed by them for the FY 2012-13 and April-September 2013 and order to recover from them under Section 73(1) read with Rule 14 of CENVAT Credit Rules 2004 of the Finance Act 1994 by invoking the extended period of five years.

(c) Interest as applicable on the entire Service Tax liability of Rs.2,13,97,044/- for the period from 2012-13 to 2015-16 and on the cenvat credit amount of Rs.15,65,673/- as mentioned and discussed in this SCN, should be charged and recovered from them under Section 75 as amended of the Finance Act, 1994;

(d) I refrain from imposing penalty under Section 76 of the Finance Act, 1994.

(e) I impose penalty of Rs. 10,000/- (Rs. Ten Thousand only) on the assessee in terms of the provisions of Section 77(2) of the Finance act, 1994 for the failure to reflect the correct taxable value in the prescribed service tax returns.

(f) I impose penalty of Rs.1,00,000/- (Rs.20,000/- each for returns for the period October 2013 to March 2014, April 2014 to September 2014, October 2014 to March 2015, April 2015 to September 2015 and October 2015 to March 2016) under rule 7C of the Service Tax Rules 1994 read with Section 70 of the Finance Act 1994.

(g) I impose Penalty of Rs.10,000/- (Rupees ten thousand only) on Shri Virendra N. Vaghela, being Director of the company viz., M/s. Pride Cars Pvt. Ltd., 12 & 3 Sigma Ceejay Legacy, Near Panjarapole Cross Road, Ambawadi, Ahmedabad-380015 (Now known as M/s. Rajarshi Cars Pvt. Ltd. & operating from G/F, Shivalik Ishan, Near C.N. Vidhyalaya, Beside Reliance Petrol Pump, Ambawadi, Ahjmedabad-380015) under Section 77(1)(c) of the Finance Act, 1944 for failure to appear before the Central Excise Officer to give evidence and produce documents against five Summons issued.

(h) I impose penalty of Rs. 2,29,62,717/- (Rs. Two crores twenty nine lakh sixty two thousand seven hundred seventeen only) on the assessee in terms of the provisions of Section 78 of the Finance act, 1994. However, in view of clause (ii) of the second proviso to Section 78 (1), if the amount of Service Tax confirmed and interest thereon is paid within period of thirty days from the date of receipt of this Order, the penalty shall be twenty five percent of the said amount, subject to the condition that the amount of such reduced penalty is also paid within the said period of thirty days.

(i) I impose penalty of Rs.1,00,000/- (Rupees one lakh only) on Shri Virendra N. Vaghela, Director of M/s. Pride Cars Pvt. Ltd under Section 78A of the Finance Act 1994.

(Sunil Kumar Singh)
Principal Commissioner
CGST, Ahmedabad South

F. No.STC/04-42/Pride Cars/OA/2017-18

Date : 11.02.2022

BY REGD. POST A.D.

To

M/s. Rajarshi Cars Pvt. Ltd.
G/F, Shivalik Ishan,
Near C.N. Vidhyalaya,
Ambawadi,
Ahmedabad-380015

Shri Virendra N. Vaghela
D-03, Orchid Park,
Near Anjani Tower,
Satellite, Ahmedabad.

Copy to:

1. The Chief Commissioner, Central Tax, Ahmedabad Zone.
2. The Asstt. Commissioner, Central Tax, Division-VI, Ahmedabad South.
3. The Asstt. Commissioner, Central Tax, TAR Section, HQ, Ahmedabad South
4. The Asstt. Commissioner (Prosecution), HQ, Ahmedabad South.
5. The Superintendent, Central Tax AR-II, Div.-VI, Ahmedabad South
6. The Superintendent, Central Tax, Systems HQ, Ahmedabad South for uploading on the website.
7. Guard file.