CUSTOMS,EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH : COURT NO. 3

Service Tax Appeal No. 10599 of 2021-DB

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-001-COM-002-21-22 dated 28.04.2021 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-I]

J.P. ISCON PVT LTD ...Appellant

Iscon House, Behind Remtrandt Building, C G Road, Opp. Associate Petrol Pump, Navrangpura
Ahmedabad, Gujarat-380009

VERSUS

C.C.E.-AHMEDABAD-I ...Respondent

C. Ex Bhavan,
Nr Panjrapole & Polytechnic, Ambavadi,
Ahmedabad,
Gujarat- 380015

WITH

1. **Service Tax Appeal No. 10711of 2021 (Jateen Gupta)**
2. **Service Tax Appeal No. 10735 of 2021 (Jayesh K Kotak)**
3. **Service Tax Appeal No. 10736 of 2021 (Amit B Gupta)**
4. **Service Tax Appeal No. 10737 of 2021 (Pravin T Kotak)**
5. **Service Tax Appeal No. 10744 of 2021 (C.C.E.-AHMEDABAD-I)**

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-001-COM-002-21-22 dated 28.04.2021 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-I]

APPEARANCE:

Present For the Appellant : Shri Amish Khandhar, CA, Shri Jigar Shah, Advocate, Ms. Rashmin Vajes, CA

Present For the Respondent : Shri Ghanshyam Soni, Joint Commissioner (Authorised Representative)

CORAM:
HON'BLE MEMBER (JUDICIAL), RAMESH NAIR
HON'BLE MEMBER (TECHNICAL),RAJU

FINAL ORDER NO. A/10270-10275 / 2022

DATE OF HEARING : 03/12/2021

DATE OF DECISION : 17/03/2021

RAMESH NAIR

The present appeals have been filed by M/s J.P. Iscon Pvt. Ltd., Shri Pravin T Kotak, Shri Jayesh T Kotak, Shri Jatin M. Gupta, Shri Amit M Gupta and also by Revenue against the common Order-in-Original No. AHM-EXCUS-001-COM-002-21-22 dtd. 27.04.2021. Both sides are in appeal against the impugned order. Issues in these appeals since emanating out of the same impugned order, they are taken up together for common disposal.

2. Briefly stated the facts of the case are that M/s J.P. Iscon Pvt. Ltd. are engaged in providing 'Construction of Residential Complex and 'Construction of Commercial Complex' Service. Information was shared by Central Economic Intelligence Bureau, New Delhi with DGGI which *inter-alia* indicated that search and Seizure proceedings were conducted by DGIT, Ahmedabad against M/s J.P. Iscon Group. The Income tax Authorities provided the documents to DGGI containing Excel Work Sheet which was seized during the Income Tax search from the computer. In view of the information, inquiry was initiated against the Appellant by DGGI. A show cause notice was issued to them for recovery of Service tax of Rs. 13,79,41,328/- in respect of taxable services "Construction of Residential Complex Services / Construction of Commercial Complex Services and Service tax of Rs. 2,98,55,000/- in respect of Work Contract Service supplied during the period 01.04.2014 to 30.06.2017. On adjudication, part demand was dropped and demand of Service tax of Rs. 5,60,28,373/- confirmed in respect of "Construction of Residential Complex Services/ Construction of Commercial Complex Services" with penalty under Section 78 and 77 of the Finance Act, 1994 and Penalty of Rs. 1 Lakhs each also imposed on Shri Pravin T. Kotak , Shri Jayesh T Kotak, Shri Jatin M Gupta and Shri Amit M Gupta. Therefore, both sides are in appeal against the impugned order.

3. Shri Jigar Shah, Learned Counsel appearing on behalf of the assessee submits that the Central Excise officers empowered to issue show cause notice under Section 73 of the Finance Act, 1994. Only the Jurisdictional officer of assessee can issue the show cause notice. The DGGI Officers are not the Central Excise officers empowered to issue show cause notice. Thus the present show cause notice dtd. 22.10.2019 is without Jurisdiction and is liable to be set aside. He placed reliance on the Hon'ble Supreme Court Judgment dtd. 09.03.2021 passed in the matter of M/s Canon India Vs. Commissioner of Customs. He submits that SCN has to adjudicated within a maximum period of 1 year. Since the present SCN has not been adjudicated within one year from the date of notice i.e. 16.10.2019, the present SCN cannot be adjudicated at this stage. Reliance in this regard placed on the

decision of Sunder System Pvt. Ltd. Vs. Union of India & Ors. – 2010(1) TMI 199- Delhi High Court.

4. He submits that, no corroborative evidence is produced by the department to show that the Appellant have received unaccounted cash towards provision of construction services during the disputed period. The entire case of Department of unaccounted cash receipt by the Appellant, which has been based on excel sheet recovered by the IT Department in their investigation is wholly arbitrary and bad in law. He placed reliance on following decisions:

(i) Common Cause & Others Vs Union of India & Others passed in IA No. 3 and 4 of 2017 in W.P. (Civil) No. 505 of 2015.
(ii) Samta Khinda Vs. Asst. Commr. of IT 2016(11)TMI 1366 – ITAT Delhi
(iii) CCE Vs. Magnum Steels Ltd. 2017(357)ELT 226 (Tri-Del)
(iv) Ruby Chlorate (P) Ltd. Vs. CCE 2006 (204)ELT 607 (Tri- Chennai)
(v) Charminar Bottling Co. (P) Ltd. Vs CCE 2005 (192) ELT 1057
(vi) Nagubai Ammal & Others Vs. B. Sharma Rao, AIR 1956 SC 593

5. He further submits that it is settled principle of law that in absence of corroborative evidence when the only relied upon documents by the officers is disputed by the assessee, the assessee cannot be penalized for the same. The following case laws also lays down the strength of corroborative evidence in the matter of evasion cases needs to produced by the department before levelling allegation against the assessee:

(i) CCE Vs. Ravishnkar Industries Ltd. 2002 (150)ELT 1317 (Tri. Chennai)
(ii) Kashmit Vanspati (P) Ltd. Vs CCE 1989(39)ELT 655 (Tribunal)
(iii) Shabroc Chemicals Vs CCE 2002 (149) ELT 1020 (Tri. Del.)
(iv) T.G.L. Poshak Corporation vs. CCE 2002 (140) E.LT. 187 (Tri. Chennai)

6. He also submits that confirmation of demand under the category of ‘Construction of Complex Service’ is wholly incorrect. The said category would not be applicable on indivisible composite contracts, wherein

materials, land and services are provided together. Since the demand of Service tax is raised under erroneous category, the same is not sustainable. Without prejudice he also submits that irrespective of classification under 'work contract service' or 'construction of residential complex service', the demand of service tax on the amount charged by the Appellants for sale of flats is not sustainable in view of the decision of the Hon'ble Delhi High Court in the case of Suresh Kumar Bansal Vs Union of India 2016(43) STR 3 (Del.).

7. He argued that the demand of Service tax cannot be confirmed merely on the basis of statements of the employee of the Appellant's company. There is no corroborative evidence produced by the Department to show that the Appellants have received unaccounted cash towards provisions of alleged construction services during the disputed period. He placed reliance on the decisions of Hon'ble Bombay High Court in the case of **Godavari Khore Cane Transport Co. Vs. CCE 2013 (29)STR (Bom)** and Hon'ble Delhi High court in the matter of **Mahesh Sunny Enterprises Pvt. Ltd. Vs. CST, New Delhi – 2014 (34) STR 21 (Del.)**

8. He also argued that in the present matter department merely relies upon the investigation conducted by the Income Tax authorities and notice issued by the Income tax authorities. It is well settled principal of law that demand cannot be raised merely on the basis of assessment made by the Income tax Authorities. He placed reliance on the following decisions/ Judgments:

(i) M/s Mayfair Resorts – 2011 (21)STR589 (T) affirmed by Hon'ble High Court Commissioner Vs Mayfair Resorts 2011(22)STR263 (P&H)
(ii)M/s Zoloto Industries – 2013 (294)ELT 455 (T)
(iii) M/s Harcharan Brothers – 2004 (168) ELT 454 (T)
(iv) M/s Laxmi Engineering Works – 2001(134)ELT 811(T)
(v) N.R. Agarwal Industries Ltd. Vs. CCE & ST, Surat 2021 -VIL-487-CESTAT-AHM-CE
(vi) Deltax Enterprises Vs. CCE Delhi-I, 2018(10)GSTL 392 (Tri.-Del)
(vii) Kipps Education Centre, Bathinda Vs CCE Chandigarh -2009(13)STR 422 (Tri.-Del)

(viii) CCE, Ludhiana Vs. Ramesh Studio & Colour Lab, 2010 (20) STR 817 (Tri. Del)

(ix) CCE, Chandigarh Vs. Bindra Tent Service 2010 (17) STR 470 (Tri. Del.)

(x) Ravi Foods Pvt. Ltd. Vs. CCE Hyderabad 2011 (266) ELT 399 (Tri. Bang.)

9. He submits that the onus of proof lies on the department to prove that the Appellants have received alleged cash from buyers during the disputed period. This onus has not been discharged by the department in the present case. The calculation of service tax is erroneous as the present show cause notice presumes the entire receipt as consideration of services which is against the principle of law settled by the Hon'ble Supreme Court in the case of Larsen and Tourbo reported at 2014 (303) ELT 3 (SC). The present show cause notice itself suffer from an incurable deficiency with respect to the classification of service and computation of tax liability. The impugned Order-In-Original is therefore liable to be set aside.

10. He also contended that Section 132(4) of the Income Tax Act, 1961 is restricted and limited to the provisions of Income tax and same cannot be used or relied upon for other purpose. In the present matter adjudicating authority has relied upon the statement of Ms. Kalindi Shah recorded by the Income Tax Authorities which cannot be used in proceedings under Chapter V of the Finance Act, 1994 in the light of above provision of law.

11. He submits that no demand can be sustainable on the basis of Excel Sheet named 'Platinum -Final -Booking Chart -28-03-2015' allegedly recovered from the computer used by Ms. Kalindi Shah. However she has not been examined and her statement has not been recorded by the revenue. On contrary, the veracity of the data contained in the Excel Sheet has been got confirmed from Shri Venkataramana Ganesna, who was not is possession of the computer and was nowhere related to the data maintained in impugned Excel Sheets. Statement of Shri Venkatarman Ganesna cannot be admitted as evidence in the absence of examination-in-chief by the adjudication authority as held in the matter of M/s G-Tech Industries Ltd 2016 (339) ELT 209 (P&H).

12. As regard the other files recovered from the computer he submits that the details found in the said files is not authentic and data contained therein is evidently not correct. The same cannot be relied upon in absence of any corroborative evidence, even the so-called author of said .xls sheet has not been examined. The Excel Sheets mention the name of the 'Buyers, however investigating officers have not attempted to contact any of the customers and no statements of the customers have been recorded. Without such exercise, the .xls sheets cannot be admitted in evidence. He relies upon the following decisions :

(1) Kashmir Vanaspati Pvt. Ltd. – 1989(39)ELT 655(T)
(2) Gurpreet Rubber Industries – 1996(82)ELT 347 (T)
(3) Universal Polythelene Ind. – 2001(130) ELT 228 (T)
(4) Shree Narottam Udyog Pvt. Ltd. – 2003 (158) ELT 40 (T)
(5) Brims Products – 2001(130) ELT 719 (T)
(6) TGL Poshak Corp – 2002 (140) ELT 187 (T)
(7) Dura Trading Co. – 2002 (148) ELT 967 (T)

13. He further submits that Section 36A and Section 36B of the Central Excise Act 1944 clearly provide a safety net before use of the electronic data. In the present matter provisions of Section 36-A and Section 36-B are not satisfied and also not followed by department. Hence evidences relied upon by the department cannot be used.

14. As regard the appeal filed by the department, he submits that the demand of Service tax amounting to Rs. 3,75,35,481/- on alleged cash amount shown as outstanding did not receive by the assessee. Since the department has failed to prove the such amount pertains to flats where sale deeds have already been executed by the assessee. The Ld. Adjudicating authority rightly dropped the demand of Rs. 3,75,35,481/- in this matter. He also submits that demand of Service tax of Rs 2,98,55,000/- rightly dropped by the Ld. Adjudicating authority on the ground that activity under consideration is neither covered under the category of 'work contract service' nor the definition of 'declared Service' as defined under Section 66E (h) of the Finance Act, 1994.

15. The demand of Service tax amounting to Rs. 11,17,67,955/- has been dropped since such demand was being raised on the basis of uncorroborated evidence by the department. The Ld Principal Commissioner correctly dropped the said demand and discussed his finding in para 29.5 of the impugned order.

16. On other hand Shri Ghanshyam Soni, the learned Joint Commissioner (Authorised Representative), reiterating the grounds of Appeal filed by the Revenue and finding of Ld. Principal Commissioner to the extent of confirmation of demand of Service tax. He submits that cash receipts under consideration have been found to be noted in diaries and other incriminating documents seized by the income tax authorities. The details contained therein are found to be matching with the .xls sheets recovered from the computer. The facts of unaccounted cash and authenticity of said excel files admitted by Shri Venkataramana Ganesna, President of the assessee in his statements were recorded before investigating officers. Therefore, service tax demand is sustainable in the present case. The order of the Principal Commissioner to the extent of dropping the demand of Service tax amounting to Rs. 8,19,12,955/- in respect of taxable services viz., 'Construction of Residential Complex Services/Construction of Commercial Complex Services' is not proper and legal and the same is required to be set aside.

17. As regard the Judgment of Hon'ble Supreme Court in the matter of M/s Canon India Vs. Commissioner of Customs, he submits that Review Petitions have been filed in Hon'ble Supreme court and requested to adjourn the matter till the review petitions are decided by the Hon'ble Supreme Court.

18. We have considered the submissions made at length by both sides and perused the records. We find that the revenue has proceeded in confirmation of the demand on the basis of documents and information provided by the Income Tax Department. The entire case of Revenue in the present matter is based on .xls sheets retrieved by the Income Tax Authorities and Statement of Smt. Kalindi Shah recorded by the Income tax Authorities. However, it is seen that apart from recording the statement of Shri Venkataramana Ganesa

in the present matter no independent investigation has been carried out by the department. We observed that Department has not brought out any independent facts or evidence as who is the service receiver, whether the cash receipts shown in the xls. Files pertaining to the service component only or otherwise and no corroborative evidence produced in support of details mentioned in the said xls. Files. In the present matter collection of a huge amount of cash in respect of provisions of services involved. However not a single rupee of unaccounted cash was found during the search conducted by the income tax. The Hon'ble Gujrat Hight Court in the matter of STATE OF GUJARAT Versus NOVELTY ELECTRONICS 2018 (16) G.S.T.L. 87 (Guj.) held that-

> ***14.*** *In the opinion of this Court, the findings recorded by the Income Tax authorities during the course of search, could have been made a starting point for inquiry as regards the discrepancy in the physical stock and that shown in the stock register. However, the statement made by the dealer, ipso facto, could not have been the basis of an addition. Acting upon the findings recorded by the Income Tax authorities, the authorities under the Value Added Tax Act were required to make an independent examination into the facts before making the assessment. As noted hereinabove, the Commercial Tax Department had also searched the premises of the dealer and no discrepancies could be found in stock and the investigation report of the department had given a clean chit to the appellant. In these circumstances, the Tribunal was wholly justified in setting aside the order of the first appellate authority to the extent it had confirmed the demand which had no legal basis, and confirming the order to the extent it had reduced the tax liability imposed by the assessing authority. The second and third questions as proposed, therefore, also do not merit acceptance.*

Without conducting the independent enquiry, the demand of Service tax only on the basis of document/ information/ data provided by the Income tax authorities by the revenue legally not sustainable. The documents relied upon loses its evidentiary value in absence of any independent enquiry.

19. We find that, in the whole matter revenue rely upon the statement of Ms. Kalindi Shah and Shri Venkataramana Ganesna both are the employees of the Assessee's company. No statement of Directors of the Appellant company recorded by the revenue to find out the truth of employee's statements. It was on records that Assessee company have raised the dispute on both the statements of employees recorded during the course of investigation by Income tax Authority and revenue. Therefore the said statement cannot be relied upon as admissible evidence in terms of the provisions of Section 9D of the Act. The provisions of Section 9D which are reproduced as under

> ***"9D. Relevancy of statements under certain circumstances.*** *- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
>
> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*
>
> *(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*
>
> *(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."*

The above Section deals expressly with the circumstances in which a statement recorded before a gazetted officer of Central Excise (under Section 14 of the Act) can be treated as relevant for the purposes of proving the truth of the contents thereof. . Reliance is placed on the ruling of the Hon'ble Punjab & Haryana High Court in the case of *Jindal Drugs (Infra),*2016 (340) E.L.T. 67 (P & H) wherein the Hon'ble High Court laid down the detailed procedure, *inter alia,* providing for cross examination of the witness of the Revenue by the Adjudicating Authority and thereafter, if the Adjudicating Authority is satisfied that the statement of the witness is admissible in evidence than the Adjudicating Authority is obligated to offer

such witnesses for cross examination by the other side/assessee. Such view has also been affirmed by the Hon'ble Supreme Court in the case of *Andaman Timber (Infra)* 2015 (324) E.L.T. 641 (S.C.).

20. We further find that Hon'ble Punjab & Haryana High Court in the case of ***Sukhwant Singh*****(1995) 3 SCC 367** it has been observed as under :-

> *8. It will be pertinent at this stage to refer to Section 138 of the Evidence Act which provides :*
>
> ***"138. Order of examinations. -*** *Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*
>
> ***Direction for re-examination. -*** *The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*
>
> *9. It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of tendering witness for cross-examination in session trials had been frequently resorted to since the enactment of the code of Criminal Procedure, 1898.*

21. In adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross

examined. We find that in the present matter Ld. Adjudicating authority failed to do such exercise. We also note that Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

22. Statements recorded during investigation in the present matter, whose makers are not examined in chief before the adjudicating authority, would have to be eschewed from evidence, and it will not be permissible for Ld. Adjudicating Authority to rely on the said evidences. Therefore, we hold that none of the said statements were admissible evidence in the present case.

24. We also noticed that in the present matter it is on the records that demand is based on the .xls worksheet which was seized during the search by the Income Tax officers from the computer being used by Ms. Kalindi S. Shah and the said Excel files were shared by the Income tax authorities with Revenue. The Revenue heavily relied upon these .xls printout documents. In this context we find that the Hon'ble Apex Court in case of M/s. Anwar P.V. v. P.K. Basheer - reported at 2017 (352) E.L.T. 416 (S.C.) has prescribed certain guidelines before accepting electronic documents as an admissible piece of evidence. The Hon'ble Supreme Court held that -

> ***"13.*** *Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four*

conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act :

(i) *The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*

(ii) *The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;*

(iii) *During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and*

(iv) *The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.*

14. *Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :*

(a) *There must be a certificate which identifies the electronic record containing the statement;*

(b) *The certificate must describe the manner in which the electronic record was produced;*

(c) *The certificate must furnish the particulars of the device involved in the production of that record;*

(d) *The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and*

(e) *The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*

15. *It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*

16. *Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.*

17. *The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.*

18. *It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility."*

The above prescribed certain guidelines were not followed by the revenue during the investigation of impugned matter before accepting electronic documents as an admissible piece of evidence. Therefore in our view no

service tax demand is sustainable on the basis of contents of said .xls sheets.

25. Further on the basis of details of investigations shared by the Income tax Authority, Revenue knew the name of author of said xls. sheet but revenue failed to record the statement of author of said xls. sheets. Therefore, the said .xls sheet is not corroborated with any other evidence, hence, cannot be used as evidence against the assessee.

26. In the impugned matter Revenue and Adjudicating authority has relied upon the statement of Ms. Kalindi Shah recorded by the Income tax Authorities. In this regard we find that the Section 132 (4) of the Income Tax Act , 1961 provides as under:

> *"The authorized officer may, during the course of search or seizure, examine on oath any person who is found to be in possession or control of any books of accounts, documents, money, bullion, jewellery to other valuable articles or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income tax -Act, 1922 (11 of 1922), or under this Act."*

We agree with the argument of Ld. Counsel that the above provision explicitly indicates that the evidentiary value of the statement recorded under the Section 132 of the Income tax Act is restricted and limited to the provisions of the Income tax and the same cannot be used or relied upon for any other purpose.

27. We also find that in the present case the Revenue has raised the Service tax demand merely on the ground of investigation conducted by the Income Tax Authorities. We find that demand cannot be raised merely on the basis of assessment made by the Income Tax Authorities. Tribunal in the case of *Ravi Foods Pvt. Ltd.* v. *C.C.E., Hyderabad* - 2011 (266) E.L.T. 399 (Tri.-Bang.) has held that admission by assessee to Income Tax department as regards undisclosed/suppressed sales turnover cannot be held to be on account of clandestine removal of their final products, in the absence of any other corroborative evidence. Similarly, in the case of *C.C.E., Ludhiana* v.

Mayfair Resorts - 2011 (22) S.T.R. 263 (P&H), it was held so. We also find that the CESTAT in the case of *Kipps Education Centre, Bathinda* v. *C.C.E., Chandigarh* - 2009 (13) S.T.R. 422 (Tri.-Del.), has held that the income voluntarily disclosed before the income tax authorities could not be added to the taxable value unless there is evidence to prove the same.

28. In view of above, we are of the considered view that in the present matter entire demand of service tax as proposed in the show cause notice is not sustainable.

29. Without prejudice to our above finding, we also find that in the present matter the Ld. Adjudicating Authority confirmed the Service tax demand of Rs. 5,60,28,373 in respect of taxable Service viz. "Construction of Residential Complex Service/ Construction of Commercial Complex Service" by assuming that the said service was provided by the assessee during the period from 01.04.2014 to 30.06.2017 and entire cash amount under consideration has been received by the assessee during the period from April 2014 to June 2017. The Ld. Adjudicating Authority in present case also dropped the demand on the ground that in all cases where the assessee have entered into a sales deed or an Agreement to sale prior to 01.04.2014, the amount have been received prior to the said date. However we find that he did not apply the same principle to letters of reservation on the ground that the same is not a contract and confirmed the demand of service tax. The Appellant produced the copies of said letters of reservation before us and we noted that letter of reservation demonstrate that the assessee has bound themselves to sell a particular flat at a particular consideration. Hence, the effect of such letters is not different than executing an Agreement to sale. We agree with the argument of Ld. Counsel that the effect of the letter is nothing else, but an agreement to sale which even if entered into orally. Oral agreement to sell a particular flat at particular rate itself lead to binding contract. Even if there is no documents, a flat owner who books a flat and pays one cheque as booking amount the appellant would be legally bound to hold an apartment in question for the concerned person and at the rate as agreed. Therefore, the Ld. Adjudicating Authority failed to extend the same logic where the booking amount is received by cheque and the letters of reservation have been issued prior to 01.04.2014. The demand of Service tax confirmed by the Ld. Adjudicating authority

pertaining the period where the letters of reservation have been issued prior to 01.04.2014 and cheque received by Appellant prior to 01.04.2014 not sustainable on this ground also.

30. As regard the Appeal filed by the department, we conclusively hold that the Revenue could not establish the charge of cash receipt beyond doubt, accordingly entire demand raised in the Show Cause Notice will not sustain even without going to the grounds of the department's appeal. However, without prejudice to our above finding we are of the view that the learned Principle Commissioner after examining the facts and legal provisions given a very detailed finding which is reproduced below:

> *"25. 4.3 " in the instant case, the only available piece of documents on records is the Sales Deed and therefore the transaction between the assessee and the customers has to be examined in terms of the tone and tenor of the said document. As already discussed above, the sale deed reveals that the same is for the sole purpose of sale of vacant plot and is definitely not for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of immovable property. Therefore, in this case it cannot be said that the assessee have entered into a contract with their customers for the purpose as specified under the definition of the term 'Work Contract'.*
>
> *25.5. In the light of above discussion, it is clearly seen that none of the limbs of the definition of 'Works Contract' as defined under Sec. 65B(54) of the Finance Act, 1994 have been satisfied in the instant case in as much as :*
>
> > **>***There is no contract entered into between the assessee and the customers for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of immovable property; AND*
> >
> > **>***There is no transfer of property in goods involved in the transaction between the assessee and their customers.*
>
> *Thus, the transaction at hand viz., sale of vacant plot is not covered under the ambit of the term 'Work Contract' as defined under Sec. 65B (44) of the Finance Act, 1994.*

26. The Show cause notice has relied upon the ratio of the case law of M/s K Raheja reported at 2006 (3) STR 337 (SC) which was affirmed in the case of M/s Larsen & Toubro Ltd. reported at 2014 (303) ELT 3 (SC) to drive home the point that an agreement to sell an immovable property could also be treated as 'Work Contract'. The assessee have contended that the analogy of the case of M/s K Raheja is not applicable to the facts of the case since the factual matrix of the same is entirely on a different footing than the case at hand in as much as the activity undertaken by M/s K Raheja was construction of residential apartments and commercial complexes. The Following text of the said ruling also supports the contention of the assessee to the effect that the issue under construction in the said case was construction of residential and commercial complexes:

> ***2.*** *Briefly stated the facts are as follows:*
>
> *The Appellants carry on the business of real estate development and allied contracts. They are having their office at Bangalore. They enter into development Agreements with owners of lands. Thereafter they get plans sanctioned. After approval of the plans they construct residential apartments and/or commercial complexes. In most cases before they construct the residential apartments and/or commercial complexes they enter into Agreements of Sale with intended purchasers. The Agreements would provide that on completion of the construction the residential apartments or the commercial complex would be handed over to the purchasers who would get an undivided interest in the land also. The owners of the land would then transfer the ownership directly to the society which is being formed under the Karnataka Ownership Flats (Regulation of Promotion of Construction, Sales, Management and Transfer) Act, 1974.*

In the case of construction of residential apartment and a commercial complex which is sold, the element of transfer of property in goods is involved is as much as the residential apartment /commercial complex would be comprise of various building materials which are transferred as property in goods during the execution of the agreement. in such circumstances the judgment is in harmony with the definition of 'Work Contract'. However, in the instant case the agreement is for the sale of vacant plot on which no construction work has been undertaken and as such the element of transfer of Property in good is missing in the transaction under consideration. Thus, I find considerable force in the contention of the assessee to the effect that the analogy of the case of

M/s K Raheja supra cannot be made applicable to the effect of the case at hand.

27. The show cause notice also make a reference to the judgment in the case of M/s Narne Construction P. Ltd. reported at 2019 (29) STR 3 (SC) wherein Hon'ble Supreme Court had held that the activity involving offer of plots for sale to its customers/ members with an assurance of development of infrastructure/amenities, lay -out approval etc. was a 'Service' within the meaning of Clause (o) of Section 2(1) of the Consumer Protection Act. The assessee have argued that the said Judgment would not be applicable to their case since the definition of the term 'service' under the Consumer Protection Act was different from the definition under Sec. 65B(44) of the Finance Act, 1944. Further it has been contended that in the case of M/s Narne Constructions, separate amount as development charges had been collected from the customers which was not so in the present case. In support of their argument, the assessee relied upon para 9 of Writ Petition 429 of 2010 of High Court of Andhra Pradesh which read as under :

> *" Although as per the allotment, Rs. 90/- per square yard alone was to be paid towards development charges, the opposite party unilaterally enhanced in to Rs. 75000/- i.e at Rs. 150 per square yard which the complainant paid. The opposite party again enhanced the said charges to Rs. 1,25,000/- at Rs. 250/- per square yard"*
>
> *In the instant case, there is nothing on record to indicate that the assessee had collected a separate charges towards development of the common amenities and other infrastructure. Further, the copies of sale deed in respect of the plotting scheme viz. Iscon Greens which have been relied upon the in SCN and marked at Sr. No. 13 to Annexure - G1 of the SCN does not in any manner indicate that the assessee have collected separate charges for development of the plot. Thus the fact of the present case are not identical to the facts in the Case of M/s Narne Constructions. Moreover, in the case of M/s Narne Construction, the matter was being examined in the light of the definition at clause (o) of Section 2 (1) of the Consumer Protection Act, whereas in the instant the show Cause Notice has made specific charges to the effect that the activity of sales of plot is 'Work Contract' in terms of the provisions of section 65B(54) of the finance Act 1944 and such activity would be a 'declared service' in terms of the provisions of section 66E(h) of the Finance Act 1944. This is very much evident from para 18.1 of the show Cause Notice which is reproduced under for ease of reference:*

Now therefore M/s J.P Iscon Pvt. Ltd., Iscon House, B/h Remtrandi Building, CG Road, Opp. Associate Petrol Pump, Navarangpura, Ahmedabad- 380009 are hereby called upon to show Cause Notice to the Principal Commissioner of Central Goods and Service Tax, Ahmedabad South Commissionerate, Ahmedabad, having his office at 1st Floor, Central GST Bhavan, Ambawadi, Ahmedabad- 380015 as to why:

(viii) the activity carried out by them viz. selling the plot with undeniable conditions of development of amenities and common facilities such as electric supply, drainage, water supply, Club house etc, should not be construed to as 'work contract service' under the provisions of Rule 65B(44) read with Rule 66E(h) of the Finance Act, 1994

(iii) The amount of service tax evaded to the tune of Rs. 2,98,55,000/- in respect of taxable service viz., "works contract service" supplied by then during the period from 01.04.2014 to 30.06.2017 as detailed in said Summary appended to this notice should not be demanded & recovered from them under proviso to sub-section (1) of Section 73 of the finance Act 1944 read with section 174 of the GST act 2017.

bye way of making the above charges, the revenue has narrowed down the compass of adjudicating authority to mere examination of the fact whether the activity of sale of plots with undeniable condition of development of amenities and common facilities such as electricity supply, drainage, water supply, club house etc. can be construed as "Work Contract" or otherwise.

27.1 In the light of specific charges, I cannot examine the issue under a different category of service or any other aspect. This is so because the well settled judicial principles do not permit the adjudicating authority to travel beyond the show cause notice. I would like to refer to a few of such judicial pronouncement as under :

a) In the case of M/s Sunrise Structurals & Engg. Pvt. Ltd. as reported at 2002 (48) ELT 503 (T) which is affirmed by the Hon'ble Apex Court as reported at 2003 (154) ELT A241(SC), the Tribunal had made the following observations:

"However, the notice proceeded on the footing that what was to be added was the profit of the job worker. Therefore, any finding that what was to be included any element other than these would be beyond the scope of the notice, and therefore impermissible".

b.) In the case of M/s Reliance Ports and Terminals Ltd. reported at 2016 (334) ELT 630 (Guj), the Hon'ble High Court of Gujrat has held as under :

"Under the circumstances, in the light of the settled legal position as emerging from the above referred decisions of the Supreme Court, that the show cause notice is the foundation of the demand under the Central Excise Act and that the order-in-original and the subsequent orders passed by the appellate authorities under the statute would be confined to the show cause notice, the question of examining the validity of the impugned order on grounds which were not subject matter of the show cause notice would not arise."

c.) In the case of M/s Kandeep Dilipbhai Dholakai reported at 2014 (307) ELT 484 (Guj), the Hon'ble High Court of Gujrat has ruled as under :

"In view of the above and for the reasons stated above and on the aforesaid ground alone and without further expressing anything on merits in favour of either parties and as it is found that the impugned orders are beyond the scope of show cause notice to the extent stated herein above, impugned orders passed by the respective authorities denying/rejecting the refund/rebate claim to the petitioners are hereby quashed and set aside"

d) In the case of M/s Ajanta Manufacturing Ltd. reported at 2019 (369) ELT 1067 (T), the Ahmedabad Tribunal has held as under :

"With regard to the other issue i.e. change in classification of the subject goods during the course of adjudication proceedings, we are of the view that since classification made in the assessment order was not proposed in the Show Cause Notice, the said order cannot go beyond the scope and ambit of the Show Cause Notice and should only confine to the findings, whether the proposals made in the Show Cause Notices for different classification should sustain or not. Since the Adjudicating Order had entirely changed the classification of the product, as proposed in the Show Cause Notice from 6914 90 90 to 6909 90 90, without issuing any notice to the appellant, we are of the view that differential duty confirmed

under the changed classification should also not stand for judicial scrutiny. Accordingly, it is held that the impugned order confirming the differential duty is not proper and justified."

In the light of above judicial pronouncement, I find that the examination of the matter has to be confined merely to the aspect of whether the activity of sale of plots with undeniable conditions of development of amenities and common facilities such as electricity supply, drainage, water supply, club house etc. can be construed as "work contract" or otherwise. In light of the elaborate discussion hereinabove, I find that such activity cannot be construed as "Work Contract" in as much as the activity is not covered within the four corners of definition of 'Work Contract' in terms of the provisions of Sec. 65B(54) of the Finance Act, 1994.

27.2 Now the second part of the show cause notice is the demand part wherein the service tax has been demanded on the taxable service viz., 'Work Contract Service' Since the activity has been found to be out of the purview of " Work Contract", the said activity cannot be said to be a 'declared service' in terms of the provisions of Section 66E(h) of the Finance Act, 1994 in as much as the said declared service is restricted to the service portion in execution of work contract Resultantly the said activity is not covered within the ambit of work contract service as defined under Section 66 E(h) of the Finance Act, 1994. Once a service has been classified under a particular head and the same is not found to be covered under the head under which the show cause notice proposes to classify the same, the demand becomes unsustainable. This principle has been laid down in the following case laws which have been relied upon by the assessee in their defence reply

a) M/s J.S.E.L. Securities Ltd. reported at 2017(4) GSTL 8(T) where in has been held as under :

"Ld. Counsel for the appellant contested the proceedings before the lower authorities mainly on the ground that the same are beyond the scope of the show cause notice. The show cause notice proposed Service Tax from the appellant under a specific category of "lease circuit service" referring to the statutory provisions applicable to the same. Whereas the Original Authority held that the appellant not being "Telegraph Authority" cannot be taxed under the said category. We note that after recording such finding, the Original Authority proceeded to levy the tax on the said income under "Stock Broker Service". We find that such proceedings are beyond the scope of the show cause

notice as no reference regarding Service Tax liability of the appellant in respect of V-SAT charges was sought to be levied under "Stock Broker Service". On this legal infirmity itself, the proceedings will fail. Accordingly, we set-aside the impugned order and allow the appeal"

b) M/s Swapne Nagari Holiday Resort reported at 2019 (21) GSTL 559 (T) where it has been held as under :

> *"We have gone through the facts of the case and the impugned order. At the outset we find that the demand against the appellant was proposed under the category of 'Business Support Service' but was confirmed under category of 'Renting of Immovable Property Service'. Clearly the demand was confirmed by going beyond the scope of show cause notice."*

c) M/s Vaatika Construction Pvt. Ltd. reported at 2020 (43) GSTL 533 (T), it has been held by the Delhi Tribunal as under:

> ***12.*** *Thus, it was not permissible for the Revenue to issue a notice demanding service tax under "construction of complex services" as defined under Section 65(105)(zzzh) of the Finance Act, 1994 [the Finance Act] when the nature of activity was of "works contract". In this connection, it would also be pertinent to refer the following decisions of the Tribunal as follows :-*
>
> > *(i) M/s. Jambeshwar Construction Co v. Commissioner of Central Excise and Service Tax, Jaipur-II [2019 (3) TMI 39 - CESTAT, New Delhi].*
> > *(ii) M/s. Choudhary Stone Crushing Co. v. Commissioner of Central Excise and Service Tax, Jaipur-II [2019 (3) TMI 38 - CESTAT, New Delhi]*
> > *(iii) CGST - Delhi-III v. Lattice Interiors (Vice-Versa) [2019 (2) TMI 1308 - CESTAT, New Delhi].*
> > *(iv) M/s. Srishti Constructions v. Commissioner of Central Excise and Service Tax, Ludhiana [2018-TIOL-337-CESTAT-CHD]*
>
> ***13.*** *In M/s. Choudhary Stone Crushing Company, the Tribunal observed as under :-*
>
> > *8. For period commencing on 1-6-2007, the composite services would be liable for classification under Works Contract Service only. But we note that Show Cause Notice*

has proposed the demand for service tax under the category of Commercial and Industrial Construction Service as well as Repair and Maintenance Service. Hence we are of the view that the confirmation of demand under the category of WCS will not be proper particularly in view of the decision of the Tribunal in case of Ashish Ramesh Dasarwar (supra) wherein Tribunal has taken the view that demand for Service Tax is to be set aside if the Show Cause Notice proposed a classification different from WCS for construction activity;

> *"6. As regards the period after 1-6-2007, since the demand was raised under 'commercial or industrial construction service, whereas admittedly the service is correctly classifiable under works contract service, demand raised under wrong head of service cannot sustain."*

9. Consequently, we set aside the demand for service tax made under the (CICS) category for Construction of foundation/roads as well as repair of roads."

14. *Likewise, a demand of service tax under a particular category could not have been confirmed under a different category. Thus, in Service Tax Appeal No. 53251 of 2015, the demand of service tax could not have been confirmed under "works contract" when the show cause notice was issued under "construction of complex services".*

27.3 *All the above case laws are identical to the facts of the present case in as much as the service tax has been demanded under the category of 'work contract service' and hence, now it would not be open for the revenue to confirm the demand of Service tax under the some other head of Service. Thus the ratio of all the above case laws is applicable to the facts of this case.*

28. In view of above discussions, I find that demand of Rs. 2,98,55,000/- fails to survive due to the fact that the activity under consideration is neither covered under the category of 'Work Contract' as defined under Section 65B(54) of the Finance Act,1944 nor under the definition of 'declared service' as defined under Section 66E(h) of the Finance Act. 1944.

29.3.11 Section 73 of the Finance Act, 1994 provides for recovery of service tax within a maximum period of five years from the relevant date in such cases has been specified under Section 73(6)(1) of the Finance Act, 1994 as the date of filing of ST-3 return. In the instant case it is observed that the ST-3 return for the period October 13 to March 14 has been filed on 26.04.2014 and the show cause notice has been received by them on 22.10.2019. Thus, the demand in respect of the amount received of on or before 31.03.2014 is beyond five years from the relevant date and as such no demand for such a period prior to five years would survive. The relevant text of Section 73 of the Finance Act, 1994 is reproduced under for ease of reference:

> *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :*
>
> *Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —*
>
> *(a) fraud; or*
> *(b) collusion; or*
> *(c) wilful mis-statement; or*
> *(d) suppression of facts; or*
> *(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,*
>
> *by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted.*

Accordingly, I find that the cash amount to the tune of Rs. 80,82,79,171/- (Rs. 76,12,95,585/- pertaining to the scheme Iscon Platinum as summarized at Annx. A-1 to SCN +Rs. 4,69,83,586/- pertaining to the scheme Iscon Harmony as summarized at Annx. B-1 to SCN), at tabulated at para 29.3.9 hereinabove, is required to be deducted from the computation under Annexure-A-1 and B-1 to the show cause notice. Annex. A-1 to SCN reveals that abetment to the tune of 70% has been granted in case of Towers H to K in terms of the provisions of Notn. No. 26/2012 ST. Likewise, Annx. B-1 to

the SCN reveals that abatement to the tune of 70% has been granted in case of Towers A & D and abatement to the tune of 75% has been granted in case of Towers B, C,E,F & G. Accordingly, the Service tax involved on the above cash amount of Rs. 80,82,79,171 comes to Rs. 3,50,58,715/. which is computed in OIO.

While making the above calculation the outstanding amount in cash as shown at column '1' to Annx. A-1 & B-1 to the SCN has not been considered since the said matter is being dealt with separately. Only the cash collected as shown in Col. 'h' of Annx. A-1 & B-1 to the SCN has been considered for the above computation. Out of the total demand of service tax to the tune of Rs. 12,80,41,844/- computed under Annx. A-1 & B-1 to the SCN, the demand of Service to the tune of Rs. 3,50,58,715/- is found to be unsustainable on the ground that the cash amount pertaining the such demand was received prior to 31.03.2014 and is beyond the period of 5 years.

29.4 Service tax not leviable on cash amount which had not been received from the customers and shown as 'Outstanding' in the Annexure -A1 and B-1 to the SCN.

29.4.1 It has been alleged in the Show Cause Notice that the Outstanding amount as shown in Annexure-1 and B-1 to SCN is liable to Service tax on the ground that no invoice has been issued in respect of such unaccounted cash amount as such the Point of Taxation would be the date of completion of service. This is evident from the narration at para 9.6 of the show cause notice which reads as under :

> *Thus, Rule 6 of the Service tax Rules, 1994, provides for payment of tax on the prescribed date immediately following the calendar month in which the service is deemed to be provided "as per the rules framed in this regard" Further, the relevant rules framed on the issue are the Point of Taxation Rules, 2011. Rule 3 of the Point of Taxation Rules, 2011 provides that in case where invoices are not issued within the specified time period prescribed under Rule 4A of the Service Tax Rules, 1994, then point of taxation shall be the date of completion of provision of service. Thus it is obvious that the event of taxation and point of taxation do not depend on realization of consideration against the provision of service but the relevant factor for taxability is provision of service and the point of taxation shall be as per Rule 3 of Point of Taxation Rule, 2011. In the instant case it is undisputed that the noticee has not issued any invoice for the consideration received in*

cash, as the consideration itself was suppressed. Therefore in terms of Rule 3 of Point of Taxation Rules, 2011 the point of taxation shall be date of completion of provision of service which has already been completed on the date on which event had been organized. Accordingly, the amount which is yet to be received, and shown as 'Outstanding' service already provided shall be taxable and the point of taxation shall be determined in terms of Rule 3 of Point of Taxation Rules, 2011.

As against the said allegation, the assessee have contended that Service tax cannot be demanded on the amount which had not been received and was shown as Outstanding on the following grounds:

a) *The principle of receipt of 'consideration' for the purpose of taxation was not done away with and stood as it was before the change to the invoice based system of taxation since corresponding amendment was made to Rule 6(3) of the Service Tax Rules, 1994 to the effect that excess service tax paid in cases where the price was re-negotiated was admissible as credit to the assessee.*
b) *The definition of the term 'service' as per Sec. 65B(44) of the Finance Act, 1944 made 'consideration' as an integral part of the service*
c) *The department themselves had not computed the service tax on the outstanding amount which is shown to be due on the cheque payment.*

29.4.2 It is an undisputed fact that such amount has not been received by the assessee till the time of issuance of show Cause Notice. The SCN in the instant case has been issued on 22.10.2019 after due investigation of the case and in the said SCN, the said amount has been shown as 'Outstanding' as evident from column 'L' of Annex. A-1 and B-1 to the SCN which clearly shows that the amount has not been received from the customer and is still outstanding. Thus, the revenue does not dispute the fact that the said amount has not been received by the assessee till the finalization of the investigation and issuance of SCN. The assessee have also contended that service tax cannot be levied on such amount since the said amount has not been received by them. Accordingly, I find that there is no dispute regarding the fact that the cash amount under discussion has not been received by the assessee and thus the examination of the matter is reduced to the very question whether Service Tax is leviable on the part of the consideration which has not been received or otherwise.

29.4.3. It is contention of the assessee that 'consideration' is an integral part for the activity to be termed as a 'service' and for the purpose of examining the same, the term 'service' as defined under Section 65B(44) of the Finance Act, 1944 is of vital importance and the same read as under:

> *"Service" means any activity carried out by the a person for another for consideration and includes a declared service.*

In light of the above definition, there is considerable force in the contention of the assessee. The direct implication of the language used in the above statute is that in absence of consideration, the activity cannot be termed as a 'service' . This theory has also been taken cognizance of at para 2.2.2. of the Service Tax Education Guide which read as under:

> ***2.2.2 What are the implications of the condition that activity should be carried out for a 'consideration'?***
>
> - *To be taxable an activity should be carried out by a person for a 'consideration'*
> - *Activity carried out without any consideration like donations, gifts or free charities are therefore outside the ambit of service. For example grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research.*
> - *An act by a charity for consideration would be a service and taxable unless otherwise exempted. (for exemptions to charities please see Guidance Note 7)*
> - *Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service.*
> - *Donations to a charitable organization are not consideration unless charity is obligated to provide something in return e.g. display or advertise the name of the donor in a specified manner or such that it gives a desired advantage to the donor.*

When the activity without consideration is not construed as 'service', the natural corollary that follows is that the amount of 'consideration' which has not been received is not liable to service tax. Thus, the argument of the assessee to the effect that service tax cannot be levied on that portion of consideration which has not been received find support in the definition of the term 'service'.

29.4.4 The assessee have contended prior to 01.04.2011, the service tax was payable at the time of receipts of the payment of the service in terms of the provisions of Rule 6(1) of the Service Tax Rules , 1994 which at the material time, read as under:

(1) The service tax shall be paid to the credit of the Central Government, -

(i) by the 6th day of the month, if the duty is deposited electronically through internet banking; and

(ii) by the 5th day of the month, in any other case,

immediately following the calendar month in which the payment are received, towards the value of taxable service.

Subsequently, the above rule was amended w.e.f. 01.04.2011 by virtue of Notification No. 3/2011 ST dtd. 01.03.2011 wherein the words ' payment are received, towards the value of taxable services' were substituted with the words 'service is deemed to be provided a per the rules framed in this regard'. Simultaneously, the point of Taxation Rules 2011 were introduced w.e.f. 01.04.2011 by virtue of Notn. No. 18/2011-ST dtd. 01.03.2011 and the Point of Taxation was specified as the earlier of the following events in terms of Rule 3 of the Point of Taxation Rules, 2011

i) Date of invoice OR

ii) Date of receipts of payment OR

iii) Date of completion of service

However, corresponding amendments were carried out in Rule 6(3) of the Service Tax Rules, 1994 with effect from 01.04.2011 by virtue of Notification No. 26/2011 -ST wherein the following amendments were carried out:

(a) in sub-rule (3) –

(i) after the words "partially for any reason", the words "or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract," shall be inserted;

29.4.4 An in-depth analysis of the amendment to Rule 6(3) of the Service Tax Rules, 1994 is required for the purpose of understanding the purpose and effect of such amendment. The text of the said rule pre-amendment as well as post-amendment is reproduced for ease of reference.

<u>Prior to amendment</u>

Where an assessee has issued an invoice, or received any payment, against the service to be provided which is not so produced by him either wholly or

partially for any reason, the assessee may take the credit of such excess service tax paid by him, if the assessee-

(a) has refunded the payment or part thereof, so received alongwith the service tax payable thereon for the service to be provided by him to the person from whom it was received; or

(b) has issued a credit note for the value of service not so provided to the person to whom such an invoice had been issued.

<u>After amendment with effect from 01.04.2011</u>

Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, or where the amount of invoice is renegotiable due to deficient provisions of service, or any terms contained in a contract the assessee may take the credit of such excess service tax paid by him, if the assessee-

(a) has refunded the payment of part thereof, so received for the service provided to the person from whom it was received or

(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.

Prior to 01.04.2011, the adjustment of excess service tax was applicable only in cases where the payment had been received against a service which was not provided either wholly or partially. After the amendment the adjustment of excess service tax paid was extended to cases where the amount was re-negotiated due any terms of the contract. This purpose for such amendment can be derived that there may be occurrences where the service tax has been discharged on the invoice value at the material time but later on a part or whole of such invoice value is not received by the service provider owing to deficient service or re-negotiation of price. In such cases, the service tax proportionate to such value not received by the service provider is to be treated as excess paid service tax and would be admissible as credit to the service provider. The direct inferences that can be drawn by the said rule after amendment is that :

i) The service tax paid on the value which has not been received by the service provider is to be treated as excess paid service tax. This would mean that service tax was not payable on such value/ consideration which has not been received by the Service provider.

ii) The excess payment of service tax is adjusted by way of taking credit. This again proves that no service tax was payable on such value not received by the service provider and if such service tax was paid the

same was not to be retained by the Government but was to be taken as credit by the service provider.

The crux of both the above reference is that no service tax is to be paid on that part of the consideration which has not been received by the service provider. Thus, it can be derived that even after the shift in the point of taxation from receipt of payment to invoice, no service tax was intended to be charged on the value which had not been received by the service provider. With a view to safeguard the interests of the service provider, the mechanism for adjustment of underlying principle of receipt based levy of service tax has continued even after the change in the point of taxation. In other words, service tax is chargeable only on the amount that is received by the service provider even after the amendments w.e.f 01.04.2011.

29.4.5 The investigation has also adhered to the above principle in as much as the service tax has only been calculated on the outstanding cash payment and not on the outstanding cheque payment. This is evident from Annexure A-1 and B-1 to the SCN where Column M is the sum total of 'Cash Received – Column H' and 'Outstanding Cash- Column L'. The applicable abatement has been calculated on such cash amount and the taxable value after deducting the abatement has been arrived at in the Colum O and K of Annexure -A1 and B1 to the SCN shows outstanding amount of Rs. 17,64,87,394/- and Rs. 11,03,02,581/- respectively and no service tax has been computed on such amounts which are shown as outstanding towards cheque payment.

29.4.6 In light of the above discussion, I find that there is consideration force in the contentions of the assessee to the effect that service tax is not chargeable on the amount which has not been received by them. This is specially so in light of the fact that the SCN itself admits that such amount has not been received by the assessee which makes it an undisputed fact that such amount has not been received by the assessee which makes it an undisputed fact that such consideration has not been received by the assessee. Accordingly the demand of service tax as per Annexure A1 and B1 to the SCN is required to be re-computed by deducting the value that has been shown as Outstanding and not received by the assessee. Annx. A-1 to the SCN reveals that abatement to the tune of 70% has been granted in case of Towers A to G & L and abatement to the tune of 75% has been granted in case of Towers H to K in terms of the provisions of Notn. No. 26/2012 ST. Likewise, Annx. B-1 to the SCN reveals that abatement to the tune of 70% has been granted in case of Towers A & D and abatement to the tune of 75% has been granted in case of Towers B, C, E,

F & G. Accordingly, the Service tax involved on the above cash amount of Rs. 88,22,62,572/- comes to Rs. 3,75,35,481/-. which is computed in OIO.

In view of the above, I find that out of the total demand of Service tax to the tune of Rs. 12,80,41,844/- computed under Annx. A-1 & B-1 to the SCN, the demand of Service tax to the tune of Rs. 3,75,35,481/- is found to be unsustainable on the ground that the cash amount has been shown as Outstanding and is not received by the assessee.

29.5 Service tax not leviable on the calculation made on the basis of third party evidence.

29.5.1 It has been alleged in the SCN that the assessee have collected amount in cash from a buyer in light of the evidence seized by the Income Tax authorities. A chit containing the detail of evidence relied upon has been reported at Page No. 39, para 7.2 of the SCN. With regard to the said allegation, the assessee have contended that the demand of service tax to the tune of Rs. 93,28,750/- is not sustainable since the document on the basis of which the said demand has been raised was not made by any of their person but was created by broker. Further, it has been contended that the said document contained 30 entries where Annexure C-1 to SCN is found to be containing 52 entries.

29.5.2 The credibility of the said document has been with vehemently challenged by the assessee on the count that the name appearing in the said documents are not the person to whom such units have been sold. The assessee have produced copies of Sale Deeds in respect of the entries under contention and scrutiny of the said sale deeds indicate that the flat at at Annexure C-1 to the SCN in respect of which the allegation have been made have been sold to the following person (as detailed mentioned in OIO)

The above indicates that except for Sr. No. 1 the name of the buyer as shown in the chit is not matching with the name of the buyers as per sales deed.

29.5.3. Further, as pointed out by the assessee in their written submission, entries at Sr.Nos. 1 to 30 are pertaining to the entries as found in the documents and the Annexure -C1 to SCN itself has shown the same of the customer as per the document and the name of the customer as per the ledgers of the assessee which are found to be differing in majority of the cases. The comparison from the relevant column of Annexure C-1 to the SCN is reproduced under the ease of reference. (Detail in OIO)

The above comparison reveals that apart from the entries at Sr. Nos .1 ,7, and 18, the Customer to whom the flats have been actually sold as per the ledgers of the assessee are not one who have been mentioned in the documents on which reliance has been placed. Thus the documents itself loses credibility since the details therein cannot be said to be true when the documents of the assessee indicate that the said flats are sold to some other entities and payment have also been shown in the ledgers of such other entities. In this credibility of the documents has been destroyed by the cogent evidence in the form of ledgers of the assessee which were existing even at the time of investigation and the facts that payment have been received from such customers. Further, the copies of sales deeds produced by the assessee also indicate that the flats have not been sold to the person whose name are appearing in the chit except for one entry. It defies all logic as to why the person who have not bought the flats under consideration should give some cash amount to the assessee.

29.5.4 It is further found that the details contained in the said document have also not been admitted by any of the company's official. The said document was shown to Shri Venkataramana Ganesna, Presient of the assessee during the course of recording his statement on 17.10.2019 and the document has been denied by him. The relevant extract of the said statement is reproduced under for ease of reference:

Q34. Please peruse page No. 29 of the notice dated 05/09/2018 issued by the Asst. Commissioner of Income Tax, Central Circle-2 (4), Ahmedabad under Section 143 of the IT Act to M/s J.P. Iscon Pvt. Ltd. wherein a scanned image of evidence seized at page No. 13 of Annexure -A2 of seized material resumed from the residence of Kalandi S Shah, marketing manager of J.P. Iscon Pvt. Ltd. for project 'Iscon Platinum' vide panchanama dated 26.02.2016 is reproduced. A scanned image of the same image is pasted as under: -

> *A.34 I peruse the image reproduced at page No. 28 of the notice dated 05/09/2019 issued by Asst. Commissioner of Income Tax, Central Circle -2 (4), Ahmedabad under Section 142 of the IT Act to M/s J.P. Iscon Pvt. Ltd. and as a token of having perused the same I put my dated signature on the page 28 of the said notice. Since it was seized from the residence of Mrs. Kalindi S. Shah, I have taken feedback from her and accordingly I submit that this sheet was given to her by a broker with a brokerage proposal to sell the flats listed in the above sheet at attractive rates in return for a brokerage*

amount. Since we were having direct inquires for these flats, she did not entertain this brokerage proposal and the paper remained in her house.

Q 35. The above sheet contains details of flat No. of Iscon Platinium (Phase -2) and it is also found that name mentioned against are tour buyers. For all Illustration, at Sr. No. 1 of the said sheet flat No. M-1102 of Iscon Platinium -Phase -2 the buyer name is showing Mr. Dua and the same also cross verified from you flat ledgers that the same flat with saleable area mentioned in the sheets is sold to Mr. Dua. Please offer your comments.

A.35 : As I have already state above this sheet is prepared by a broker who is not related to us and discussed above given a proposal to our employee Mrs. Kalindi Shah to get buyers. With respect to specific case of flat No. M1102 the name of customer is Ms Jaspal Singh J Dua and as stated above we have directly dealt with him for sale of the flat and not through the above mentioned brokerage data. I further retreated that this is data prepared by a broker for his own business.

It is very surprising that the investigation has not deemed to fit to conduct any investigation in respect of the said piece of document especially when the same was denied by Shri Venkataramana Ganesna in his statement and the fact that the buyer of the flat mentioned therein were different a compared to the ledger of the assessee at the time of investigation. Despite these facts, the show cause notice has proposed to demand service tax on the basis of such uncorroborated document.

29.5.5 In the instant case, the document is claimed to have been authored by some broker and the investigation has failed to bring any substantial material on record to prove the authenticity of the said document. Coupled to this fact, the financial records maintained by the assessee in form of ledger and the copies of sale deeds produced by them is depicting the fact that the buyers of the flat are totally different from the one's whose name are mentioned in the loose document. Accordingly, the documents relied upon loses its evidentiary value and no demand can be raised on the basis of such uncorroborated document. My conclusion is aptly supported by the Judgement in the case of M/s Emmtex Synthetics Ltd. reported at 2003 (151) ELT 170 (T) wherein it has been observed as under:

> *For want of any tangible evidence and in view of the facts, circumstances and evidence, referred to above, no presumption on the basis of uncorroborated, uncross-examined evidence of B.M. Gupta*

and the alleged entries made by him in his private diary, loose sheets/charts, packing slips could be drawn about the receipt of the polyester yarn by the appellants from the company, M/s. HPL, in a clandestine manner during the period in question. Similarly, no inference could be legally drawn against the appellants of having manufactured texturised yarn out of the said polyester yarn and the clearance thereof, in a clandestine manner without the payment of duty. The surmises and conjectures cannot take place of legal proof. The excise department was required to prove by cogent, convincing and tangible evidence the allegation of clandestine receipt of polyester yarn from the company, M/s. HPL and thereafter manufacture of texturised yarn out of the same and clearance thereof without payment of duty, by the appellants. But the department, in our view, has failed to establish the same

The effect of lack of evidence has been discussed by the Hon'ble Patna High Court in the case of M/s Brims Products reported at 2011(271) ELT 0184 (Pat) which is reproduced under

Presumptions and assumptions cannot take place of positive legal evidence, which are required for proving the charge. Even if, it is assumed that some raw materials were received at the factory of the respondent during the said period, the same cannot become conclusive proof of production and clandestine sale to different parties. Due to lack of positive evidence, benefit of doubt will always go in favour of the assessee.

In view of the above, I find that the balance of convenience lies in favour of the assessee since the very basis of the demand is found to be inadmissible in evidence and as such as the demand of Rs. 93,18,759/- as per Annexure - C1 to the show cause notice fails to survive on merits."

30. On going through the above findings, we find that the Adjudicating Authority with careful application of mind dealt with the issue on facts and statutory provisions for dropping of part demand. Therefore, we do not find any infirmity in the finding of the impugned order, except the finding on receipt of cash. Accordingly, the same is upheld to the above extent. Consequently, the Revenue's appeal is liable to be dismissed.

As regard to the issue of jurisdiction raised by the revenue that whether the DGGI has power to issue show cause notice by relying upon the Apex Court judgment in the case of Canon India *supra,* since we have decided the entire case on its fact and merit, we do not address the issue of jurisdiction and the said issue is left open.

31 As regards the penalties imposed on co-appellants, we find that in view of the foregoings, the demand itself is not sustainable against the main Appellant, hence the question of penalties on co-appellants does not arise.

32. As per our above discussion, we pass the following order :

(i) The appeals filed by J.P. Iscon Pvt. Ltd., Shri Pravin T Kotak, Shri Jayesh T Kotak, Shri Jatin M. Gupta, Shri Amit M Gupta are allowed.

(ii) Revenue's appeal is dismissed.

(Pronounced in the open court on 17.03.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Diksha