आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009
फ़ोन नंबर./ PHONE No.: 079-2754 4599	फैक्स/ FAX : 079-2754 4463	E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.NO. STC/15-22/OA/2020 DIN : 20231064WT0000169263

आदेश की तारीख़ / Date of Order : 30.10.2023

जारी करने की तारीख़ / Date of Issue : 30.10.2023

द्वारा पारित/Passed by -

उपेन्द्र सिंह यादव / UPENDRA SINGH YADAV

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR– 03/2023-24

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क 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 ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 को संबोधित 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, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल 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.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा

हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. 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 दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।

(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 बिना 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 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर 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 wherc the Bench is situated and the demand draft shall be attached to the form of appeal:

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

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

8. 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.

विषयः -कारण बताओ सूचनाः

Subject- Show Cause Notice No. No. DGGI/AZU/Gr.D/36-24/2020-21 dated 24.07.2020 issued to M/s. GTPL Hathway Ltd, Ahmedabad & Shri Jayanta Kumar Pani (the then Chief Financial Officer), M/ s. GTPL Hathway Ltd, Ahmedabad by the Additional Director General, Directorate General of Goods & Service Tax Intelligence, Zonal Unit, Ahmedabad.

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-03/2023-24

Brief Fact of the Case,

1. M/s. GTPL Hathway Ltd. (hereinafter referred to as "M/s. GTPL"/said noticee for the sake of brevity) having registered office at C-202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmedabad - 380004 were primarily engaged in providing Cable Operator service and Broadcasting services, apart from providing Management or Business Consultant Service, Business Auxiliary Service, Internet Cafe, selling of space or time slots for advertisement service and Renting of Immovable Property service. For the said services, GTPL were registered with Service Tax Commissionerate, Ahmedabad under the provisions of Finance Act, 1994 and were holding Service Tax Registration STC No.AACCG6676MST001.

2. Executive Summary

Information received indicated that M/s GTPL had imported Set Top Boxes (STBs) from various manufacturers located in China, Hongkong and Taiwan and for the STBs, had imported STB Conditional Access System (CAS) from M/s. Nagravisions SA, Switzerland. M/s. Nagravision SA, Switzerland [hereinafter referred to as "NAGRA" for the sake of brevity) is the holder of Intellectual Property Rights for the CAS software.

The intelligence further indicated that NAGRA, who were not having any office in India, had entered into an agreement with M/s. GTPL wherein Nagra granted them (M/s. GTPL was earlier known as M/s. Gujarat Telelink P. Ltd.) a non-exclusive, non-transferrable and non-sublicensable license for the territory to use the Nagra CAS software for operating the STBs from the acceptance date and for as long as the agreement remained in force, subject to the provisions of the agreement for the purpose of operating the CAS in the territory on payment of license fee. The intelligence also indicated that M/s. GTPL was under obligation to pay service tax on such license fees paid to Nagra under reverse charge mechanism but they knowingly did not pay the service tax on such expenses incurred by them.

3. Action taken on intelligence

Acting on the above intelligence, letters dated 15.05.2020, 28.05.2020 and 29.05.2020 from file bearing F. No.DGGI/AZU/Gr.D/ 12(4)5/2020-21 were issued to M/s. GTPL seeking the following documents:

(I) Agreement with M/s. Nagravision SA, Switzerland for supply of Nagravision DLK Conditional Access System along with purchase orders, invoices and details of payments made to M/s. Nagravision

SA, Switzerland.

(II) Annual Report for the year 2014-15 & 2015-16.

(III) Trial Balance for the period from 2014-15 to 2017-18

(IV) Break-up of Expenditure in Foreign Currency

(V) Income Tax Returns (Form 3-CD along with Annexures) for the period from 2014-15 to 2017-18.

(VI) Copy of contract/ agreement entered with the entities shown under Section 195 of Income Tax along with all the annexures, if any, and ledgers for the period from 2014-15 to 2017-18 (upto June).

Pursuant to the said letters, M/s. GTPL had submitted the following documents under the cover of their forwarding letters dated 26.05.2020 and 11.06.2020:

- Agreement dated 19.04.2013 with Nagra along with purchase order and invoices;
- Sample purchase orders and invoices;
- Ledgers in case of foreign service providers as shown in TDS statement u/s 195 of the Income Tax Act, 1961;
- Agreement with vendors providing STBs;
- Annual Reports for the year 2014-15 & 2015-16;
- Trial Balance for the period 2014-15, 2015-16 and 2016-17;
- Income Tax Returns for the period 2014-15, 2015-16 and 2016-17;

On the issue of non-payment of service tax against the service availed by them from Nagra, legal consultant of M/s. GTPL Shri Rahul Patel vide letter dated 10.06.2020 submitted that there was no revenue loss to the exchequer as the issue was revenue neutral i.e. they were eligible for availing full cenvat credit of input services if service tax would have been paid under reverse charge mechanism on such transactions. They had placed reliance on the following cases so far as their argument regarding the case being revenue neutral was concerned.

(i) CCE Vs. Coca-Cola India P. Ltd. - 2007 (213) ELT 490 (SC)
(ii) Choice Laboratories Ltd. Vs. Union of India - 2016 (341) ELT 604 (Guj)
(iii) Jay Yuhsin Ltd. Vs. VVE - 2000 (119) ELT 718
(iv) Sanvijay Rolling & Engineering Ltd. Vs. CCE - 2018 (11) GSTL 344 (Born),
(v) CCE Vs. Tarapur Grease India P. Ltd. - 2016 (334) ELT 416 (Born),
(vi) Mahindra & Mahindra Ltd. Vs. CCE - 2019 (368) ELT 105 (Tr-Mumbai)
(vii) Sarovar Hotels P. Ltd. Vs. CST - 2018 (10) GSTL 72 (Tri-Mum)
(viii) K-Air Specialty Gases P. Ltd. Vs. CCE- 2017 (4) GSTL 370 (Tri-Mum)
(ix) Bharat Oman Refineries Ltd. Vs. CCE - 2017 (4) GSTL 221 (Tri-Del)

4. Scrutiny of documents and recording of statements:

4.1 M/s. GTPL submitted a copy of agreement dated 19.04.2013, viz.

"AGREEMENT FOR THE SUPPLY OF A NAGRAVISION DLK CONDITIONAL ACCESS SYSTEM AND FOR SUPPLY OF ASSOCIATED SERVICES", as amended from time to time, that they had entered into with NAGRA.
The relevant clauses of the said agreement are reproduced as below:-

This agreement was entered into between Nagravision SA, Route de Geneva 22, 1033 Cheseaux s/Lausanne, Switzerland, a corporation organized under the laws of Switzerland ("NAGRA") and Gujarat Telelink Private Limited, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Mandir, Shahibaug Ahmedabad 380004, India, a corporation organized under the laws of India ("M/s. GTPL").

A) Whereas Nagra was a provider of solutions for digital TV including conditional access systems.

(B) Whereas M/s. GTPL was a leading national MSO delivering cable services in 9 states across India.

(C) Whereas M/s. GTPL intended to introduce the Nagravision Conditional Access System and to get access to the related maintenance and support services of Nagra for its operation of such CAS to encrypt its programme services to be distributed on its network (the "Project").

(D) .....

1. Definitions

Capitalized terms used in this Agreement shall have the meaning set out in this Article 1, or failing that, they shall have the meaning ascribed to them in relevant Attachment:

- "**Activation Keys**" shall mean a set of keys called virtual UA produced by Nagra for the unique purpose of M/s. GTPL and which enables to grant and manage the rights for a given subscriber. These Activation keys are produced and delivered on the basis of orders sent by M/s. GTPL. Activation Keys shall be delivered by batch of SOOK.
- "**Agreement**" means the present agreement for the supply of a Nagravision DLK, conditional access system and for the supply of associated services, including all Attachments hereto. "**Installation Site**" shall be at GTPL's Playout Center in 2d Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Mandir, Shahibaug, Ahmedabad 380004, India.
- "**Intellectual Property Right(s)**" shall include patents, patent applications, utility models, utility model applications, trademarks, trademark applications, domain names, domain name applications, right in names, registered and unregistered copyrights, authorship rights, rights in databases, registered and unregistered design rights, rights in know-how, trade secrets,

inventions, improvements, discoveries and all other forms of intellectual property rights having equivalent or similar effect to any of the foregoing, regardless whether such rights are registered or unregistered.

•**"Nagravision Conditional Access System" ("CAS" or "System")** means the DLK Navigation system for conditional access as described and defined in the Statement of Work (Attachment S 1) and in the Solution Architecture (Attachment S 2), comprising the Nagra headend hardware and software as well as CAK residing in the set-top-boxes that have been validated by Nagra.

•**"Software"** means the computer application programs installed in the CAS.as listed in the Solution Architecture.

•**"Subscriber"** means all end users that get access to GTPL's programme and services encrypted with the System operated by GTPL.

2. Object of the agreement
3. Supply and installation of the CAS
4. Installation of the CAS
5. Acceptance testing for the installation of the CAS
6. Change requests concerning the CAS
7. Delivery of Activation Keys for the system

7.1. Customer shall order Activation Keys upon issuance of a purchase order.

7.2. Nagra shall deliver the Activation Keys to Customer by batch of fifty thousand (50'000) units upon receipt of full payment of the CAS software license fees as set out in Clause 11.2.

"C- License Grant

8. Licenses

8.1 Subject to the payment of the license fee provided for in the "Commercial Terms" (Attachment S 6), Nagra hereby grants to GTPL a non-exclusive, non-transferable and non-sublicensable license for the territory to use the CAS software from the acceptance date and for as long as the agreement remains in force subject to the provisions of this agreement for the purpose of operating the CAS in the territory. Nothing in this agreement is intended to give GTPL or any third party any right of ownership with respect to the Intellectual Property Rights in the CAS software.

8.2 "GTPL may create 2 archival copies of the Software and otherwise copy or reproduce the Software or any portion thereof only as such copying is incidental to the use and operation of the Software for the purposes authorized above. GTPL shall only have the right to make 2 back-up copies of any Software documentation. No right or license is granted under this agreement for the use or other utilization of the Software, directly or indirectly, for the benefit of any other

person or entity or, except as provided according to this agreement, in conjunction with any equipment other than the CAS. GTPL is obliged to keep the copies in safe custody and to limit the access to the personnel operating the CAS, to Nagra personnel providing repair and maintenance, and to GTPL's Security Officer. Upon Nagra's request, GTPL shall forward a list containing the names of the people having access to the copies.

8.3 .....

8.4 .....

8.5. Except as expressly provided in this Agreement, no license under any patents, copyrights, trademarks, trade secrets or any other Intellectual Property Rights, express or implied, are granted by Nagra to GTPL under this Agreement. Nagra shall have no obligation under this Agreement to provide any hardware, services or software exceeding those necessary to fulfil this Agreement.

8.6. This Software is being licensed and not sold to GTPL hereunder. GTPL agrees that, as between the Parties and for all purposes under the laws of all countries, Nagra shall be considered the owner of the Intellectual Property Rights in the CAS, including the Software, and any copies thereof, and of all copyright, trade secret, patent, trademark and other Intellectual Property Right therein. Physical copies of the Software in any medium shall remain the property of Nagra, and such copies shall be deemed to be, only licensed to GTPL.

8.7.....

D - Maintenance and Support; Security

9. Maintenance and Support

9.1 Nagra shall provide maintenance and support in accordance with the Maintenance and Support Conditions.

9.2 The yearly fee for maintenance and support according to the Maintenance and Support Conditions (Attachment S4) is defined in the "Commercial Terms".

9.3....

9.4....

10. Security

10.1. *To the extent GTPL has notified Nagra that it has decided to subscribe to Nagra's security services as described in this Agreement before the end of the Warranty Period and pays the corresponding security fee, Nagra shall provide security services in accordance with the Security Agreement. The yearly fee for security services according to the Security Agreement is defined in the "Commercial Terms". Security services must be subscribed on an un-interrupted basis.*

10.2 GTPL shall cooperate with Nagra in accordance with the Security Agreement in order to ensure security of the CAS."

From the above contract it was evident that Nagra owned the Intellectual Property Rights over their CAS software. This fact was evident from the narration in clause 8.1 of the above agreement.

> *"Nothing in this agreement is intended to give GTPL or any third party any right of ownership with respect to the Intellectual Property Rights in the CAS software"*

From the above agreement it was further evident that Nagra had permitted M/s. GTPL to temporarily use, during the period of agreement, their CAS software by providing activation keys for which they were holding Intellectual Property Rights, upon payment of license fee as stipulated in *"Commercial Terms"* of the above mentioned agreement. This fact is evident from the clause 8.1 of the above agreement which is as given below:

"8.1. Subject to the payment of the license fee provided for in the "Commercial Terms" (Attachment S-6), Nagra hereby grants to GTPL a non-exclusive, non-transferable and non-sublicensable license for the territory to use the CAS software from the acceptance date and for as long as the agreement remains in force subject to the provisions of this agreement for the purpose of operating the CAS in the territory. Nothing in this agreement is intended to give GTPL or any third party any right of ownership with respect to the Intellectual Property Rights in the CAS software."

From the above contract, it appeared that Nagra had not provided the services of development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software to M/s. GTPL but allowed M/s. GTPL to use their proprietary software 'CAS' on payment of license fees.

In this regard, on the issue of whether grant of such permission to use a proprietary software would be a service or goods, in the case of Infotech Software Dealers Association Vs. Union of India, the Hon'ble High Court of Madras in its decision dated 24.08.2010 had held that "If the software is sold through the medium of internet in the form of downloadable, it does not fit into the ambit of "IT software of any media". In that event, it is possible to hold that when an access control is given through an internet medium with a user name and password and when there is no CD or other storage media for the item, it does not satisfy the requirement of being 'goods' or the entry used in the statute."

In the present case as well, the software would not qualify as 'goods' as M/s. GTPL used to receive a link from Nagra via electronic mode containing Activation Code and this Activation Code was essential for the CAS software to give controlled access to the users/subscribers. This fact was also confirmed by Shri Anil Prakash Mal Bothra, Chief Financial Officer of GTPL in response to Question No.10 of his statement recorded on 16.06.2020, wherein he stated that each Set Top Box contains Conditional Access System and one code was pre-configured for each STB so as to activate the STBs with CAS. He further stated that they used to receive a link containing Activation Code mode from the foreign vendor and this activation code was being

used by them electronically to activate the CAS software installed in the STB at the clients end so that the clients get conditional access to the channels being broadcasted by respective broadcaster. Thus, as per decision of the Hon'ble High Court of Madras in the case of Infotech Software Dealers Association Vs. Union of India dated 24.08.2010, as M/s. GTPL was getting access of activation code through an internet medium and there was no CD or other storage media for the activation code, the said activity of getting access of activation code through an internet medium did not satisfy the requirement of being goods.

It was also seen from Clause 8.1 of the agreement dated 19.04.2013 between Nagra and M/s. GTPL that subject to payment of the license fee provided for in the "Commercial Terms" (Attachment S 6), Nagra had granted M/s. GTPL a non-exclusive, non-transferable and non-sublicensable license for the territory to use the CAS software from the acceptance date and for as long as the agreement remained in force subject to the provisions of the agreement for the purpose of operating the CAS in the territory and that nothing in the said agreement was intended to give M/s. GTPL or any third party any right of ownership with respect to the Intellectual Property Rights in the CAS software.

Accordingly, since CAS software in the present case could not be considered as goods, the activity under consideration in the present case would not qualify as "transfer of goods by way of hiring, leasing; licensing or in any such manner without transfer of right to use such goods". Thus, it appeared that the activity of Nagra viz. giving permission for use of their CAS software, to M/s. GTPL subject to payment of License Fees would not qualify as activity defined under Section 66E(f).

It appeared that, in the present case, Nagra was holding Intellectual Property Right for their CAS software. Nagra had granted permission for use of said CAS software to M/s. GTPL under the subject agreement by providing activation key electronically. Further, the right of ownership of the said CAS software at all times remained with Nagra. This permission was accorded, for a defined period and for the purposes as defined in the said agreement, subject to payment of License Fees by M/s. GTPL to them as stipulated under the said agreement. Thus, it appeared that the said activity of permitting use of CAS software over which Nagra was having Intellectual Property Rights for a consideration paid by M/s. GTPL would squarely qualify as an activity defined under Section 66E(c) of the Finance Act, 1994 viz. "temporary transfer or permitting the use or enjoyment of any intellectual property right".

Thus, it appeared that the payment of **Rs. 45,61,10,538/-** made by M/s. GTPL to Nagra as reflected in their books of account, during the period October-2014 to June 2017, was on account of the fact that Nagra had granted M/s. GTPL non-exclusive, non-transferable and non-sublicensable right to use their CAS software, which was Nagra's Intellectual Property, on payment of License **Fee.** The method of payment or the terms of payment of this License Fee was as stipulated in Attachement-6 to the said agreement and this attachment was titled as "Commercial Terms". Accordingly, it appeared that the said activity on part of Nagra would be classifiable as "temporary transfer or permitting the use or enjoyment of any intellectual property right", as stipulated under the provisions of Section 66E(c) of the Finance Act, 1994.

4.2 Fee paid for other services in relation to license fee - Maintenance & Repair, Security Fee Further, M/s. GTPL had also received taxable services, viz. maintenance and support service, from Nagra under the provisions of the same agreement dated 19.04.2013. As a consideration towards receipt of the said services, M/s. GTPL made payment of **Rs.61,52,182/-** to Nagra during the period October-2014 to June-2017.

The scope of maintenance and support services was covered under Clause D of the said agreement and the relevant part of said Clause D is reproduced below:

D- Maintenance and Support; Security

9. Maintenance and Support

9.1 Nagra shall provide maintenance and support in accordance with the Maintenance and Support Conditions.

9.2 The yearly fee for maintenance and support according to the Maintenance and Support Conditions (Attachment S4)is defined in the "Commercial Terms" (Attachment S6)....."

In terms of "Commercial Terms" of said agreement, as defined in Attachment S 6 of the said agreement, the amount of consideration for said maintenance and support service was fixed at 15% of the value of Head End hardware.

It is evident that Nagra was a foreign company located in non-taxable territory and was not having any office in taxable territory. Thus, in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012, M/s. GTPL was liable to pay service tax under reverse charge mechanism on such services received by them from Nagra. However, it appeared that M/s. GTPL

failed to pay service tax on such transactions. Further, no justifiable reason for non-payment of service tax was given by M/s. GTPL or their authorized representatives.

4.3. M/s. GTPL submitted copy of their Income Tax Returns for the period April- 2014 to March-2018 along with their Form 3CDs. On verification of the said Form 3CDs, it was found that M/s. GTPL had shown certain deductions of TDS under Section 195 of the Income Tax Act, 1961. It is pertinent to mention here that in case specified payment was made to non-residents or foreign company, the person making such payment is required to deduct TDS at stipulated rates in terms of Section 195 of the said Act.

4.4. Accordingly, M/s. GTPL was requested to give the details of payments made by them to the foreign companies for which they had deducted TDS under Section 195 of the Income Tax Act, 1961. On verification of the statement in 3CD it was found that M/s. GTPL had made the payments to the foreign companies.

4.5. On comparation with the ledgers maintained by M/s. GTPL, it was found that the nature of transactions against which the payments were made was not properly reflected as mentioned in the worksheet. For example, in case of payment made to Nagra the nature of transactions was mentioned in the statement of TDS deduction under Section 195 of the Income Tax Act, 1961 as "License Fee" in all cases. However, from the ledgers maintained and submitted by M/s. GTPL, it appeared that certain payment made by M/s. GTPL to Nagra was in respect of "Maintenance charges". Accordingly, the exact nature of said transactions were established from the ledgers maintained by M/s. GTPL

4.6. Further, details of invoices issued by other foreign vendors viz., M/s. Ericsson Television Ltd., Sweden & M/s. Media Partner Asia Research Services Pte Ltd., were called for.

4.7. It appeared that Services were received by M/s. GTPL from M/s. Media Partners Asia Research Services Pvt Ltd., Singapore and M/s. Ericsson Television Ltd., Sweden.

4.7.1. From the invoices issued by the foreign vendors, it was evident that both M/s. Media Partners Asia Research Services Pte Ltd,, Singapore and M/s. Ericsson Television Ltd., Sweden were foreign based service providers located in non-taxable territory, In case of transaction with M/s. Media Partners Asia Research Services Pte Ltd,, Singapore, M/s. GTPL had received 'MPA Research & Consulting Services' and had paid a consideration of **Rs.23,51,825/**to M/s. Media Partners Asia Research Services Pte Ltd,, Singapore towards

the receipt of said services. This fact was evident from the description of services mentioned in the Invoice No.RES14501 dated 22.08.2016 issued by M/s. Media Partners Asia Research Services Pte Ltd, Singapore as well as corresponding ledger maintained by GTPL.

4.7.2. Similarly in case of transaction with M/s. Ericsson Television Ltd., GTPL had received troubleshooting and rectification services for their Headend support and consideration of **Rs.83,817/** - was paid by GTPL to M / s. Ericsson Television Ltd. towards receipt of the said services. This fact was evident from the Work Order No.0227 dated 14.06.2016 issued by GTPL in favour of M/s. Ericsson Television Ltd.

It was evident that M/s. Media Partners Asia Research Services Pte, Singapore and M/s. Ericsson Television Ltd., Sweden were foreign companies located in non-taxable territory and were not having any offices in taxable territory. Thus, in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012, M/s. GTPL was liable to pay service tax under reverse charge mechanism on such services received by them from M/s. Media Partners Asia Research Services Pte Ltd., Singapore and M/s. Ericsson Television Ltd., Sweden. However, it appeared that M/s. GTPL had failed to pay service tax on such transactions.

4.8. Statement dated 16.06.2020 tendered by Shri Anil Prakash Mal Bothra, CFO of M/s. GTPL under the provisions of Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and Section 70 and 174 of the Central Goods And Services Tax Act, 2017 was recorded wherein he interalia, stated that:-

(i) that, his company was engaged in providing Cable TV services to its customers, services of management and business consultancy to their joint venture companies; services of activation of STBs for which they collect activation charges and for providing time slots for advertisement, they receive advertisement as well as placement revenue.

(ii) that, he was looking after finance, accounts, taxation and secretarial work and that taxation includes both direct taxes and indirect taxes.

(iii) that, his company was receiving services like Pay-channel services, Business Auxiliary services such as consultancy, commission, CHA, marketing and advertisement, AMC etc. and that, with regard to reverse charge, his company is receiving services of Goods Transport Agency, Legal, Rent-a-Cab.

(iv) that, his company had received services in relation to License Fees & AMC from foreign vendors such as Nagra Vision SA, Beijing Novel-Super Digital TV Technology Co. Ltd., Verimatrix Inc.,

Team Viewer, Harmonic International AG, Synamedia Asia P. Ltd., Evertz Microsystems Ltd. and Binary Global Ltd. on which his company is paying IGST under GST law since 01/07/2017. His company is also paying IGST under GST on Ocean Freight.

(v) that, in case of License Fees and AMC, nature of transactions with foreign vendors are the same for both service tax regime as well as GST regime and that there is no change in the nature of service that is being provided in GST period from the services that were provided during the service tax period by the foreign vendors.

(vi) that, his company had not paid any service tax on License Fees paid for activation of STBs and AMC services received from foreign vendors as his company had not received any taxable services in India and the same was not falling under taxable service.

(vii) that, he had perused Notification No.25/2012-Service Tax dated 20/06/2012, Section 66D & Section 68(2) of Finance Act, 1944, and Section 5(3) of IGST Act, 2017 and stated that there was no difference in the provisions of the Section 68(2) of Finance Act, 1994 and Section 5(3) of IGST Act, 2017.

(viii) that, he had perused Notification No.30/2012-Service Tax dated 20/06/2012 and Notification No.10/2017-Integrated Tax (Rate) dated 28/06/2017 and commented that Notification No.10/2017-Integrated Tax (Rate) dated 28/06/2017 speaks about any services whereas Notification 30/2012-ST dated 20 /06/2012 is in respect of any taxable service. That, in case of GST, any services that are being procured by recipient located in the taxable territory from the person located in non-taxable territory, will be subjected to GST under RCM whereas in case of service tax it was only the taxable service that was liable to service tax under RCM. That, his company had not paid the service tax because such transactions were not regarded as service.

4.9. Another summons dated 16.06.2020 was issued to Shri Anil Prakash Mal Bothra, Chief Financial Officer of M/s. GTPL to appear on 17.06.2020 for recording his statement. Pursuant to the same, Shri Anil Prakash Mal Bothra appeared in person on 17.06.2020 to tender his statement wherein he inter-alia stated as under:

(i) that, activation key was a code which was generated online through CAS Server of Nagravision or other CAS provider. That, pursuant to a request by M/s. GTPL to Nagra Vision or other CAS provider, a set of different keys were made available over the service. That, thereafter, the key were mapped with NUID

(identification no of Set Top Box) in order to activate the Set Top Box and that, each activation key had unique VUID and it was to be used once.

(ii) that, whether activity undertaken by his company would fall under the exclusion clause of definition of service as stipulated under Section 65B (44) of the Finance Act, 1994, he stated that his company was advised that licensing activity did not involve any element of service and that, Nagra was merely sharing a list of activation keys which were being used to activate the Set Top Box. That, in such circumstances, Nagra cannot be said to have carried out any activity. That, as perused from the definition of service as stipulated under Section 65B (44) of the Finance Act, 1994, there had to be an activity in order to constitute 'service' which was absent in the given set of transactions and accordingly service tax was not leviable and his company did not pay.

(iii) that, with regard to whether payment of license fees by his company falls under the purview of Section 66B which specifies negative list of services, he stated that the activities carried out by Nagra for his company was under the contract dated 19/04/2013 and the same contract was operative as on date with certain amendments regarding rates. That, otherwise the activity remained same throughout the period April 2014 to June 2020. That, as on date his company is paying IGST on such transactions as the said activities are treated as services. That, service tax was not paid on the same activity carried out in the pre-GST era. That, the applicability of service tax was decided by the management at the material time. Since he joined the company in October 2019, he was neither privy to the reasons for said decision nor a party to the said decision.

(iv) that, he perused the statements of his company showing details of TDS u/ s 195 of IT Act for the year from 2014-15 to 2017-18 (upto June-17) and stated that his company had made payment in foreign currency to M/ s. Nagra Vision towards Activation Keys used for CAS, M / s. Media Partner Asia Research Services Pte Ltd. towards Consultancy Fees and M/s. Ericsson Television Ltd. towards Service charges for rectification of Digital H/E.

(v) In case of Invoice No.RES14501 dated 22/08/16 issued by M/s. Media Partners Asia Research Services Pte Ltd., he stated that the service was regarding 'MPA Research & Consulting Services' wherein they had received services from M/s. Media Partners Asia Research Services Pte Ltd., Singapore towards India Pay - TV and Broadband Overview.

(vi) With respect to their company WO No.0227 dated 14/06/2016

raised in the name of M/s. Ericsson Television Ltd., Sweden and corresponding Invoice No.8418026692 raised by the vendor, he stated that the said transaction was in relation to 'Service charges for rectification of Digital H/E'.

(vii) that, with regard to services received from M/ s. Media Partners Asia Research Services Pte Ltd. and M/s. Ericsson Television Ltd., he stated that the services were consumed in India and the said services were taxable services at the material time. That, he was of the view that no tax was to be paid under RCM on these services. That, the entire exercise would have been revenue neutral and in view of that, no tax was paid under RCM on such transactions;

(viii) He perused service tax returns filed by his company for the period from October-2014 to June-2017 and state that as the applicability of service tax was decided by the management at the material time and that, as he had joined in October 2019, he was neither privy to the reason for not showing the details of the services received from foreign vendors in ST-3 returns nor a party to the said decision.

Thus, it was seen from the statement of Shri Anil Prakash Mal Bothra that M/s. GTPL had received services in relation to License Fees & AMC from foreign vendors during GST regime as well as service tax regime and he agreed that the nature of services received during GST period and service tax regime was the same, yet, as admitted, M/s. GTPL had not discharged service tax liability on this service. He accepted that M/s. GTPL was paying IGST on such services under GST law since 01.07.2017. The reason as stated by him, for non-payment of service tax under reverse charge mechanism on services received in relation to License Fees & AMC from foreign vendors during service tax regime, was that they did not consider the activity as service. This reasoning appeared to be baseless and without any merits in as much as the said services were very well covered under Section 66E(c) of the Finance Act, 1994. He further stated that applicability of service tax on such services during the period October-2014 to June-2017 was decided by the management at the material time and that as he had joined M/s. GTPL in October-2019, he was neither privy to the reason for not showing the details of the services received from foreign vendors in ST-3 returns nor a party to the said decision. However, after having been authorized by M/s. GTPL to give statement and divulge facts of the case on their behalf, the reply tendered by him appears to be nothing but an evasive tactic so as to escape from the responsibility of having taken a decision of not paying service tax on the said services received by them. The fact that M/s. GTPL did not disclose details about these

transactions in their ST-3 returns for the period October-2014 to June-2017 also give strong indication that M/s. GTPL wanted to evade the payment of service tax.

From the above statements dated 16.06.2020 and 17.06.2020 tendered by Shri Anil Prakash Mal Bothra, it was evident that M/s. GTPL took a well thought decision of not to pay service tax under reverse charge mechanism, on the transactions made by them with the foreign service providers. It was also evident that on the said transactions they had made payment of GST under the provisions of IGST Act, 2017. It appeared that in order to escape the liability, they contended that the activity for which they have made payment to foreign companies did not fall under the definition of "services" as stipulated under the provisions of the Finance Act, 1994.

5. Legal Provisions

The present case encompassed the period October-2014 to June-2017 and accordingly, the provisions of Finance Act, 1994, as in effect from 01.07.2012 would be applicable to the present case. The relevant sections/rule are as Section 65(B)(44)/Section 66(B)(51)/Section 66B/Section 66E/Section 66C/ Section 68/ Section 73(1)/Section 78/ Section 78A of the Finance Act, 1994, Rule 2(1)(d)(G) of the Service Tax Rule, 1994, Rule 3 of the Place of Provisions Rules, 2012/Section 142/174 of the CGST Act, 2017, Notification No. 30/2012-ST dated 20.06.2012.

6. Observations of the department

Nagra was a provider of solutions for digital TV including Conditional Access System (CAS) and is also holder of intellectual property right in respect of their "Nagravision Conditional Access System".

Conditional Access is a technology that protects the content and rights of digital TV operators. Conditional access, as the name itself suggests, provides the service of controlling the access to digital television to people who are or are not subscribers. Their end goal is simple and clear - encrypting the channel signal and decrypting it only for the viewers who meet the required conditions. Besides the most common use by digital TV operators, conditional access can also be applied to digital radio and data broadcasts, non-broadcast information and interactive services. Software required for the system (STBs) was supplied by the CAS provider, so that the broadcasters can incorporate it in their own equipment.

6.1. In respect of the payment made by M/s. GTPL to Nagra for transactions covered under agreement dated 19.04.2013, viz. "AGREEMENT FOR THE SUPPLY OF A NAGRAVISION DLK CONDITIONAL ACCESS SYSTEM AND FOR SUPPLY OF ASSOCIATED

SERVICES", except for the transactions covered under Part-D of the said agreement

From the documents available on records, it was observed that M/s. GTPL had received taxable services from their foreign supplier viz. Nagra, for which total consideration of **Rs.45,61,10,538/-** was paid during the period from October-2014 to June-2017. These services were procured by M/s. GTPL from Nagra under the agreement dated 19.04.2013. It was evident that Nagra was a foreign company located in non-taxable territory and was not having any office in taxable territory. Further, it also appeared that M/s. GTPL had failed to pay service tax on such transactions.

In terms of Section 68(2) of the Finance Act, 1994 read with Notification No. 30/2012-ST dated 20.06.2012, the recipient of services located in taxable territory was under obligation to pay 100% services tax on the value of taxable services received by them from the service provider located in non-taxable territory. Further, in terms of clause 51 of the section 65B of the Finance Act, 1994, 'taxable services' means any service on which tax is leviable under section 66B. And Section 66B stipulates that service tax shall be payable on the value of all services, except for the services specified in negative list as stipulated under Section 66D of the Finance Act, 1994. Further, the term "services" as defined in sub-section (44) of section 65B of the Finance Act means any activity, including the declared service as stipulated under Section 66E of the Finance Act, 1994, carried out by a person for other person for consideration but excludes the activity which incorporates transfer of title in goods or immovable property, transaction in money or actionable claim, provision of service by employee to employer in course of employment and fees taken in any court or tribunal established under any law of land.

From the contract dated 19.04.2013, it appeared that activity was carried out by Nagra, a company located in non-taxable territory and not having any offices in India, for M/s. GTPL which was located in taxable territory, for consideration of **Rs.45,61,10,538/**during the period from October 2014 to June 2017.

From the said contract, it also appeared that the said activity carried out by Nagra for M/s. GTPL for consideration was, infact, allowing GTPL to use Nagra's CAS Software which was Nagra's Intellectual Property. This was evident from the clause 8.1 of the said agreement which reads as:

> 8.1 *Subject to the payment of the license fee provided for in the "Commercial Terms" (Attachment S-6), Nagra hereby grants to GTPL a*

non-exclusive, non-transferable and non-sublicensable license for the territory to use the CAS software from the acceptance date and for as long as the agreement remains in force subject to the provisions of this agreement for the purpose of operating the CAS in the territory. Nothing in this agreement is intended to give GTPL or any third party any right a/ownership with respect to the Intellectual Property Rights in the CAS software."

The fact that Nagra was holding Intellectual Property Right over the said CAS software is also evident from Clause 8.6 of the said agreement. The said clause is as given below:

8.6. This Software is being licensed and not sold to GTPL hereunder. GTPL agrees that, as between the Parties and for all purposes under the laws of all countries, ***Nagra shall be considered the owner of the Intellectual Property Rights in the CAS, including the Software, and any copies thereof, and of all copyright, trade secret, patent, trademark and other Intellectual Property Right therein. Physical copies of the Software in any medium shall remain the property of Nagra, and such*** *copies shall be deemed to be only licensed to GTPL."*

It appeared that the above mentioned activity did not fall under 'Negative List' as stipulated under the provisions of Section 66D of the Finance Act, 1994. This activity also did not qualify to be an activity stipulated under the exclusion clause of the definition of 'Service' as provided under the provisions of Section 65B(44) of the Finance Act, 1994. Further, the said activity of permitting GTPL to use the CAS software, whose Intellectual Proprietary Rights were held by Nagra, was also not exempted under Mega Exemption Notification No.25/2012-ST dated 20.06.2012.

It was evident that Nagra was providing the same services to M/s. GTPL, under the same agreement dated 19.04.2013, even during the GST period and, incidentally, M/s. GTPL was paying IGST on such transactions right from July-2017 onwards. It is pertinent to mention that the nature of transaction, under the said agreement dated 19.04.2013, had remained the same in GST period as it was in the pre-GST period and this fact was admitted by Shri Anil Prakash Mal Bothra. M/s. GTPL was paying IGST on all such transactions in the GST period considering the said activity to be 'Service'.

From the above, it appeared that M/s. GTPL, during the period from October-2014 to June-2017, had procured the services, as covered under Section 66E(c) of the Finance Act, 1994, viz.

permission for temporary use or enjoyment of Intellectual Property Right, from Nagra for a total consideration of Rs.45,61,10,538/-.

In terms of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(i)(G) of the Service Tax Rules, 1994 and notification no. 30/2012 ST dated 20.06.2012, 'person liable for paying service tax' in relation to any taxable service provided or agreed to be provided by any person located in a non-taxable territory and received by any person located in the taxable territory, is the recipient of service.

In view of the above, it appeared that the services provided by Nagra to M/s. GTPL and for which consideration of **Rs.45,61,10,538/-** was paid during the period from October- 2014 to June-2017, were taxable services as specified under Section 66E(c) of the Finance Act, 1994. And, since Nagra was located in non-taxable territory, GTPL was liable to pay service tax, under reverse charge mechanism, on the same as M/s. GTPL was located in taxable territory in terms of provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(i)(G) and provisions of Notification No.30/2012-ST dated 20.06.2012.

6.2. In respect of the payment made by M/s. GTPL to foreign companies in respect of services other than services falling under Section 66E(c) of the Finance Act, 1994 as discussed in para 6.1 above:

On scrutiny of ledgers and Income Tax Returns filed by M/s. GTPL, it appeared that M/s. GTPL had made payments to foreign companies for provision of services other than discussed in para 6.1 above.

6.2.1. Services received by GTPL from Nagra

From scrutiny of the documents available on record it appeared that M/s. GTPL had received taxable services, viz. maintenance and support services, from Nagra under the provisions of their agreement dated 19.04.2013. As a consideration towards the receipt of said services GTPL made payment of **R.s.61,52,182/-** to Nagra during the period from October-2014 to June-2017. The scope of maintenance and support services is covered under section D of the said agreement and the relevant part of said section D is reproduced below:

"D- Maintenance and Support; Security

9. Maintenance and Support

9.1. Nagra shall provide maintenance and support in accordance with the Maintenance and support conditions

9.2. *The yearly fee for maintenance and support according to the Maintenance and Support conditions (Attachment S 4) is defined in the "Commercial Terms" (Attachment S 6)....."*

In terms of "Commercial Terms" of said agreement, as defined in Attachment S 6 of the said agreement, the amount of consideration for said maintenance and support service was fixed at 15% of the value of Head End hardware.

It was evident that Nagra was a foreign company located in non-taxable territory and was not having any office in taxable territory. Thus, in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012, M/s. GTPL was liable to pay service tax under reverse charge mechanism on such services received by them from Nagra. However, it appeared that M/s. GTPL had failed to pay service tax on such transactions. Further, no justifiable reason for non-payment of service tax was given by M/s. GTPL or their authorized representatives.

In terms of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(i)(G) of the Service Tax Rules, 1994 and Notification No. 30/2012-ST dated 20.06.2012, 'person liable for paying service tax' in relation to any taxable service provided or agreed to be provided by any person located in a non-taxable territory and received by any person located in the taxable territory, is the recipient of service.

In view of the above, it appeared that the services provided by Nagra to M/s. GTPL and for which consideration of **Rs.61,52,182/-** was paid during the period October-2014 to June-2017, were taxable services. And, since Nagra was located in non-taxable territory, GTPL was liable to pay service tax, under reverse charge mechanism, on the same as M/s. GTPL was located in taxable territory in terms of provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(i)(G) of the Service Tax Rules, 1994 and Notification No. 30/2012-ST dated 20.06.2012.

The above mentioned facts were also accepted by Shri Anil Prakash Mal Bothra in his voluntary statement dated 17.06.2020.

6.2.2. Services received by M/s. GTPL from M/s. Media Partners Asia Research Services Pvt. Ltd., Singapore and M/ s. Ericsson Television Ltd., Sweden

In case of services received by M/s. GTPL from M/s. Media Partners Asia Research Services Pte Ltd., Singapore and M/s. Ericsson Television Ltd., Sweden, M/s. GTPL submitted invoices raised by M/s. Media Partners Asia Research Services Pte Ltd.,

Singapore and M/s. Ericsson Television Ltd., Sweden. In case of M/s. Ericsson Television Ltd., M/s. GTPL also submitted their Work Order No.0227 dated 14.06.2016.

From these documents, it was evident that both M/s. Media Partners Asia Research Services Pte Ltd., Singapore and M/s. Ericsson Television Ltd., Sweden were foreign based service providers located in non-taxable territory. In case of transaction with M/s. Media Partners Asia Research Services Pte Ltd., Singapore, M/s. GTPL had received 'MPA Research & Consulting Services' and consideration of **Rs.23,51,825/-** was paid by M/s. GTPL to M/ s. Media Partners Asia Research Services Pte Ltd., Singapore towards receipt of the said service. This fact was evident from the description of services mentioned in the Invoice No.RES14501 dated 22.08.2016 issued by M/s. Media Partners Asia Research Services PVT, Singapore and the financial records maintained by GTPL.

Similarly, in case of transaction with M/s. Ericsson Television Ltd., M/s. GTPL received troubleshooting and rectification services for their Headend support and consideration of **Rs. 83,817 / -** was paid by M/s. GTPL to M/s. Ericsson Television Ltd. towards receipt of the said services. This fact was evident from the Work Order No.0227 dated 14.06.2016 issued by M/s. GTPL in favour of M/ s. Ericsson Television Ltd. reproduced above, and the financial records maintained by M/s. GTPL.

Thus, it was evident that M/s. Media Partners Asia Research Services Pte Ltd., Singapore and M / s. Ericsson Television Ltd., Sweden were foreign companies located in non-taxable territory and were not having any offices in taxable territory. Thus, in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012, M/s. GTPL was liable to pay service tax under reverse charge mechanism on such services received by them from M/s. Media Partners Asia Research Services Pte, Singapore and M/s. Ericsson Television Ltd., Sweden. However, it appeared that M/s. GTPL had failed to pay service tax on such transactions.

It is pertinent to mention that the said services received by M/s. GTPL from M/s. Media Partners Asia Research Services Pte, Singapore and M/s. Ericsson Television Ltd. appeared to be neither falling under the "Negative List" as stipulated under the provisions of Section 66D of the Finance Act, 1994, nor were exempted under Notification No.25/2012-ST dated 20.06.2012. Further, it appeared that these services would also not qualify as an activity stipulated under the exclusion clause of the definition of 'Service' as provided under the provisions of Section 65B(44) of the Finance Act, 1994.

The above mentioned facts were also accepted by Shri Anil Prakash Mal Bothra in his voluntary statement dated 17.06.2020.

In view of the above, it appeared that the services provided by M/s. Media Partners Asia Research Services Pte Ltd. and M/s Ericsson Television Ltd to M/s. GTPL and for which consideration of **Rs.23,51,825/-** and **Rs.83,817/-** respectively were paid to them, during the period from October-2014 to June-2017, were taxable services. And, since M/s. Media Partners Asia Research Services Pte Ltd. and M/s. Ericsson Television Ltd. were located in non-taxable territory, GTPL was liable to pay service tax, under reverse charge mechanism, on the value of the said services as M/s. GTPL was located in taxable territory, in terms of provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(l)(d)(i)(G) of the Service Tax Rules, 1994 and Notification No.30/2012-ST dated 20.06.2012.

In view of the above, it appeared that 'Maintenance and Support' services provided by Nagra, 'MPA Research & Consulting' services provided by M/s. Media Partners Asia Research Services Pte Ltd., Singapore and 'Troubleshooting and Rectification' services provided by M/ s. Ericsson Television Ltd., Sweden to GTPL and for which consideration of **Rs.85,87,824/-** was paid during the period from October-2014 to June-2017, were taxable service. And, since Nagra, M/s. Media Partners Asia Research Services Pte Ltd., Singapore and M/s. Ericsson Television Ltd., Sweden were located in non-taxable territory, M/s. GTPL was liable to pay service tax, under reverse charge mechanism, on the same as M/s. GTPL was located in taxable territory in terms of provisions of Section 68(2) of the Finance Act,1994 read with Rule 2(l)(d)(i)(G) and provisions of Notification No.30/2012-ST dated 20.06.2012.

6.3. M/s. GTPL had also submitted that even if they were held to be liable to payment of service tax under reverse charge mechanism in case of the above transactions, the entire case would have been revenue neutral as credit of the service tax paid under RCM was duly available. In support of their contention they have relied upon the following decisions:

(i) CCE Vs. Coca-Cola India P. Ltd. - 2007 (213) ELT 490 (SC)
(ii) Choice Laboratories Ltd. Vs. Union of India - 2016 (341) ELT 604 (Guj)
(iii) Jay Yuhsin Ltd. Vs. CCE - 2000 (119) ELT 718
(iv) Sanvijay Rolling & Engineering Ltd. Vs. CCE- 2018 (11) GSTL 344 (Born),
(v) CCE Vs. Tarapur Grease India P. Ltd. - 2016 (334) ELT 416 (Born),
(vi) Mahindra & Mahindra Ltd. Vs. CCE- 2019 (368) ELT 105 (Tr-Mumbai)
(vii) Sarovar Hotels P. Ltd. Vs. CST- 2018 (10) GSTL 72 (Tri-Mum)
(viii) K-Air Specialty Gases P. Ltd. Vs. CCE- 2017 (4) GSTL 370 (Tri-Mum)
(ix) Bharat Oman Refineries Ltd. vs. CCE- 2017 (4) GSTL 221 (Tri-Del)

In case of the decision listed at (vi), (vii), (viii) & (ix) above, relied upon by M/s. GTPL in support of their view of revenue neutrality, it was evident that in all these four cases, there was a doubt regarding applicability of RCM. However, in the present case, it was clearly established that M/s. GTPL was aware about the taxability of the services in the service tax regime as well, as they had paid IGST on said services in GST regime. Further, this was also established from the fact that the agreement between GTPL and Nagra for provision of said services remained same/unchanged in service tax regime as well as GST regime. Further, the contention of M/s. GTPL appears to be grossly misplaced and is erroneous. It was an established fact that the credit of the service tax paid under reverse charge mechanism was available to the service recipient, but for that the service recipient had to first pay the tax. If the principle of revenue neutrality is applied in case of non-payment of tax under RCM, the provisions of reverse charge mechanism as stipulated under the Section 68 (2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012 would become redundant. Such a view would be against the settled legal principles that any interpretation which renders the provisions of a statute redundant, otiose or surplusage has to be avoided. This view was well supported by the decision of Hon'ble Tribunal Mumbai, WZB, in case of The Board of Control for Cricket in India Vs. Commissioner of Service Tax-II. In its decision the Tribunal has held that the case cannot be revenue neutral in view of the fact that in this case because service tax is being demanded from the Appellant only for the reason that the service provider is nonresident and in case service provider was located in India, service tax would have been paid by him in respect of the present transactions. It was further held that manner of payment of the tax would not change the nature of levy and in any case if the argument of revenue neutrality is accepted as permissible defense in the present case, entire scheme of payment of taxes on reverse charge basis will become otiose and no business liable to pay service tax would be required to pay service tax in respect of services received by them from non-resident service providers, for the reason that the tax so paid will be available as credit to them.

Further, the cases relied upon by M/s. GTPL were not applicable to the present case as the facts of the relied upon cases were not similar to the present case.

7. Quantification of service tax:

On scrutiny of the documents submitted such as ledgers, Purchase Invoices, Balance Sheet, it appeared that the payment

made by M/s. GTPL to the service providers located in non-taxable territory towards receipt of taxable services from such service providers for each financial year is as given in the Table below:

Financial Year	Taxable Value (Rs.)	Service Tax (Rs.)
2014-15 (From October-14 onwards)	2,02,72,853	25,05,725
2015-16	27,55, 18,845	3,96,90,832
2016-17	16,89,06,664	2,53,36,000
Total	46,46,98,362	6,75,32,556

In view of the above it appeared that the total service tax liable to be recovered from M/s. GTPL on account of the taxable service, valued at **Rs.46,46,98,362/-** received by them for the period from 01.10.2014 to 30.06 2017, from the service providers located in non-taxable territory, was **Rs.6,75,32,556/-**

8. Justification in general for invocation of proviso to Section 73(1) of Finance Act, 1994

8.1. The scheme of service tax rests on voluntary compliance by a party entrusted with the responsibility to pay the service tax. As such, the original hypothesis with which one starts out is that the assessee would be complying with the law in all earnestness and with assiduousness that is warranted of a responsible tax payer. Interference of departmental officers is generally not permitted as a matter of routine, but only as exceptions and that too when there was specific information or reason to believe that the tax liability was not correctly being discharged. The CBEC, from time to time, has come out with instructions regarding visits by departmental officers, scrutiny of tax returns and other related matters that serve to underline and strengthen the voluntary compliance system.

8.2. The action of disclosure itself is ordinarily limited to the details contained in the periodical return filed once in every six months and the onus to determine facts and issues relevant to the correct ascertainment and discharge of service tax levy remains with the provider of taxable services (except in a few select cases covered by Rule 2 of the Service Tax Rules, 2004). If such facts on the basis of which an independent and proper evaluation can be made is kept away from the department due to an act of omission or commission by the party responsible to pay the tax, then it would constitute a

situation where the first proviso to section 73 of the Finance Act, 1994, can reasonably be invoked.

8.3. The first proviso to section 73 of the Finance Act 1994, states *'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 subsection shall have effect, as if, for the words "one year", the words "five years" had been substituted.'*

* After 28.05.2012, the underlined portion above reads as, *"eighteen months"*

** And After 14.05.2016, the same underlined portion reads as, *"thirty months".*

8.4. Fraud as the Merriam- Webster dictionary explained it to be, is an act of misrepresenting. Punctuation forms part of the statute and, even if the reader has to be wary of older Acts, in which punctuation was inserted after enactment by the printer, the punctuation of modern statutes must be given the significance it has to the ordinary user of the English language.

8.5. Thus very clearly, in the Finance Act 1994, the use of the word 'or' after each of the expressions fraud, collusion, wilful mis-statement, suppression of facts, and contravention of any of the provisions implies that the presence of any one of the elements along with the intention to suppress is enough to invoke and sustain the invocation of the proviso above. It appeared that a suppression of facts can happen even in the absence of a fraudulent intention or a wilful mis-statement, but where suppression has happened and out of a conscious decision extended period is to be invoked.

8.6. The assessee had an obligation to comply with the statutory provisions and to furnish the information as required there under.

i) Section 68(1) of the Act, as it stood during the relevant period, provides that every person providing taxable service to any person shall pay service tax at the rate specified in section 66 B in such a manner and within such period as may be prescribed.

ii) Section 66 B provides for the levy of the tax 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. It also specifies the rate of tax to be applied as well as.

iii) Section 66C provides for the Determination of place of provision of service

iv) Sections 66 D and 66E contain a declaration of the 'Negative list of services' and list the 'declared Services" respectively.

v) Section 66F lays down the Principles of interpretation of specified descriptions of services or bundled services

vi) Section 67 provides for the manner of how the taxable services are to be valued.

vii) Section 6 7 A provides for the date of determination of rate of tax, value of taxable service and rate of exchange.

viii)Section 69 mandates that every person liable to pay the service tax shall apply to the proper officer for registration.

ix) Section 70 directs that every personal liable to pay service tax shall himself assess the tax due on the services provided by him and shall furnish the periodical returns as prescribed.

8.7. Thus, the afore mentioned statutory provisions of service tax cast an obligation upon the assessee to get registered by furnishing the appropriate details; to pay the correct amount of service tax; and to file periodical returns.

8.8. So far as 'suppression of facts' is concerned, the phrase implies that withholding of information is suppression of facts; P. Ramanatha Aiyar's Concise Law Dictionary (1997 Edition Reprint 2003- page 822) explains it to mean the situation where [if] *there is an obligation to speak,* [failure to do so] *will constitute the "suppression of fact"* and distinguishes this situation from where *there* is *no obligation to speak, silence cannot be termed "suppression".*

8.9. All these facts narrated above show that the assessee suppressed the facts, by non-compliance with the obligations cast upon them by the statutory provisions. The suppression of the facts clearly gave one conclusion that the assessee had intention to evade the tax, and nothing else. It is imperative to mention here that intent is a state of mind which can only be inferred from the actions or their lack thereof.

8.10. Intention to evade payment of tax need not require it to be proved with mathematical precision. In deciding whether the provision is directory or mandatory, one has to ascertain whether the power is

coupled with a duty of the person to whom it is given to exercise it. If so, then it is imperative. Generally the intention of the legislature is expressed by mandatory and directory verbs such as 'may', 'shall' and 'must'. The words 'may', 'shall' and 'must' should initially be deemed to have been used in their natural and ordinary sense. 'Shall'- in the normal sense imports command. It is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory. It depends upon the context in which the word 'shall' occurs and the other circumstances. Unless an interpretation leads to some absurd or inconvenient consequences or contradicts with the intent of the legislature the court shall interpret the word 'shall' in mandatory sense. Must- is doubtlessly a word of command. It is observed that in the context of sections 68, 69, 70 of the Finance Act 1994, through the use of the word 'shall' make it mandatory for every person liable to pay service tax to engage in action that is laid down in these sections. It is one of the rules of construction that a provision is not mandatory unless non-compliance with it is made penal. Mandatory provisions should be fulfilled and obeyed exactly, whereas in case of provisions of directory enactments substantial compliance is satisfiable.

8.11. And whereas GTPL are/were having a very good team of employees well conversant with tax matters as well as very skilled/learned/educated tax consultants having knowledge of the various provisions of service tax and as such they were aware of such provisions relating to service tax. However, they deliberately adopted the modus of suppression as discussed in this show cause cum demand notice to evade payment of service tax.

8.12. In this case, the period to reckon for demand of service tax was from October-2014 to June- 2017. In the ST-3 returns filed by M/s. GTPL, they had knowingly failed to disclose the details of taxable services received by them from the service providers located in non-taxable territory to the department. Instead, they had chosen to suppress the true details regarding their service tax liability in the ST-3 returns filed by them with malafide intent to evade payment of service tax. Had the department not noticed the facts of suppression of the value of services received from various vendors located in non-taxable territory, the service tax so evaded would have remained undetected.

8.13. It was seen from the facts that emerged during the investigation of the instant case that M/s. GTPL had not filed the correct service tax returns and in fact they had indulged in wilful suppression in respect of the services received by them on which reverse charge mechanism was applicable. Thus, M/s. GTPL had suppressed material facts from

the department by not filing correct ST-3 returns. This appeared to be done intentionally so as to evade the payment of service tax under reverse charge mechanism. Non-disclosing of services received from foreign vendors shows clear intent to evade payment of service tax under reverse charge mechanism by an act of suppression and omission by M/s. GTPL though they were well aware of the unambiguous provisions of the erstwhile Finance Act, 1994 and Rules made there under. Had the investigation proceedings not been conducted by DGGI, Ahmedabad Zonal Unit, these facts would have gone undetected.

8.14. In view of the specific omissions as elaborated above, it was apparent, that M/s. GTPL had deliberately suppressed the facts as discussed in para supra which amounts to wilful suppression of facts and mis-statement with the deliberate intent to evade payment of service tax. Therefore, the extended period of limitation as envisaged under proviso to **Section 73(1)** of the erstwhile Finance Act, 1994 read with Section 174 of the CGST Act, 2017 appeared to be invocable for demanding service tax evaded during the period from October-2014 to June-2017 and M/s. GTPL appeared to have rendered themselves liable to penalty under Section 76 and/ or 78 of the Finance Act, 1994.

8.15. In this regard, it might not be out of place, to highlight the observations of the Hon'ble Apex Court in the case of Rajasthan Spinning and Weaving Mills/ High Court of Gujarat at Ahmedabad in Tax Appeal No. 338 of 2009 in the case of Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd. dated 22.04.2010 regarding applicability of the extended period in different situations.

8.16. Therefore, it appeared that M/s. GTPL had wilfully suppressed the value of taxable services received from various service providers located in non-taxable territory upon which they were required to pay service tax under reverse charge mechanism with the sole intent to evade payment of service tax and therefore the extended period of limitation of five years as envisaged under proviso to sub-section (1) of Section 73 of the erstwhile Finance Act, 1994 (as it existed up to 30.06.2017) read with Section 174 of Central Goods And Service Tax Act, 2017, for the demand and recovery of service tax (including Cess) applicable in the instant case. Consequently, M/s. GTPL, were also liable to pay interest as per Section 75 of the Finance Act, 1994 for delayed payment of aforesaid amount of service tax and were also liable to penalty under section 76 and/ or 78 of the Finance Act, 1994.

9. Contraventions

9.1. In view of the above it appeared that M/s. GTPL had knowingly failed to pay the service tax on the taxable services received by them from the service providers located in nontaxable territory in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012. Thus, it appeared that M/s. GTPL had knowingly contravened the provisions of

i. Section 68(2) of the Finance Act, 1994 read with Rule 2(l)(d)(i)(G) and provisions of Notification No.30/2012-ST dated 20.06.2012; in as much as they had failed to pay service tax on the value of the taxable services received by them from the service providers located in non-taxable territory;

ii. Rule 6(1) of the Service Tax Rules, 1994 also read with Rule 7 of the Point of Taxation Rules, 2011 for having not paid the service tax under RCM on due date;

iii. Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they had failed to submit the true and correct periodical returns as the said periodical returns did not disclose information regarding the tax liability under RCM in case of taxable services received by them from service providers located in non-taxable territory.

9.2. Further, all the above acts of omission committed by M/s. GTPL, coupled with the contravention of the Act/Rules made thereunder, constituted an offence of the nature as described under the provisions of section 76 and/ or section 78 of the Finance Act, 1994 and Section 77 of the Finance Act, 1994. Therefore, M/s. GTPL appeared to have rendered themselves liable to penalty under the provisions of Section 76 and/ or Section 78 of the Finance Act, 1994 for failure to pay service tax under RCM in case of taxable services received by them from service providers located in non-taxable territory, with clear intent to evade payment of service tax leviable thereon. They also appeared to have rendered themselves liable to penalty under the provisions of section 77(2) of the Finance Act, 1994, in as much as they had failed to file the correct returns showing correct service tax liability in case of their liability under RCM for taxable services received by them from service providers located in non-taxable territory.

9.3. M/s. GTPL also appeared to be liable to pay interest as per Section 75 of the Finance Act, 1994 for such non/delayed payment of service tax of **Rs.6,75,32,556/-**.

9.4. Shri Jayanta Kumar Pani, the then Chief Financial Officer of M/s. GTPL, was the person responsible for taxation issues of the company, during which the aforesaid acts of nonpayment of service tax on the services covered under reverse charge were committed by M/s. GTPL and as such, he had a decisive role to play in the present evasion. It is evident that M/s. GTPL had received services in relation to License Fees & AMC from foreign vendors during GST regime as well as service tax regime and that the nature of services received during GST period and service tax regime was the same, yet, M/s. GTPL had not discharged service tax liability on this service. M/s. GTPL has been paying IGST on such services under GST law since 01.07.2017. The very fact that the details of the services received from foreign vendors during the period October-2014 to June-2017 were not shown in ST-3 returns gave strong indication that M/s. GTPL wanted to evade the payment of service tax. Thus, Shri Jayanta Kumar Pani, the then Chief Financial Officer of M/s. GTPL, appeared to have rendered himself liable to penalty under **Section 78A** of the Finance Act, 1994, for the infractions committed by his company.

10. Therefore, **M/s. GTPL Hathway Ltd,** (M/s. GTPL). having registered office at C-202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmedabad - 380004 were issued notice and called upon to show cause to the Principal Commissioner/Commissioner, CGST, Central Excise & Service Tax, Ahmedabad North Commissionerate, having his office at 1st Floor, Custom House, Navrangpura, Near All India Radio, Ashram Road, Ahmedabad-380009, Gujarat, as to why: -

i. Services received by them from M/s. Nagravision SA, Switzerland in respect of which they had paid **Rs.45,61,10,538/-** as license fees, should not be classified as declared services as stipulated under Section 66E(c) of the Finance Act, 1994.

ii. Service Tax amount of **Rs.6,75,32,556/- (Rupees Six Crores Seventy Five Lakhs Thirty Two Thousand Five Hundred and Fifty Six Only),** as detailed in Annexure-A and Annexure-B to this SCN, not paid on taxable services received by them, under the reverse charge mechanism, during the period from October-2014 to June-2017, from the service providers located in non-taxable territory, should not be recovered under proviso to Section 73(1) of the Finance Act,1994 read with Section 68 of the Act ibid.

iii. Interest, at applicable rate, should not be recovered from them under Section 75 the Finance Act, 1994 for non-payment of service tax as mentioned at (ii) above;

iv. Penalty should not be imposed upon them under the

provisions of Section 76 and/ or 78 of the Finance Act, 1994 for willful mis-statement, suppressing the facts and contravention of statutory provisions with an intent to evade payment of service tax mentioned at (ii) above.

v. Penalty should not be imposed upon them for contravention of provisions of the Finance Act, 1994 under Section 77 (2) of the Finance Act, 1994.

11. Shri Jayanta Kumar Pani, the then Chief Financial Officer of GTPL, C-202, 2d Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmedabad - 380004 was issued notice and called upon to show cause to the Principal Commissioner /Commissioner, CGST, Central Excise & Service Tax, Ahmedabad North Commissionerate, having his office at 1st Floor, Custom House, Navrangpura, Near All India Radio, Ashram Road, Ahmedabad-380009, Gujarat, as to why penalty should not be imposed on him under the provisions of Section 78A of the Finance Act, 1994.

12. Personal hearing

1st PH fixed on 24.01.2023

The noticee vide their letter dated 25.01.2023 received on 03.02.2023 had sought adjournment citing reason that in the similar matter their appeal is pending before the Hon'ble CESTAT, Mumbai.

2nd PH fixed on 13.02.2023

The noticee vide their letter dated 13.02.2023 sought adjournment showing reason that their authorised representative was out of station due to pre scheduled programme and requested for next date for hearing.

3rd PH fixed on 11.10.2023

Mr. Rahul Patel, CA, authorized representative, appeared for hearing on behalf of the Noticee. The gist of verbal submissions made by him during hearing is as under:-

1. He submitted that the present show cause notice is to be treated as a protective show cause notice to the proceeding initiated by the office of Directorate of Revenue Intelligence, Mumbai vide SCN No. DRI/MZU/CI/INT-19/2016 and dated 29.05.2018 / Order-in-Original No. 06/SA(06)ADG(ADJ.)/DRI/MUMBAI/2019-20 and dated 16.05.2019.
2. It is further submitted that the payments on which tax is proposed in the present show cause notice was consideration towards access towards activation keys using the Conditional Access System – software provided by foreign companies mainly the Nagravisions SA and thus the same be classified as Online Database Access and Retrieval Services referred to in rule 9 of Place of Provision of Services Rules and accordingly the place of

provision of such activities shall be the location of the foreign company and accordingly the service tax is not payable in respect of the said transactions.

3. It was further submitted that the issue involved in the case is completely revenue neutral as the tax if paid by the assessee would have been taken as CENVAT Credits and usable against the demand of tax and therefore no further demand to be raised.
4. It was further submitted that the notice is barred by limitation provided in section 73 of the Act.
5. It was further submitted that the interest and penalty must not be imposed looking to the facts of the case.
6. It was also requested to grant additional time of 10 days to make detailed written submission.

Defense Submission

13. The said Noticee (M/s. GTPL) vide their letter dated 18.10.2023 received on 19.10.2023 submitted their written submission, wherein they interalia have stated that:

Based on various submissions and explanations set forth hereinafter with respect to different grounds, the Noticee pressed that the demand of Service Tax proposed in the Notice is not tenable and contrary to the provisions of the Act. Furthermore, the Noticee contended and submitted that the proposals to demand interest and impose penalty are also illegal and contrary to the provisions of the Act as under:-

1. Reg : Amount of Rs. 45,61,10,538 paid to Vendors did not attract Service Tax u/s 66B of the Act.

a. Service Tax for the period involved in the Notice was levied by way of section 66B of the Act. Provisions of section 66B of the Act read as under:-

"SECTION 66B. Charge of service tax on and after Finance Act, 2012.—

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen percent. 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."

b. Section 66B levied a tax on the value of all services provided or agreed to be provided in the taxable territory. Taxable territory was defined in section 65B(52) as *"the territory to which the provisions of this Chapter apply"*. Provisions of the Chapter-V of the Act were made applicable by way of section 64 to whole of India except the State of Jammu and Kashmir.

c. Section 66C of the Act empowered the Central Government to prescribe the rules to determine *"the place where such services are provided or*

deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided."

d. Provisions of section 66C were in the nature of enabling machinery required to deem certain parameters for the purpose of taxation. However, the facts and circumstances of absolute nature requiring aid of no fiction or deeming machinery to determine its place must be dealt with by its absolute, apparent and obvious *situs* and no resort was required to be made to the provisions of section 66C and rules made thereunder. It is pertinent to emphasis that the charging provisions contained in section 66B borne no reference to the provisions of section 66C and did not require mandatory reference in order to determine the place at which services were provided or agreed to be provided. Hence the only interpretation which can be made to bring harmony amongst the provisions of the Act, would necessitate application of the provisions of section 66C of the Act only in case of ambiguity as regards *situs* or where the fiction was created to supersede the *situs* obvious and unequivocal.

e. In the case on hand and as it transpires from the facts narrated in the Notice, following important factors can be noted :

a. Vendors were located outside India and performed from the locations situated outside India;

b. No evidence brought on record to indicate partial or complete performance in India;

c. Services, if any, were in the nature of an access to the software application owned, possessed and maintained by the Vendors at their locations

d. No evidence brought on record to indicate transfer of software application to the location of the Noticee or any other location in India

e. No specific fiction created by the provisions of section 66C or rules made thereunder has been referred to in the Notice to supersede the situs i.e. location of the Vendors

f. In light of the important facts narrated above, it is necessary to hold that the *situs* of the performance of activities by the Vendors was absolute, unambiguous, unequivocal, perceivable and discernible without aid of the provisions of section 66C of the Act and rules made thereunder. As the said place is outside the Taxable Territory, the provisions of section 66B of the Act were not attracted and as *a fortiori* the levy of tax was not made.

g. Therefore, the demand proposed in the Notice of Rs. 6,75,32,556 did not survive the provisions of the Act.

2. Reg : Activities having Place of Provision outside India as per Rule 9

a. Without prejudice to foregoing submission, it is to further submit that the Place of Provision, if required to be determined as per Place of Provision of Services Rules, 2012 (*hereinafter referred to as "Rules"*) prescribed under section 66C of the Act, the same shall be determined as per rule 9 instead of rule 3.

b. Rule 9 *ibid* dealt with determination of place of provision with respect to specified services. Text of the rule 9 as it prevailed prior to amendment made w.e.f. 09.11.2016, is reproduced hereinafter for sake of quick reference :

*"9. Place of provision of specified services. - The **place of provision of following services shall be the location of the service provider** :-*

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) Online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of means of transport, upto a period of one month."

c. In case of Online Information and Database Access or Retrieval Services (*hereinafter referred to as "OIDAR Services"*), place of provision was the location of the service provider, as per above stated rule 9.

d. OIDAR Services were defined in rule 2(l) *ibid* as *"providing of data or information, retrievable or otherwise, to any person, in electronic form through a computer network."*

e. Furthermore, the definition of OIDAR Services was given in rule 2(ccd) of Service Tax Rules, 1994, w.e.f. 09.11.2016, as under :

"online information and database access or retrieval services" means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology and includes electronic services such as,-

(i) advertising on the internet;

(ii) providing cloud services;

(iii) provision of e-books, movie, music, software and other intangibles via telecommunication networks or internet;

(iv) providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;

(v) online supplies of digital content (movies, television shows, music, etc.);

(vi) digital data storage; and

(vii) online gaming;";

f. From both the definitions of OIDAR Services, it commonly emanates that any act of providing data or information over or through electronic network or system shall be treated as OIDAR Services. In the case on hand, it is unequivocal to state that the delivery was performed over and only over the electronic network. Essence of the contract with the Vendors was to gain an access to the software application for the purpose of downloading of electronic key which is required to activate the STB. Key is a set of data generated mathematically through an algorithm and resulting into specific information for use by the electronic system and therefore it clearly falls

within the scope of data and information. Moreover, the service by way of provision of such key, which is the essence of the contract, can only be possible through the electronic network connected through internet.

g. From the findings of para 2,8, & 19 of the SCN by the DGGI Officers and the facts presented by the Noticee hereinbefore, following important aspects can be noted :

   a. Essence of the arrangement with the Vendors was to receive the activation key
   b. Activation key is classifiable as data and information both;
   c. Activation key is received from the software application owned, possessed and maintained by the Vendors;
   d. Activation key is delivered through and over the electronic network connected through internet
   e. Software application was provided in the Servers of the Vendors located outside India

h. Accordingly, the very activity undertaken by the Vendors was required to be classified as OIDAR Services falling within the scope of Rule 9 and accordingly the place of provision of such activities was at the location of the Vendors i.e. outside India.

i. It is pertinent to state that none of the facts and inferences made hereinbefore were disputed or controverted in the Notice by the DGGI and hence it is essential that the place of provision be determined in light of the foregoing.

j. Having the place of provision situated outside India, the activities were not to be subjected to the levy of Service Tax under section 66B of the Act and accordingly demand made in the Notice for the period concerned, shall be required to be assailed.

k. From above, Service Tax for the period involved in the Notice was levied by way of section 66.

3. Reg. : Activities undertaken by the Vendors not classifiable under section 66E(c) of the Act

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a. Core of the allegation raised by the DGGI in the Notice in order to demand Service Tax on the activities undertaken by the Vendors is that the said activities were classifiable under Section 66E(c) of the Act. Para 6.1. & 6.2 of Show cause notice was relied for demand of Service tax on license fees classified as declared services as stipulated under Section 66E(c) of the Finance Act, 1994.

b. Section 66E(c) of the Act read as under :

*"**SECTION [66E. Declared services.** — The following shall constitute declared services, namely :—*

...

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;"

c. Clause (c) of Section 66E of the Act deems the activity of temporary transfer or permitting the use or enjoyment of any intellectual property right. Intellectual Property Right had not been defined in the Act but the scope of which was explained in Para 6.3 of Education Guide as the right which included – 'copyright', 'patent', 'trademark', 'design', 'any other similar right to an intangible property'.

d. In the arrangements made by the Noticee with the Vendors, it was the access to the software application for the purpose of downloading of activation key through electronic network / internet, for which the payments were made. However, the said arrangements did not involve transfer of any of the intellectual property right. Activation key, which is a set of mathematically generated data represented as an information for use by the electronic device, can by no stretch of imagination, be classified as intellectual property right and therefore question of applying the clause (c) of Section 66E does not arise.

e. It is needless to emphasise that the show cause notice is a foundation of the litigation and a result of the thought process executed by the revenue to demand the duty from the assessee which is getting reflected in form of an allegation. It is therefore *sine qua non* to frame exact allegation as per the statutory provisions to require the other side to show causes. In case the show cause notice fails to raise exact allegation the demand automatically fails.

f. As it appears from above discussion the Notice had proposed to demand the Service Tax by classifying the activities under clause (c) of section 66E of the Act which is patently and manifestly incorrect and wrong, question of demand of Service Tax does not arise.

4. Reg : Facts involved in the Notice were completely Revenue Neutral

a. Without prejudice to foregoing submissions and without admitting the liability of Service Tax, it is further submitted that the demand proposed in the Notice violates the doctrine of revenue neutrality and therefore the same is required to be dropped *in limine*.

b. As set out in the brief facts the source of revenue of the Noticee is subscription and activation charges for which the STBs are used. Noticee had been paying full amount of service tax at the full rate and on entire amount, without availing benefit of exemption or abatement in value of taxable services. Consequently, the Noticee was entitled to full amount of CENVAT Credits available to it with respect to various inputs and input services.

c. Payments made to the Vendors were in relation to the STBs which were essential to provision of Cable Television services for which the consideration was being received in form of either subscription charges or activation

charges. Hence, the Service Tax if any paid on the said payments would have been available to the Noticee as credits under CENVAT Credit Rules, 2004. Moreover, the Noticee was able to utilized the entire amount of such credit if availed upon payment of such tax. For abundant clarity, following summary of taxation is presented as evident from the copies of Form ST-3 concerning to the period involved.

PARTICULARS	AMOUNT RS.
Total Service Tax Payable for the period October, 2014 to June, 2017 as per ST-3	2,42,53,93,203
Less : Total CENVAT Credit utilized	1,83,54,74,088
Net Tax Payable	58,99,19,115
Total Tax Paid in Cash	58,99,19,115

d. From the above table, it is apparent that the total tax paid in Cash by the Noticee for the period involved was significantly higher than the amount of CENVAT Credit otherwise available to the Noticee in form of Service Tax paid under reverse charge. Hence, it had caused no loss or detriment to the interest of exchequer and thus the situation is completely revenue neutral.

e. In case the demand is confirmed against the Noticee, it would not only cause tremendous financial hardship to the Noticee but would also entail into double benefit to the exchequer. Therefore, it is necessary that the demand proposed in the Notice be dropped by paying due respect to the doctrine of revenue neutrality.

f. In fortification of the submission made hereinbefore, reliance is placed on following decisions :

   a. **CCE v. Coca-Cola India Pvt Ltd – 2007 (213) ELT 490 (SC)** wherein Apex Court has allowed pleading of revenue neutrality where the credit was available of the dues arising from change in classification.

   b. **Choice Laboratories Ltd v. Union of India – 2016 (341) ELT 604 (Guj)** wherein applicability of revenue neutrality was very much accepted by the High Court.

   c. Larger Bench in case of **Jay Yuhshin Ltd v. CCE – 2000 (119) ELT 718** has accepted applicability of the doctrine of revenue neutrality where relation of the credit availability to himself has been proved.

   d. **Sanvijay Rolling & Engineering Ltd v. CCE – 2018 (11) GSTL 344 (Bom), CCE v. Tarapur Grease India Pvt Ltd – 2016 (334) ELT 416 (Bom), Mahindra & Mahindra Ltd v. CCE – 2019 (368) ELT 105 (Tr-Mum) affirmed by Supreme Court – 2019 (368) ELT A41**, wherein revenue neutrality was very much accepted and applied in case of demand on account of clearances to sister concerns.

e. **Sarovar Hotels Pvt Ltd v. CST – 2018 (10) GSTL 72 (Tri-Mum), K-Air Specialty Gases Pvt Ltd v. CCE – 2017 (4) GSTL 379 (Tri-Mum), Bharat Oman Refineries Ltd v. CCE – 2017 (4) GSTL 221 (Tri-Del)** wherein it has been consistently held that demand arising on account of import of services where CENVAT Credit is otherwise available cannot be sustained on ground of revenue neutrality.

5. Reg : Appropriation of the demand against the Service Tax paid by the Noticee

a. Without prejudice to foregoing, it is further submitted in extension of the concept of revenue neutrality that the demand proposed in the Notice is on account of reverse charge in hands of the Noticee. It may be appreciated that the case involved in the Notice is not that of the revenue neutrality on account of tax required to be paid by the service provider or any other person but it being demanded from the Noticee itself.

b. As discussed and explained hereinabove, if the tax would have been paid by the Noticee the same was duly available as CENVAT Credit and which would certainly been utilized against payment of service tax on output services.

c. Hence, in any case the total amount of tax to be paid in Cash by the Noticee for the period involved would remain same. For sake of better appreciation following illustration is advanced :

Sl No	Particulars	If RCM Paid	If RCM Not Paid
1	Value of Output Taxable Services provided by Noticee	Rs. 1000	Rs. 1000
2	Tax on Output Services	Rs. 150	Rs. 150
3	CENVAT Credit other than tax payable under RCM to Vendors	Rs. 50	Rs. 50
4	Net Output Tax Payable in Cash	Rs. 100	Rs. 100
5	Tax paid in Cash under RCM on payments to Vendors	Rs. 20	Rs. 0
6	Additional CENVAT Credit	Rs. 20	Rs. 0
7	Net Output Tax Payable in Cash	Rs. 80	Rs. 100
8	Total Payment in Cash	Rs. 100	Rs. 100
10	Total Collection in Cash by Government from Noticee	Rs. 100	Rs. 100

d. From above it transpires that the situation is completely revenue neutral. However, an important legal question which crops up for careful evaluation and consideration is whether the Notice is capable to demand the further tax under section 73 of the Act.

e. It is needless to submit that the demand of tax on output tax as well as demand of tax under reverse charge mechanism, both are governed by the same provisions of section 73 of the Act. Hence, when it comes to the demand of tax under the provisions of section 73, it does not maintain a distinction as to whether the demand is of output tax or tax under reverse charge. Therefore, it becomes *sine qua non* for the Central Excise Officer to ensure that the demand being made under section 73 must not result into demand of the tax already collected by the exchequer or the demand must not result into effective collection of an amount more than the amount authorised by the provisions of section 66B of the Act.

f. In a former situation, very provisions of section 73 would become inapplicable as the tax already paid cannot be construed as short payment / non-payment of tax. Whereas in case of later, demand would violate the very mandate of Article 265 of the Constitution of India.

g. Therefore, it is to be appreciated that the demand which has been proposed by the DGGI in the Notice is not tenable as the same had already reached to the account of exchequer and hence the very proceeding initiated by the said Notice stands void and redundant.

6. Reg : DGGI Officers were not empowered to issue the Notice

a. Without prejudice to foregoing, it is to further submit that the Notice is improper and illegal in terms of the provisions of the Act. Notice is served upon the Noticee pursuant to an investigation by the DGGI which did not have any jurisdiction to conduct and conclude the inquiry in relation to Service Tax pursuant to omission of Chapter V to the Finance Act, 1994 by virtue of Section 173 of the Central Goods and Services Tax Act, 2017. It may please be appreciated that pursuant to omission of Chapter V, the office of DGGI did not have any authority or powers to investigate and conclude the inquiry against the Noticee and therefore basis of the impugned Notice was illegal and improper. Hence, no demand shall be raised against the Noticee based on the illegal and improper Notice for want of jurisdiction.

7. Reg : Notice was issued in violation of the period of limitation prescribed in Section 73

a. Without prejudice to foregoing submissions, the Noticee would further submit that the Notice has proposed to invoke extended period of five years in terms of proviso to section 73(1) of the Act which is contrary to the law.

b. The larger period of limitation is invoked for issuance of the Notice and which is based on the allegation of suppression of facts with deliberate intent to evade payment of service tax.

c. Before the submission is advanced in legal as well as factual matrix and in specific context of the allegations framed in the Notice, it is most pertinent to submit at the outset that act of invoking larger period in the Notice is

purely mechanical, arbitrary and non-speaking. The Noticee has completely failed to understand and comprehend as to the true and plausible reasoning for alleging suppression on part of the Noticee and whether the act of invoking larger period is thoughtful and well deliberated or a sheer outcome of anxious effort to bring the demand within the fold of a valid notice. It is very well settled principle of law that invocation of larger period should not be a matter of ordinary course and shall be supported by contemporaneous facts and evidences. Mere mentioning of facts and circumstances or blur allegations are not sufficient to expect the assessee to show causes as regards allegations grave in nature. All the contraventions stated in proviso to section 73(1) of the Act are grave and serious and be resorted only when the facts and evidences suggest positive defiance of law by the assessee rather than mere inaction or non-payment of tax. In the case, if the findings of the Notice are carefully perused, it reveals that the revenue had not applied its mind before levelling allegations and the Noticee cannot be said to have put on notice as to the exact reasoning of suppression if any committed by the Noticee. It clearly emanates from the Notice that the act of invoking larger period is an anxious effort made by revenue to save the notice from being hit by normal limitation and without attributing cohesive as well as plausible reasons as regards suppression if any committed by the Noticee.

d. It is a settled position of law that onus of proof to invoke larger period lies on revenue and it is the revenue who shall bring all corroborative evidences / facts in the show cause notice. Rather than being submissive in nature, revenue should analyse facts, intentions, reasoning and possibility of deliberate efforts behind non-payment / short payment of tax / duty. Mere mentioning of facts and observing to a fact of non-payment does not automatically enable revenue to invoke larger period. For better understanding of position of law and applicability thereof to present facts, attention is invited to provisions of section 73(1) proviso.

e. Proviso to section 73(1) which enables revenue to issue show cause notice within a period of five years instead of one year, presupposes existence of one of the five specified states of affairs indulged into by the Noticee. It is the revenue who should gather sufficient evidences as to indicate which one of the five reasons, the Noticee has been indulged into, before invoking larger period. If careful perusal is made, it would be found that list of specified reasons starts with word 'fraud', 'collusion' and 'willful mis-statement'. Using of words 'fraud' etc in the list shows degree of intensity legislature intended to exist before substituting period of one year with a larger period of five years. It is not the mechanical provision enabling revenue to depend upon under every circumstance where demand involves for a period more than one year. Words 'fraud' etc are of highest amplitude and involves deliberate and *mala fide* intentions on part of the Noticee with an object to deceive the tax authorities by acting in sheer

defiance of law to make unlawful and illegal monetary advantage. Therefore before taking recourse to proviso, it is expected from revenue that proper and adequate findings are brought on records having direct and proximate relation to stated practices of tax evasion by the Noticee. Merely because demand involved stands barred by normal period of one year, revenue tend to invoke larger period in anxiety of initiating actions will defeat the very purpose of drawing a legislative line of demarcation between situation where demands should be made within one year and those to be made within larger period. The way revenue has proposed to invoke larger period in present case, if accepted, every demand beyond one year would be attempted to be protected by revenue under proviso without differentiating between the Noticee having a strong case in its favour and the one involving wilful default. Therefore, the Noticee craves liberty to submit that the revenue has not sufficiently and adequately established suppression on part of the Noticee and it has failed in shifting the onus unto the Noticee. In such circumstances, the Noticee is not to be attributed of grave charges involving suppression.

f. Views expressed in foregoing paras get support from a landmark decision of Hon'ble Supreme Court in case of PUSHPAM PHARMACEUTICALS COMPANY V. CCE, BOMBAY 1995 (78) ELT 401 (SC), CCE v. CHEMPHAR DRUGST & LINIMENTS – 1989 (40) ELT 276 (SC), PADMINI PRODUCTS v. CCE – 1989 (43) ELT 195 (SC), CONTINENTAL FOUNDATION JT. VENTURE V. CCE 2007 (216) ELT 177 (SC)

Hon'ble Supreme Court has clearly distinguished intricacy of word 'suppression' being casually used by department. It has held that word 'suppression' when accompanied by very strong words as 'fraud', 'collusion' has to be construed with same intensity and in strict manner. Moreover it is laid down that burden to prove suppression with an intent to evade payment of duty is cast upon the department.

g. In light of foregoing, it can be submitted without any hesitation that the onus had not been discharged by the DGGI while issuing the Notice and merely alleging suppression on part of the Noticee is not in conformity with the requirements of section 73 as explained by the Apex Court.

h. It is to further submit without prejudice to above that the allegation is not only legally misperceived but fails to survive on factual matrix also. It is alleged that the information was not provided to the department by way of filing of correct ST-3. However, all the periodical returns filed in Form ST-3 were subjected to audit under EA-2000 and at no point in time the issue was ever raised by the Audit Party. It is needless to submit that the issue involved in the Notice was involving huge amount and of a noticeable size and which must have caught the attention of the Audit Party even though the audit would have been carried out on sample basis. However, the Audit Party had not pointed out the issue in past. Copy of the Final Audit Report submitted.

i. Furthermore, it is to submit that the information as regards non-payment of Service Tax on the payments made to the Vendors was very well within the knowledge of the department when the inquiry was made by the DRI Officer and the Customs Notice was issued. Moreover, the fact was well addressed and deliberated during the course of adjudication before passing of the Customs Order. Therefore, it is completely incorrect and misleading while alleging in the Notice by DGGI that the fact was not known to the department before and it was suppressed by the Noticee.

j. It is also discernible from the facts, more particularly the Customs Notice and Customs Order, that the present Notice was issued in a protective manner so as to safeguard the interest of revenue if the department does not succeed the appeal preferred by the Noticee before Tribunal against the Customs Order. Intention of the revenue is clearly forthcoming from the proceeding as well as the facts that the Noticee shall be held liable to pay either Customs Duty or Service Tax.

k. However, in order to save the responsibilities, the Notice has been issued by DGGI without making references to the Customs Notice. Therefore, the Noticee requested to call upon the records of the DGGI to see as to how and from where the intelligence was gathered by the DGGI before initiation of the enquiry.

l. It therefore appears without any iota of doubt that the present Notice is issued protectively but with invocation of extended limitation so as to save the demand from the bar of limitation.

m. Therefore, it is necessary to hold that the larger period of limitation is not available to the DGGI and the demand involved in the Notice for the period falling outside the normal period of limitation is to be held illegal and contrary to the provision of the Act.

n. Without prejudice to foregoing, it is to further submit that another core allegation leveled in the Notice in conjunction with the suppression, is deliberate intent to evade payment of tax.

o. From the facts and submissions with respect to revenue neutrality, it is made abundantly clear that there was no loss or detriment to the interest of the exchequer nor the Noticee had gained anything out of non-payment of tax under reverse charge. Hence, the Noticee cannot be presumed to have carried deliberate intent to evade payment of tax.

p. Hence, the act of invoking larger period of limitation by DGGI fails to survive all the tests of section 73 of the Act.

q. the demand of interest u/s 75 is not enforceable and penalties under section 77 and 78 are also not imposable as the very demand of Service Tax fails to survive in view of foregoing grounds, submissions and discussions.

DISCUSSION AND FINDINGS:-

14. I have carefully gone through the facts of the case, defense reply made by the noticee, submission made during personal hearing and thereafter and other case records available with me in the matter.

15. First of all, I find the core facts of case from the show cause notice which indicates that M/s. GTPL had imported Set Top Boxes (STBs), wherein elements of CAS software was embedded, from various manufacturers located in China, Hongkong and Taiwan. For activation of the said CAS software embedded in STBs, M/s. GTPL had entered into agreement with M/s. Nagravision SA, Switzerland for supply of activation key and use of the said CAS software on payment of License Fees. M/s Nagravision was the holder of Intellectual Rights for the said CAS Software, therefore, the said activity to the DGGI appeared to be classifiable as "temporary transfer or permitting the use or enjoyment of any intellectual property right" as stipulated under Section 66E(c) of the Finance Act, 1994. Further, apart from the supply of CAS software by Nagra, M/s. GTPL had also received other allied Services (Maintenance, Support and Security) as AMC from Narga as well as other foreign vendors. Since, M/s. Nagravision and other vendors were located in non taxable territory and were not having any establishment in taxable territory in India, M/s. GTPL being a recipient of these services, appeared to be liable to pay service tax under RCM on license fees paid towards use or enjoyment of operative functions of the CAS software embedded into the impugned Set Top Boxes as well as amount paid to foreign vendors towards other allied services such as Maintenance and support service.

16. The crux of the issues which needs to be decided by the undersigned as adjudicating authority, are as under :-

i. Whether the license fees paid to overseas vendor (Nagra) by M/s GTPL towards use of functions of the CAS software embedded in imported Set Top Boxes (STBs) falls under the declared service as ***"temporary transfer or permitting the use or enjoyment of any intellectual property right"*** in terms of provisions of Section 66E(c) of the Finance Act, 1994 and the same are liable to payment of service tax under Reverse Charge Mechanism;

ii. Whether other allied services **(AMC)** such as Maintenance and Support Service received from foreign vendors falls under taxable service in terms of provisions of Section 65(B)(51) of the Finance Act, 1994 and the same are liable to payment of service tax under Reverse Charge Mechanism;

17. I find that the said noticee in the case have made a very detailed defence submission which I find deserves to be termed as "too much fuss on too clear an issue". I find that as per the legal provisions governing the issue, the said

noticee does not have any legal backing to defend their case as they have not disputed either in their written submission or during personal hearing regards the scope of service in respect of transactions made with the foreign vendors in respect of license fees towards getting permission for right to use of CAS software. Despite this, M/s. GTPL have filed their defence reply to the SCN after passage of more than three years from date of receipt of the said notice which ought to have been filed within one month from the date of receipt of the show cause notice and contested merely showing inability to pay service tax on account of revenue neutrality, place of provisions of service, SCN issued authority without jurisdiction etc. which I would herein below discuss in detail one by one, at latter part in the order. It would, therefore, be a better idea to first look at the legal provisions governing the issue.

18. I find that the legal provisions which are pivotal in the present issue are mainly Section 65B, Section 66B, Section 66E, Section 68 of the Finance Act, 1994 and Rule 2(1)(d), Rule 7 of the Service tax Rules, 1994, Section 66C of the Finance Act, 1994 and Rule 3 of the Place of Provision of Service Rules, 2012. The provisions are interlinked and to simplify the issue, the text of above provisions are reproduced separately one by one.

18.1. I find that the present case encompasses the period October-204 to June-2017 and accordingly, the provision of Finance Act, 1994 as in effect from 01.07.2012 would be applicable to the present case.

18.2. I find that after introduction of Negative list concept with effect from 01.07.2012 following mechanism is created in the statute with regard to classification of service vide Section 65B(44) which states 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.*
>
> ***Explanation 1*** *. — For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—*
>
> *(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and*

Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

the duties performed by any person who holds any (B) post in pursuance of the provisions of the Constitution in that capacity; or

the duties performed by any person as a (C) Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

*['**Explanation 2.** - For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include —*

any activity relating to use (i) of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

any activity carried out, (ii) for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out —

by a lottery distributor or (a) selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner;

by a foreman of chit fund for (b) conducting or organising a chit in any manner.;]

***Explanation 3.** — For the purposes of this Chapter,—*

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

***Explanation 4.** — A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;*

18.3. Section 65(B)(5 l) of the Finance Act, defines the term "taxable services' as:

"(51) "taxable service" means any service on which service tax is leviable under section 66(B);"

18.4 Section 66E;-

Declared Services – The following shall constitute declared services, namely:-

(a) to (b) ....

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right

(d) to (i)....

SECTION [66B. Charge of service tax on and after Finance Act, 2012. —There shall be levied a tax (hereinafter referred to as the service tax) at the rate of 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.

On carefully perusing the above provisions, it is evident that any activity carried out by a person for another for a consideration, and includes a declared service is covered under a "service". I observe that with effect from 01.07.2012 the service of *temporary transfer or permitting the use or enjoyment of any intellectual property right* under section 66E(c) of the Finance act, 1994 as discussed supra is included in the table of declared service. Therefore, the activities of foreign vendors (M/s Nagra) appears to be squarely covered in the definition of the declared service and is not covered in the negative list nor is it covered in the exclusion clauses of the above definition of service.

19. Now, Coming to the allegations made in the Show Cause Notice, I find that M/s. GTPL had imported Set Top Boxes (STBs) with pre-fitted Conditional Access Software (CAS software) from various manufacturers located in China, Hongkong and Taiwan and for provisions of activation and use of operative functions of the said CAS software, M/s. GTPL had entered into an agreement with M/s. Nagravisions SA, Switzerland (Nagra) who had granted a non-exclusive, non-transferrable and non-sublicensable license for supply of activation key in order to activate the CAS software pre-fitted in the STBs on payment of license fees, subject to the pre-agreed terms and conditions.

20. It can be discerned from the facts elaborated in SCN that the Conditional Access is a technology that protect the content and rights of digital TV operators. Further, the Conditional access provides the service of controlling the access to digital TV operators to encrypting the channels signal and decrypting it for the viewers who meet the required conditions. Besides the most common use by digital TV operators, conditional access can also be applied to digital radio and data broadcasts, non-broadcast information and interactive services. Software required for the system (STBs) was supplied by the CAS provider, so that the broadcasters can incorporate it in their own equipment. It is evident that only after activation of the CAS software fixed in imported STBs, the clients/subscribers of M/s. GTPL gets conditional access to the channels being broadcasted by respective broadcaster.

21. I find that the statement of Shri, Anil Prakash Mal Bothra, Chief Financial Officer recorded during investigation is very relevant to clarify the position of activity undertaken by the foreign vendors wherein he explained that an Activation Key is a code which is being generated online through CAS

Server of Nagarvision or other CAS provider and mapped with NUID (identification no. of Set Top Box) in order to activate the Set Top Box. He further explained that each activation key has Unique NUID and it can be used once. Further, he had deposed that NAGRA was merely sharing a list of activation keys which were being used to activate the CAS Software pre-fitted in Set Top Boxes.

22. Now, It appears that the license fees had been paid to the foreign vendors (Nagra) by M/s GTPL meant for activation of the CAS software fixed into imported Set Top Boxes so that the clients can get conditional access to the channels being broadcasted by the broadcasters and also enjoy or use of functions of CAS software under pre-agreed terms and conditions. The relevant paras of the agreement dated 19.04.2013 executed between the said Noticee and Nagra towards the license in respect of the provisions provided for operating or use of CAS software reproduced are as below:-

8. Licenses

8.1 Subject to the payment of the license fee provided for in the "Commercial Terms" (Attachment S 6), Nagra hereby grants to GTPL a non-exclusive, non-transferable and non-sublicensable license for the Territory to use the CAS Software from the Acceptance Date and for as long as the Agreement remains in force subject to the provisions of this Agreement for the purpose of operating the CAS in the Territory. Nothing in this Agreement is intended to give GTPL or any third party any right of ownership with respect to the Intellectual Property Rights in the CAS Software.

8.2 GTPL may create 2 archival copies of the Software and otherwise copy or reproduce the Software or any portion thereof only as such copying is incidental to the use and operation of the Software for the purposes authorized above. GTPL shall only have the right to make 2 back-up copies of any Software documentation. No right or license is granted under this Agreement for the use or other utilization of the Software, directly or indirectly, for the benefit of any other person or entity or, except as provided according to this Agreement, in conjunction with any equipment other than the CAS. GTPL is obliged to keep the copies in safe custody and to limit the access to the personnel operating the CAS, to Nagra personnel providing repair and maintenance, and to GTPL's Security Officer. Upon Nagra's request, GTPL shall forward a list containing the names of the people having access to the copies.

8.3 Save to the extent the law imposes Nagra to grant such right to GTPL shall not permit any third party to translate, reverse engineer, decompile, recompile, update or modify the Software without the prior written consent of Nagra. Furthermore, GTPL shall not combine or distribute any of the Software with any software that is licensed under terms that seek to require that any of the Software (or any associated Intellectual Property Rights) be provided in source code form (e.g. as "open source"), licensed to others to allow the creation or distribution of derivative works or distributed without charge.

8.4 The CAS to be installed by Nagra may contain computer software which is owned by third parties and licensed by Nagra or is embedded in third party hardware. GTPL does not acquire ownership of such software by acquiring a license on the CAS, and is granted the right to use said software subject to clause 8.1 only.

8.5 Except as expressly provided in this Agreement, no license under any patents, copyrights, trademarks, trade secrets or any other Intellectual Property Right, express or implied, are granted by Nagra to GTPL under this Agreement. Nagra shall have no obligation under this Agreement to provide any hardware, services or software exceeding those necessary to fulfil this Agreement.

8.6 The Software is being licensed and not sold to GTPL hereunder. GTPL agrees that, as between the Parties and for all purposes under the laws of all countries, Nagra shall be considered

the owner of the Intellectual Property Rights in the CAS, including the Software, and any copies thereof, and of all copyright, trade secret, patent, trademark and other Intellectual Property Right therein. Physical copies of the Software in any medium shall remain the property of Nagra, and such copies shall be deemed to be only licensed to GTPL.

8.7 The above license does not cover the right to use the System with STBs which are not certified by Nagra in accordance with Nagra certification rules imposed to STB manufacturers.

On plain reading the above paras, it is evident that the activity (agreement/license for use or enjoyment of functions of CAS software) carried out by Nagra for M/s. GTPL for a consideration was, intact, allowing M/s. GTPL to use Nagra's CAS Software which was Nagra's Intellectual Property and Nagra was holding Intellectual Property Right over the said CAS software and nothing was intended to give M/s. GTPL or any third party any right of ownership with respect to the Intellectual Property Rights in the said CAS software. However, the CAS software is licensed to M/s GTPL with right to use the functions of said software for operating the imported Set Top Boxes.

23. Further, It is seen from Clause 8.1 of the agreement dated 19.04.2013 entered between the foreign vendor (Nagra) and the said noticee (M/s. GTPL) that subject to payment of the license fee as provided in the "Commercial Terms" (Attachment S 6), the foreign vendor (Nagra) had granted a non-exclusive, non-transferable and non-sublicensable license to the said noticee (M/s. GTPL) for use of the CAS software from the date of its successful acceptance test and for as long as the agreement remained in force subject to fulfilment of terms and conditions as stipulated in the said agreement. This can be put in a simpler way by saying that the activity carried out by the foreign vendor (Nagra) viz. giving permission for use of their CAS software, to the said noticee subject to payment of License Fees would aptly qualify as temporary transfer or permission to use or enjoyment of functions of such CAS software.

24. It is worth mentioning here that Intellectual Property Rights and ownership of the said CAS software had remained at all times with the foreign vendor (Nagra) and the permission for right to use of the functions of CAS software was accorded to M/s. GTPL, for a pre-defined period and purposes as per the agreement, subject to payment of License Fees. It, therefore, Prima facie, leads to the conclusion that the license fees paid for granting the permission to use of CAS software over which Nagra was having Intellectual Property Rights would squarely qualify as a service activity defined under Section 66E(c) of the Finance Act, 1994 viz. "temporary transfer or permitting the use or enjoyment of any intellectual property right".

25. At this moment, it is pertinent to remember that the activation Key was used in order to activate the CAS software embedded into STBs by the respective

license holder and the use of the license is solely customised to the licensee i.e. the said noticee in this case. The clear & inescapable intention of the seller was that they had kept back the copyright of software and what was transferred to the said noticee was only the right to use with copyright protection and by that agreement even the said noticee entered into an End-User License Agreement for using the software as per condition stipulated therein. It is pertinent to mention here that in common parlance, end user is a person who uses a product or utilizes the service. Considering the above facts, I am of the considered view that the transaction that took place in this case for permission for use of CAS software on temporary basis under pre-agreement terms and conditions would amount to a "declared service" in terms of Provisions of Section 66E(c) of the Finance Act, 1994.

25.1. Further, in support of my above view, I rely upon the decision of Hon'ble High Court of Madras in case of M/s Infotech Software Dealers Association vs. Union of India reported **in 2010 (20) S.T.R. 289 (Mad.)** wherein the incidental question dealt with regards whether a software is goods or in some transactions it could be considered to be a service. The relevant paras of the said judgement are reproduced as under:-

"31. From the above, the dominant intention of the parties would show that the developer or the creator keeps back the copyright of each software, be it canned, packaged or customised, and what is transferred to the network subscriber, namely, the members of the association, is only the right to use with copyright protection. By that agreement, even the developer does not sell the software as such. By that Master End-User License Agreement, the members of petitioner-association again enter into an End-User License Agreement for marketing the software as per the conditions stipulated therein. In common parlance, end user is a person who uses a product or utilises the service. An end user of a computer software is one who does not have any significant contact with the developer/creator/designer of the software. According to Webster's New World Telecom dictionary, an end user is "the ultimate user of a product or service, especially of a computer system, application or network." ***On a careful reading of the above, we are of the considered view that when a transaction takes place between the members of ISODA with its customers, it is not the sale of the software as such, but only the contents of the data stored in the software which would amount to only service.*** *To bring the deemed sale under Article 366(29A)(d) of the Constitution of India, there must be a transfer of right to use any goods and* ***when the goods as such is not transferred, the question of deeming sale of goods does not arise and in that sense, the transaction would be only a service and not a sale."***

It is important and quite relevant to mention here that in view of above, the transfer of a software for end use based exclusively to the customer by the vendors keeping back the copyright protection of the said software would amount to be a service and if the said transfer has taken place on temporary basis then it would obviously amount to be a declared service as per provisions of the Section 66E(c) of the Finance Act, 1994.

26. Further, it also becomes incumbent upon me to record it here that the said noticee (M/s. GTPL) had been *suo moto* paying IGST on transactions made in respect of license fees with its foreign vendors for use of CAS software in the GST regime from July, 2017 onwards considering the said activity as **'service'** and the

said fact has been accepted by Shri, Anil Prakash Mal Bothra, CFO of the noticee company in his statement dated 16.06.2020 recorded during the course of investigation and he had also deposed that the nature of service & the nature of transactions in case of license fees and AMC with the foreign vendors were same for both the service tax regime as well as the GST regime. It is also observed that the provisions governing the levy of IGST on the supply of the CAS software under the IGST Act, 2017 are exactly the same as the existing provisions of Finance Act, 1994. The provisions under Section 5(3) of the IGST Act, 2017 and Section 68(2) of the Finance Act, 1944 are same and both deal with the levy of tax by way of issuing of notification by the Central Government. The relevant text of Notification 30/2012-Service tax dated 20.06.2012 and Notification No, 10/2017-Integrted Tax (Rate) dated 20.6.2017 issued in this regards are reproduced as below:-

Notification No.	Description of Service (wording)	Person liable to pay tax
Notification No. 30/2012-ST dated 20.06.2012	In respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory:	Recipient of service
Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017	In respect of any services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory.	Recipient of service

27. It is quite apparent that the meaning of taxable service in Service Tax regime except those covered under certain exemptions and meaning of Service in GST regime both are same in terms of the above Notification. Further, it is observed that the nature of transaction, under the said agreement dated 19.04.2013, had also remained same in GST period as it was in the pre-GST period It is also pertinent to mention here that all services, other than those covered either under Negative list as per provisions of Section 66D of the Finance Act, 1994 or Mega Exemption Notification No. 25/2012-ST dated 20.06.2012, are taxable at the material time.

28. At this juncture, on conjointly analysing the overall facts of the case and taking into consideration the discussions in the paras supra, I find that **activity undertaken by the foreign vendors in respect of payment of license fees is merely granting permission for use the functions of CAS software upto the validity period of such license as per pre agreed terms and conditions and it was not intended to give M/s. GTPL any right of ownership with respect to the Intellectual Property Rights in the CAS software, therefore,** the activity carried out by the Nagra appears to be correctly classified as "temporary transfer or permitting the use or enjoyment of any intellectual property right" and considered aptly as declared service.

In view of above, I am quite convinced in coming to the conclusion that the licence fees paid to Nagar for provisions of use of CAS software have been

established beyond doubt as "declared service" in terms of provisions of Section 66E(c) of the Finance Act, 1994.

29. Now, coming to the submissions of the said noticee, I find that the said noticee have contested in their defense submission that the activity related to license fees paid to NAGRA for CAS Software did not fall under category of Declared Service as per Section 66E(c) of the Finance Act, 1994 as the activation key was a set of mathematically generated data represented as an information for use by the electronic device and there was no transfer of any of the intellectual property right involved. The said argument is not accepted at first glance and the same appears totally irrelevant to the actual fact of the case. It is quite well established from my above discussion that the payment was made to the foreign vendors towards the license fees for granting permission for use of CAS software on temporary basis as per pre-agreed terms and conditions and the question of declared service in this case has also been established bound doubt. I observe that the said CAS software is activated and available for use to M/s. GTPL based on generation of activation key and further, the supply of activation key appears to be restricted to permission for use or enjoyment of the CAS software under soundness of the agreement.

30. I find that the M/s. GTPL had made submission that the amount of Rs. 45,61,10,538/- paid to Vendors did not attract Service Tax u/s 66B of the Act as the performance of activities were outside the taxable territory within the meaning of place of provisions of Section 66C of the Act. The said argument is also not accepted as in terms of provisions of Section 66C of the Act, the place of provisions Rule, 2012 is notified wherein Rule 3 of the Place of Provision of Services Rules, 2012 prescribes in generally the place of provision of a service shall be the location of the recipient of service unless otherwise there was some specific activity performed. I find that service activity performed by the foreign vendors is well established as declared service under category of temporary transfer or permitting the use of intellectual property rights as per provisions of Section 66E(c) of the Finance Act, 1994 and the same is not required to be reiterated here again. Further, in terms of provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(i)(G) and provisions of Notification No.30/2012-ST dated 20.06.2012, M/s GTPL, located in taxable territory, was liable to pay service tax, under reverse charge mechanism since the service provider NAGRA was located in non-taxable territory.

31. I, further, find that the M/s. GTPL had contested that the very activity undertaken by the NAGRA was required to be classified as OIDAR Services falling within the scope of Rule 9 *(b) Online information and database access or retrieval services* and accordingly the place of provision of such activities was at the location of the Vendors i.e. outside India as the essence of the arrangement with the Vendors was to receive the activation key and activation key is classifiable as

data and information both as the activation key is delivered through and over the electronic network connected through internet. **The said argument is not accepted at all as the same is found without any legal backing.** It is clear that the activity undertaken by NAGRA does not fall under OIDAR Service having reason that that activity undertaken by foreign vendors appears to be transfer of right to use the CAS software embedded into Set Top Boxes on payment of license fee as per pre-agreed terms and conditions.

31.1. From the facts of case, it is also evident that the payment of license fees is not only made for activation of CAS software but also for granting permission for use or enjoyment of function of such software for the period specified as per the agreement. It is also evident that the online information and database access is provided to the clients/subscribers of M/s. GTPL after activation of CAS software pre-fitted into the Set Top Boxes by the respective broadcasters to broadcast their channels. There is, therefore, no scope to consider the activity performed by the foreign vendors other than "Declared Service" defined under Section 66E(c) of the Finance Act, 1994.

The details of License fees paid to NAGRA for provisions of CAS software are under.

F.Y.	Name of the foreign vendors, country	Amount paid to foreign vendors	Service Tax applicable	Nature of transaction
2014-15	**Nagravision, Switzerland**	18368453	2270341	License Fees
2015-16		285685200	41236270	
2016-17		152056885	22808533	
Total		**456110538**	66315143	

32. Further, I find that the show cause notice had made other allegations that the said noticee (M/s. GTPL) had received taxable service from foreign vendors viz.

F.Y.	Name of the foreign vendors, country	Amount paid to foreign vendors	Service tax applicable	Nature of transaction
2014-15	Nagravision, Switzerland	19,04,400/-	235384	Maintenance
2015-16		20,48,445/-	286782	
2016-17		21,99,337/-	329901	
	Total	6152182	852067	
2016-17	Erisson Television Ltd. Sweden	83,817/-	12573	Troubleshooting Charges
2016-17	Media Partner Asia Research Services Pvt. Ltd., Singapure	23,51,825	352774	Research & Consultancy Service
	Total	2435642	365346	
	Grand Total	**8587824**	**1217413**	

32.1. I find that the agreement dated 19.04.2013 executed between NAGRA and the said Noticee stipulates that Nagra shall provide maintenance and support; security on basis of yearly fee (**AMC**). Relevant text is reproduced hereunder:-

"9.1. Nagra shall provide maintenance and support in accordance with the maintenance and support conditions (attached)

9.2. The yearly fee for maintenance and support according to the maintenance and support Conditions is defined in the "Commercial Terms"

10. Security

10.1. *To the extent GTPL has notified Nagra that it has decided to subscribe to Nagra's security services as described in this Agreement before the end of the Warranty Period and pays the corresponding security fee, Nagra shall provide security services in accordance with the Security Agreement. The yearly fee for security services according to the Security Agreement is defined in the "Commercial Terms". Security services must be subscribed on an un-interrupted basis.*

10.2 GTPL shall cooperate with Nagra in accordance with the Security Agreement in order to ensure security of the CAS."

32.2. Further, I find the invoice no. RES14501 dated 22.08.2016 in respect of service from Media Partner Asia Research Services Pte. Ltd., Singapure & work order no. 0227 dated 14.06.2016 in respect of service of Erisson Television Ltd. Sweden as inserted in SCN at para 4.7.1 and the description of service as "MPA Research & Consulting Services" & "troubleshooting and rectification services for the Headend support", respectively.

32.3. On going through the said work orders/invoices and contents of agreement executed with their foreign vendors as well as ledgers maintained by the said noticee, I find other than license fees certain amounts were paid to foreign vendors for repair, maintenance & other support services under AMC and shri Anil Prakash Mal Bothra, CFO of the noticee company in statement recorded during the course of investigation has also confirmed that these services were taxable services at the material time.

32.4. Further, I find that the said noticee have not made any disagreement regards events of taxability of these services either in their written submission or during personal hearing held in this matter. Rather, they have made arguments that the taxable events would be revenue neutral as they were eligible for taking credit towards payment of service tax which is nothing but showing their acceptance of tax liability towards these services under reverse charge mechanism.

In view of above, I am inclined to hold that these services are covered under the ambit of taxable Service in terms of provisions of Section 65(B)(51) of the Finance Act, 1994 in service tax point of view has already been discussed in above paras.

33. Now I come to discuss the next limbs of the issue whether the activity carried out by the Nagra and other foreign venders are liable for payment of service tax under the provisions of Finance Act, 1994.

33.1. I reiterate that all elements of a service in respect of the activity carried out by the foreign venders in this case are clearly and soundly established in view of my above discussions and findings hence the same does not require any replication here. Now, the exemption provisions operational in the service tax regime needs to be looked for testifying whether the activity or service received from the foreign venders by M/s. GTPL are covered under the scope of any exemptions or are taxable for payment of service tax at the material time.

33.2. I find that Mega exemption Notification No. 25/2012-ST dated 20.06.2012 and Negative list of service as per provisions of Section 66D of the Finance Act, 1994 distinguished the services covered under exemption from payment of service tax. On looking thoroughly into the contents of these exemption provisions pertaining to both negative list or Mega exemption Notification, there is nothing in these provisions which grant exemption from service tax to the services received by the noticee. Rather than this, I find that Shri Anil Prakash Mal Bothra, the Chief Financial Officer of the noticee company has also confirmed in his statement that the transactions in respect of provisions of service received from the foreign vendors by their company are neither covered under Notification No 25/2012-ST dated 20.06.2012 nor do they fall under Negative list of service as envisaged under Section 66D of the Finance Act, 1994.

33.3. Further, I observe that the M/s. GTPL had received taxable services from their foreign vendors for which total consideration of **Rs. 46,46,98,362/-** was paid during the period from October-2014 to June-2017 and the foreign vendors were located in non-taxable territory and they were also not having any office in taxable territory hence the service tax liability on such transactions shall lie on ***the recipient of such service.*** I find that the Notification 30/2012-ST dated 20.06.2012, issued under Section 68(2) of the Finance Act, 1994, had notified the services and the extent of service tax payable thereon by the person to pay service tax and other relevant provisions as extracted below;-

Sr. No.	Description of Service	Percentage of Service tax payable by the person providing service	Percentage of Service tax payable by the person receiving service
10	**in respect of any taxable service provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory**	**NIL**	100%

(i) Rule 2(1)(d)(i)(G) of the Service Tax Rules, 1994 deals with the situations **person liable for paying the service tax**, the relevant clause is reproduced below:-

"(G) in respect of any taxable service provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory, ***the recipient of such service.***

(ii) Rules 7 of the Point of Taxation of Service Rules, 2012 prescribes the point of taxation in case of service tax liability arisen on account of reverse charge mechanism is the date of payment if payment is made within three month.

(iii) *Rule (3) of the Place of Provision of Service Rules, 2012* deals with the situations where the place of provision of a service shall be the location of recipient of service

(iv) In terms of provisions of Section 174(2) of the CGST Act, 2017, any investigation, inquiry, adjudication, recovery to be proposed to be effected etc, in the GST period, under the provisions of the Finance Act, 1994 is saved.

In terms of statutory provisions stipulated as above, it is evident that the recipient of services located in taxable territory is under obligation to pay 100% service tax under **Reverse Charge Mechanism** on the value of taxable service received by them from the service provider located in non-taxable territory and in the case on hand, M/s. GTPL had received taxable services from their foreign suppliers viz. Nagra and others which were located in non-taxable territory and were not having any office in taxable territory, therefore, the said noticee (M/s. GTPL) is correctly liable to pay service tax of Rs. 6,75,32,556/- under the provisions of Section 73(1) of the Finance Act, 1994 alogwith applicable interest under the provisions of Section 75 of the Finance Act, 1994.

34 Coming to the submission of the said noticee (M/s GTPL), I find M/s. GTPL had submitted that the facts involved in the present notice were completely revenue neutral as they were entitled to full amount of CENVAT credit of input or input services. Even they have utilized entire credit and made cash payment also. The entire case would be revenue neutral as credit of the service tax paid under RCM was duly available. In support of their contention, they have relied upon the following judgements;

(i) CCE Vs. Coca-Cola India P. Ltd. - 2007 (213) ELT 490 (SC)
(ii) Choice Laboratories Ltd. Vs. Union of India - 2016 (341) ELT 604 (Guj)
(iii) Jay Yuhsin Ltd. Vs. VVE - 2000 (119) ELT 718
(iv) Sanvijay Rolling & Engineering Ltd. Vs. CCE- 2018 (11) GSTL 344 (Born),
(v) CCE Vs. Tarapur Grease India P. Ltd. - 2016 (334) ELT 416 (Born),
(vi) Mahindra & Mahindra Ltd. Vs. CCE- 2019 (368) ELT 105 (Tr-Mumbai)
(vii) Sarovar Hotels P. Ltd. Vs. CST- 2018 (10) GSTL 72 (Tri-Mum)
(viii) K-Air Specialty Gases P. Ltd. Vs. CCE- 2017 (4) GSTL 370 (Tri-Mum)
(ix) Bharat Oman Refineries Ltd. vs. CCE- 2017 (4) GSTL 221 (Tri-Del)

34.1. Ongoing through the above case laws relied upon by the M/s. GTPL, I find that in case laws listed at (i), (ii), (iii), (iv) & (v) above cited by said noticee (M/s. GTPL), I find that the issues involved in these cases regards revenue neutral were with respect to duty or tax payable at each stage of manufacture and availability of credit of such duty or tax was on same person/manufacturer only. However, in the present case there was a transaction between the service provider located in non-taxable territory and service recipient located in India. Since the tax was actually payable by the service provider but for the reason of him not being available in India, the same is recoverable from the service recipient. Further, in case of the decision listed at (vi), (vii), (viii) & (ix) above, relied upon by the said noticee (M/s. GTPL) in support of their view of revenue neutrality, it is evident that in all these four cases, there was a doubt regarding applicability of RCM. Further, in the present case, it is clearly established that M/s. GTPL was aware about the taxability of the services in the service tax regime as they had paid IGST on said services in in the succeeding GST regime treating the activity as taxable service. Further, this is also established from the fact that the agreement between M/s. GTPL and Nagra for provision of said services remained same/unchanged in-service tax regime as well as GST regime. In view of these counts, the contention of M/s. GTPL appears to be grossly misplaced and the same is found to be erroneous.

35. First of all, I observed that the arguments made by M/s GTPL regards revenue neutrality is nothing but acceptance of liability of service tax in respect of transactions made with foreign vendors under Reverse Charge Mechanism. Further, I observe that the position of revenue neutrality cannot be accepted in the present case. The availability of Cenvat credit depends on several factors, one of which is that the service tax leviable on such services is required to be paid, without which cenvat credit is not available at all anywhere. Rule 3 of the Cenvat credit Rules, 2004 stipulates that cenvat credit of specified tax have been paid on input service are only available as credit which is not the situation in the present case. In this regard, I refer to the decision in the case of M/s 'Forbes Marshall Private Limited V. Commissioner of Central Excise, Pune-I' – 2015 (38) S.T.R. 843 (Tri. - Mumbai) - the Tribunal found that it is fact that duty having been paid by the appellants, they were entitled to take CENVAT credit which they have taken. The issue remains of deciding whether interest and penalties are to be demanded. The Tribunal held that simply because a situation leads to revenue neutrality does not imply that tax need not be paid in time. Where law requires tax to be paid it has to be paid as per time specified. In this case the tax has been paid much later than the date on which it was due. The time to be considered for interest purpose is the time between the due date and the payment day. It cannot be said that the

Government has not lost interest between the two dates. The Tribunal held that interest is payable. Thus revenue neutrality arises in cases of reverse charge mechanism, export of services etc., in which the service tax paid by them is eligible for credit. On following the concept of revenue neutrality the assessee cannot escape from paying service tax and interest. He should pay the service tax in time and later on the interest also is liable to be paid by him. In case the non payment of service tax is with intention to evade payment it would also attract penalty. Also, The tribunal's larger bench had an occasion to extensively examine the applicability of revenue neutrality in Jay Yuhshin Ltd. Versus Commissioner Of Central Excise, New Delhi as reported in 2000 (119) E.L.T. 718 (Tribunal - LB). This decision very succinctly prescribed the contours:

> *"(a) Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme;*
>
> *(b) Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence;*
>
> *(c) With particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods;*
>
> *(d) We express our opinion in favour of the view taken in the case of M/s. International Auto Products (P) Ltd. (supra) and endorse the proposition that once an assessee has chosen to pay duty, he has to take all the consequences of payment of duty."*

36. Thus, in the said judgement it has clearly been held that Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme. It has also been held therein that where the scheme opted by the assessee is found to be misused, the existence of an alternate scheme would not be an acceptable defence.

37. Further, it is a universally accepted fact that the credit of the service tax paid under reverse charge mechanism was available to the service recipient, but for that the service recipient had to first pay the tax. If the principle of revenue neutrality is applied in case of non-payment of tax under RCM, the provisions of reverse charge mechanism as stipulated under the Section 68 (2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012 would

become redundant. **Such a view would be against the settled legal principles that any interpretation which renders the provisions of a statute redundant, otiose or surplusage has to be avoided.** This view is well supported by the decision of Hon'ble Tribunal Mumbai, WZB, in case of the Board of Control for Cricket in India Vs. Commissioner of Service Tax- Mumbai II as reported in *2019 (29) G.S.T.L. 304 (Tri. – Mumbai)* In its decision the Tribunal has held that the case cannot be revenue neutral in view of the fact that in this case because service tax is being demanded from the appellant only for the reason that the service provider is non resident and in case service provider was located in India, service tax would have been paid by him in respect of the present transactions. It was further held that manner of payment of the tax would not change the nature of levy and in any case if the argument of revenue neutrality is accepted as permissible defense in the present case, entire scheme of payment of taxes on reverse charge basis will become otiose and no business liable to pay service tax would be required to pay service tax in respect of services received by them from non-resident service providers, for the reason that the tax so paid will be available as credit to them.

38. Further, **I find that the said noticee (M/s. GTPL) has contested** that the notice was illegal and improper as DGGI officers were not empowered to issue the notice since they do not have any jurisdiction to conduct and conclude the inquiry in relation to Service Tax pursuant to omission of Chapter V to the Finance Act, 1994 by virtue of Section 173 of the Central Goods and Service Tax Act, 2017. The said argument is not accepted in any manner as provisions of saving clause under Section 174(2)(e) of the CGST Act, 2017 has clearly not affected certain aspects/provisions of Finance Act, 1994 such as (e) *"affect any investigation, inquiry, verification, (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax.....as if this Act and not been so amened or repealed"*.

In view of the above, the said argument of the said noticee (GTPL) is found to be totally baseless and unacceptable.

39. Now coming to next issue regards proposal for invocation of proviso to Section 73(1) of the Finance Act, 1994 and imposition of penalty upon the said Noticee (M/s. GTPL) as well Shri Jayanta Kumar Pani, the CFO of the said Noticee at the material time.

39.1. I find that the present demand notice is proposed under the proviso to Section 73 (1) of the Finance Act, 1994. The first proviso to section 73 of the Finance Act 1994, states *'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 subsection shall have effect, as if, for "five years".'

39.2. It is appropriate to mention here that Fraud is as the Merriam-Webster dictionary explains it to be, an act of misrepresenting. Punctuation forms part of the statute and, even if the reader has to be wary of older Acts, in which punctuation was inserted after enactment by the printer, the punctuation of modern statutes must be given the significance it has to the ordinary user of the English language. Thus very clearly, in the Finance Act 1994, the use of the word 'or' after each of the expressions fraud, collusion, wilful mis-statement, suppression of facts, and contravention of any of the provisions implies that the presence of any one of the elements along with the intention to suppress is enough to invoke and sustain the invocation of the proviso above. It appears that a suppression of facts can happen even in the absence of a fraudulent intention or a wilful mis-statement, but where suppression has happened and out of a conscious decision extended period is to be invoked.

39.3. Further, so far as 'suppression of facts' is concerned, the phrase implies that withholding of information is suppression of facts; P. Ramanatha Aiyar's Concise Law Dictionary (1997 Edition Reprint 2003- page 822) explains it to mean the situation where [if] *there is an obligation to speak,* [failure to do so] *will constitute the "suppression of fact"* and distinguishes this situation from where *there* is *no obligation to speak, silence cannot be termed "suppression".*

39.4. The Government has from the very beginning placed full trust on the service provider so far as service tax was concerned and accordingly measures like self-assessment etc. based on mutual trust and confidence were in operation. Further, taxable service provider was not required to maintain any statutorily prescribed or separate records under the provision of service tax rules, as considerable amount of trust is placed on the service provider and private records maintained by them for normal business purpose are accepted, practically for all purpose of service tax. All these operate on the basis of honesty of the service provider, therefore, the governing statutory provision create an

absolute liability, when any provision is contravened or there is a breach of trust placed, on the service provider, no matter was it occurred innocently or otherwise.

39.5. I find that the facts which have emerged during the investigation of the instant case reveals that M/s. GTPL had not filed the correct service tax returns and in fact they had indulged in wilful suppression in respect of the services received by them on which reverse charge mechanism was applicable. Thus, M/s. GTPL had suppressed material facts from the department by not filing correct ST-3 returns. This appears to have been done intentionally so as to evade the payment of service tax under reverse charge mechanism. Non-disclosing of services received from foreign vendors shows clear intent to evade payment of service tax under reverse charge mechanism by an act of suppression and omission in as much as M/s. GTPL though being well aware of the unambiguous provisions of the erstwhile Finance Act, 1994 and Rules made there under, still did not discharge their service tax liability under RCM.

39.6. I find that all these facts narrated above clearly and unambiguously show that the said noticee suppressed the facts, by non-compliance with the obligations cast upon them by the statutory provisions. The suppression of the facts clearly leads to the inescapable conclusion that the said noticee had intention to evade the tax, and nothing else. It is imperative to mention here that intent is a state of mind which can only be inferred from the actions or their lack thereof. Intention to evade payment of tax is not required to be proved with mathematical precision. In deciding whether the provision is directory or mandatory, one has to ascertain whether the power is coupled with a duty of the person to whom it is given to exercise it. If so, then it is imperative. Generally the intention of the legislature is expressed by mandatory and directory verbs such as 'may', 'shall' and 'must'. The words 'may', 'shall' and 'must' should initially be deemed to have been used in their natural and ordinary sense. 'Shall'- in the normal sense imports command. It is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory. It depends upon the context in which the word 'shall' occurs and the other circumstances. Unless an interpretation leads to some absurd or inconvenient consequences or contradicts with the intent of the legislature the court shall interpret the word 'shall' in mandatory sense. Must- is doubtlessly a word of command. It is observed that in the context of sections 68, 69, 70 of the Finance Act 1994, through the use of the word 'shall' make it mandatory for every person liable to pay service tax to engage in action that is laid down in these sections. It is one of the rules of construction that a provision is

not mandatory unless non-compliance with it is made penal. Mandatory provisions should be fulfilled and obeyed exactly, whereas in case of provisions of directory enactments substantial compliance is satisfiable.

In view of the specific omissions as elaborated above, it is apparent, that M/s. GTPL had deliberately suppressed the facts as discussed in para supra which amounts to suppression of facts and willful mis-statement with the deliberate intent to evade payment of service tax. Therefore, the extended period of limitation as envisaged under proviso to **Section 73(1)** of the erstwhile Finance Act, 1994 read with Section 174 of the CGST Act, 2017 is required to be invocable for demanding service tax evaded during the period from October-2014 to June-2017.

39.7. In this regard, I rely upon, the observations of the Hon'ble Apex Court in the case of Rajasthan Spinning and Weaving Mills/ High Court of Gujarat at Ahmedabad in Tax Appeal No. 338 of 2009 in the case of Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd. dated 22.04.2010 regarding applicability of the extended period in different situations.

"11. A plain reading of sub-section (1) of Section 11A of the Act indicates that the provision is applicable in a case where any duty of excise has either not been levied/paid or has been short levied/short paid, or wrongly refunded, regardless of the fact that such non levy etc. is on the basis of any approval, acceptance or assessment relating to the rate of duty or valuation under any of the provisions of the Act or Rules thereunder and at that stage it would be open to the Central Excise Officer, in exercise of his discretion to serve the show cause notice on the person chargeable to such duty within one year from the relevant date.

12. The Proviso under the said sub-section stipulates that in case of such non levy, etc. of duty which is by reason of fraud, collusion, or any mis-statement or suppression of facts, or contravention of any provisions of the Act or the rules made thereunder, the provisions of sub-section (1) of Section 11A of the Act shall have effect as if the words "one year" have been substituted by the words "five years".

13. The Explanation which follows stipulates that where service of notice has been stayed by an order of a Court, the period of such stay shall be excluded from computing the aforesaid period of one year or five years, as the case may be.

14. Thus the scheme that unfolds is that in case of non levy where there is no fraud, collusion, etc., it is open to the Central Excise Officer to issue a show cause notice for recovery of duty of excise which has not been levied, etc. The show cause notice for recovery has to be served within one year from the relevant date. However, where fraud, collusion,

etc., stands established the period within which the show cause notice has to be served stands enlarged by substitution of the words "one year" by the words "five years". In other words the show cause notice for recovery of such duty of excise not levied etc., can be served within five years from the relevant date.

15. *To put it differently, the proviso merely provides for a situation where under the provisions of sub-section (1) are recast by the legislature itself extending the period within which the show cause notice for recovery of duty of excise not levied etc. gets enlarged. This position becomes clear when one reads the Explanation in the said sub-section which only says that the period stated as to service of notice shall be excluded in computing the aforesaid period of "one year" or "five years" as the case may be.*

16. *The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.*

17. *The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.*

18. *The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible.*

19. *The language employed in the proviso to sub-section (1) of Section 11A, is, clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the*

only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom.

20. *Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated.*

21. *It may be noticed that where the statute does not prescribe a period of limitation, the Apex Court as well as this Court have imported the concept of reasonable period and have held that where the statute does not provide for a period of limitation, action has to be taken within a reasonable time. However, in a case like the present one, where the statute itself prescribes a period of limitation the question of importing the concept of reasonable period does not arise at all as that would mean that the Court is substituting the period of limitation prescribed by the legislature, which is not permissible in law.*

22. *The Apex Court in the case of Rajasthan Spinning and Weaving Mills (supra) has held thus :*

"From sub-section (1) read with its proviso it is clear that in case the short payment, non payment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in default within one year from the relevant date [defined in sub-section (3)]. In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice

and a priory the period for which duty can be demanded gels extended to five years."

23. *This decision would be applicable on all fours to the facts of the present case, viz. when non-payment etc. of duty is intentional and by adopting any of the means indicated in the proviso, then the period of notice gets extended to five years."*

39.8. Further, It would not be out of context to mention here that M/s. GTPL are/were having a very good team of employees well conversant with tax matters as well as very skilled/learned/educated tax consultants having sound knowledge of prevailing provisions of service tax and as such they were aware of such provisions relating to service tax. However, they deliberately adopted the modus of suppression as discussed here above to evade payment of service tax. The important point which needs to highlighted here is that in the succeeding GST regime from July 2017 onwards, the said noticee (M/s. GTPL) *sou moto* had started to pay IGST towards the transactions of license fees paid to its foreign venders under the same nature of transactions and the same terms and conditions treating the entire activities as "Service" even without any interaction/direction by the department. These facts are more than enough to lead me to believe that the consideration/arrangements made with foreign vendors in the instant case was willfully suppressed from the department at the material time with intent to evade payment of service tax and the noticee had deliberately not paid the applicable service tax on such transactions.

40. Coming to the submission of the said noticee (M/s. GTPL), I find that the said noticee have in their defence contended that the notice is barred by limitation since they have not suppressed any information from the department with intention to evade payment of service tax. In this regard, I find that consequent upon the issuance of Notification No. 36/2004-ST dated 31.12.2004, under Section 68(2) of the Act read with Rule 2(1)(d)(iv) of the Service Tax Rules,1994 levy of service tax on taxable services received in India from a non-resident, not having any office in India, arises on reverse charge basis w.e.f 1.1.2005. Section 66A has also been introduced in the Finance Act w.e.f. 18/04/2006. Therefore, Government's view on the taxability of the services and the person liable for paying service tax was well within the knowledge of the said noticee. I find that, even though the said noticee may disagree and not pay service tax, the onus to declare the value of such services in the ST-3 returns was on the said noticee which they patently failed to do. Therefore, I do not find any merit in the contention of the said noticee with regard to the bar of limitation.

40.1. I, further, find that they have relied on the judgment in case of Pushpam Pharmaceuticals Company Vs. CCE, Bombay 1995 (78) ELT 401 (SC), CCE vs. Chemphar Drugst & Liniments 1989 (40) ELT 276 (SC) & Padmini Products vs. CCE- 1989 (43) ELT 195 (SC) wherein deliberate intention to evade payment of tax and suppression of fact with intent to evade payment of tax have been accentuated. These cases do not have much water to shield the said noticee (M/s. GTPL). From my above discussions, the deliberate intention of the said noticee (M/s. GTPL) have already been established beyond doubt. Further, at this stage, it is also to be taken into account that the decision for payment of tax after implementation of GST from day one on the very same transactions treating the same as service activity was a well thought plan of the noticee to escape the payment of service tax in Service tax regime which appears to be an evasive tactic so as to escape from service tax by the said noticee (M/s. GTPL).

40.2. I also rely on the judgment of Tribunal in the case of M/s Tech Mahindra Ltd V CCE, Pune-III wherein it has been held that-

Business Auxiliary Services - Sales promotion and marketing activities fall within definition of Business Auxiliary Services, taxable from 2003 onwards - Sections 65(19) and 65(105)(zzb) of Finance Act, 1994. [para 6.1]

Demand, interest and penalty - Service tax - Services received from foreign service provider by service recipient situated in India having its fixed establishment/permanent residence in India - Deeming legal fiction created to treat service Recipient as service provider for application of provisions of Chapter V of Finance Act, 1994 - Appellant required to declare transactions in statutory returns - Appellant liable to pay service tax for services received for period on or after 18-4-2006, i.e., the date on which Section 66A of Finance Act, 1994 enacted - Demand of ` 2,69,94,321 and interest of ` 1,48,95,196 for the period 2006-2007 upheld - Demand for period prior to 18-4-2006 not sustainable - However, benefit of doubt extendable for non-disclosure of information at relevant time - Penalties under Sections 76, 77 and 78 ibid waived by invoicing provisions of Section 80 ibid. [paras 6.2, 6.6]

Demand - Limitation - Suppression of facts - Non-disclosure of transaction in ST-3 returns inspite of specific statutory mandate in Section 66A of Finance Act, 1994, clearly amounts to suppression of facts - Balance sheets do not reflect payments made for various transactions separately, only gives gross amount of expenditure incurred in terms of foreign currency - Copy of agreement with foreign entity, not provided to department - Copy of agreement provided only after commencing of investigation - Demand not time barred - Section 11A of Central Excise Act, 1944. [paras 6.4, 6.5].

In the case of KUTTUKARAN TRADING VENTURES Versus C.C.E., CUS. & SERVICE TAX, COCHIN { 2014 (35) S.T.R. 481 (Ker.)} it was held that-- ***Demand***

- Limitation - Finding of adjudicating authority that assessee had not furnished all material details in their ST-3 returns and those details were disclosed only in audit conducted by Department - HELD : This is a finding of fact, which cannot be ignored by higher appellate authorities, especially when there is no material to come for different finding - Invocation of extended period upheld - Section 71(3) of Finance Act, 1994. [para 25]. Maintained in 2015 (40) STR J187 (Supreme Court) .

In view of the above, the suppression of facts with deliberately intention to evade payment of tax on part of M/s. GTPL has been established and hence the provisions of Section 73(1) of the Finance Act, 1994 are correctly invokeable.

41. I, further, find that the said noticee (M/s. GTPL) has contested that the present show cause notice was issued as a protective demand against the proceeding initiated by DRI, MZU, Mumbai vide Customs Notice dated 29.05.2018 and OIO dated 16.05.2019 which was appealed by M/s. GTPL and which is pending before the Hon'ble Tribunal, Mumbai. Therefore, they are facing demands of Customs duty as well as Service Tax with respect to same subject matter. The application of suppression of fact in this case is irrelevant and extended period not invocable in this case. However, on going through the SCN & OIO presented by M/s. GTPL before me, the core facts raised in the dispute under customs are that the customs duty was demanded and confirmed by taking a view that the value of license fees of CAS software paid to NAGRA needs to be a part of assessable value of imported Set Top Boxes. At this stage, first of all, I do not agree with the arguments made by the noticee that the case on hand has been raised as protective demand and the said arguments are found without any legal basis. Without interloping into provisions of customs, I find that the activities under consideration have soundly been established as "taxable service" as per my above discussion. Further, it is incumbent upon the undersigned to record it here that the customs duty and service tax are not mutually exclusive and both taxes are imposable on different taxable events under the independent laws. In support of my view, I rely upon the decision of Hon'ble CESTAT, New Delhi in case of M/s Atul Kaushik Vs. Commissioner of Customs (Export), New Delhi reported at 2015 (330) E.L.T. 417 (Tri. – Del.) wherein the Hon'ble Tribunal dealt with an identical situation and held that there is no prohibition of levy of different taxes on same transactions, as it may inhere distinct taxable events. Customs duty and Service Tax are not mutually exclusive. The relevant portion of order of the Hon'ble Tribunal is reproduced as under:-

"14. ..... No constitutional provision is brought to our notice inhibiting levy of taxes under different statutes on the same transactions. It is axiomatic that the same transaction may inhere distinct taxable events, exigible to different taxes. The only question is whether demand of tax is sustainable under the particular statute, as claimed by Revenue. The licence fee being a condition of sale is includible in the assessable

value of the media packs in terms of the Customs Act, 1962 and the Rules made thereunder and there is no provision warranting exclusion from the assessable value for customs purposes, on the ground that service tax has become chargeable on such licence fee under a different statute."

41.1. Further, I find that said ruling of the Hon'ble CESTAT, New Delhi has also been upheld by the Hon'ble Supreme Court of India while dismissing Civil Appeal No. 13443 of 2015 filed by the Oracle India Pvt. Ltd. as reported 2016 (339) E.L.T. A136 (S.C.) wherein the Hon'ble Supreme Court has passed the following order:-

"We see no reason to interfere with the impugned order passed by Customs, Excise & Service Tax Appellate Tribunal." The Civil Appeal is accordingly dismissed"

In view of the above, I am inclined to hold that the taxable events in respect of the transactions made with the foreign vendors by the M/s. GTPL and the demand under both the statutes on same transactions would amount to separate friction events of tax and the same would be correctly decided under provisions of appropriate law in the relevant point of view. On these counts, the said submission does not have any weightage and bearing on the issue in support of M/s. GTPL.

In view of the above discussions, I find that this is a clear case of doing something which was prohibited in law and not doing something which was required by law. Hence I find that the charge of suppression of material facts with intention to evade service tax have been conclusively established herein above. Had the DGGI, AZU not conducted the investigation/inquiry, the said taxable value would have escaped assessment and might have resulted in non payment of service tax thus leaving the government exchequer poorer. Further, the said noticee (M/s. GTPL) even without any intervention/advise from department had started paying IGST in the succeeding GST regime from July-2017 onwards treating all these activity as taxable service events and there is no dispute in the nature of activities and terms and conditions in service tax regime as well as GST regime of all such transactions made with foreign vendors. They were aware of the facts regarding payment of service tax under RCM on the aforesaid services received by them but have not paid the same and neither they have disclosed the same before the department. The suppression with an intent to evade payment, on part of the said noticee, is proved beyond doubt and proviso to Section 73(1) of the Finance Act, 1994 has rightly been applied in the instant case and the demand of service tax for the period October-2014 to June-2017 alongwith interest is justified.

42. Coming to the issue of penalty, I find that the notice proposes penal action under Section 76 or/and 78, and 77 (2) of the Finance Act, 1994. I find that Section 76 provides for penalty in case of a person who is liable to pay service tax

in accordance with Section 68 or the rules made thereunder but fails to pay such tax. Section 77 (2) has been invoked proposing penalty for failure to self assess the tax liability correctly and failure to file Service Tax returns with correct details. Penalty under Section 78 has been proposed for suppressing of fact/wilful misstatement of fact and not disclosing the value of taxable service from the department with intent to evade payment of service tax.

42.1 I find that penalty under Section 76 and 78 of the Finance At, 1994 are mutually exclusive and in terms of the proviso inserted in Section 78 w.e.f 10/5/2008 if penalty is imposed under Section 78, no penalty can be imposed under Section 76. Therefore, I hold that penalty under Section 76 is not imposable on the said noticee (M/s. GTPL) and in coming to this conclusion, I rely upon the decision of the Hon'ble Tribunal in the case of Commissioner of C. Ex., Jaipur Vs. Abhi Nandan Banquets reported at 2014 (034) STR 0120 (Tri.Del). At para 14 of the said judgment it was held that *"Further we notice that penalties have been imposed under Section 76 and 78 of the Finance Act, 1994. Basically these two penalties are for the same offence. Thus position is recognized in Finance Act, 1994 by the 5th proviso added in Section 78 by amendment made through Finance Act, 2008".*

42.2. In the present case the suppression of facts and willful misstatement has been established.beyond doubt, as discussed in the paragraphs *supra*. Keeping the said views, I consider this is a fit case for imposing penalty under Section 78 of the Finance Act, 1994. However as this order is being issued after the date of enactment of the Finance Bill 2015 i.e. 14/5/2015, the amended provisions of Section 78, are applicable, which reads as under :-

> ***Section 78 (1)*** *– "Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collision 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, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which* ***shall be equal to hundred per cent. of the amount of such service tax:***
>
> ***Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined:***
>
> *Provided further that where service tax and interest is paid within a period of thirty days of–*

(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty shall be twenty-five per cent. of the service tax so determined:

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period:

Explanation. – For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records."

42.3 It is seen from the above that in cases where details relating to transactions are recorded in specified records for the period from 08/04/2011 to enactment date of Finance Act, 2015 (i.e. 14/05/2015), penalty shall be 50 per cent of the Service Tax so determined. In the instant case it is not a matter of dispute that the transactions were recorded in the books of the noticee. Further, in terms of Section 78B(1)(b) the provisions of Section 78 as amended by the Finance At, 2015 shall be applicable where 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. In view of the transitional provision of Section 78B(1)(b), for the period from October-2014 to 14/05/2015, in the present case the noticee are liable to the penalty amounting to 50% of the service tax determined in terms of this order. Further, in respect of the service tax evaded by them for the period from 15/05/2015 to June-2017, the benefit of proviso to Section 78 regards penalty upto 50% shall not be available hence after 14/05/2015, the noticee are liable to penalty equal to 100% of the service tax amount.

43. As regards penalty under Section 77(2) of the Finance Act, 1994. Section 77(2) speaks about any person who contravenes any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided in this chapter, shall be liable to a penalty which may extended to ten thousand rupees. I find that the noticee was liable to pay Service Tax under reverse charge mechanism in respect of the taxable value received by them from foreign vendors located in non-taxable territory. However, as discussed hereinabove, the said noticee failed to declare the correct value in respect of

taxable service received from the service providers located in non-taxable territory and failed to file returns showing service tax liability under RCM and thereby contravened the provisions of Rule 70 of the Finance Act, 1994 readwith Rule 7 of the Service Tax Rules, 1994. No separate penalty is elsewhere provided for contraventions or such failure on part of the said noticee (Ms/. GTPL). Therefore, I hold that the penal provisions under the provisions of Section 77(2) of the Finance Act, 1994 invoked in the show cause notice are attracted to this case.

44. Further, I find that the SCN proposes penalty, on Shri Jayanta Kumar Pani, the then Chief Financial Officer of the Noticee company, under the provisions of Section 78A of the Finance Act, 1994. Section 78A of the Finance Act, 2017 reproduced 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.

As per above provisions, it evident that any person of management committee or other officer of a company who was responsible for conduct of business knowingly concerned himself with contraventions of provisions of Chapter V of the Finance Act, 1994, he shall be liable for personal penalty.

44.1. I find that the show cause notice alleges that Shri Jayanta Kumar Pani, the then Chief Financial Officer of the Noticee company was the person responsible for taxation issues of the company, during which the aforesaid acts of nonpayment of service tax on the services covered under reverse charge were committed by M/s. GTPL and as such, it appears that he had a decisive role to play in the present evasion. It is evident that M/s. GTPL had received services in relation to License Fees & AMC from foreign vendors during GST regime as well as service

tax regime and that the nature of services received during GST period and service tax regime was the same, yet, M/s. GTPL had not discharged service tax liability on this service. However, M/s. GTPL is paying IGST on such services under GST law since 01.07.2017. The very fact that the details of the services received from foreign vendors during the period October-2014 to June-2017 were not shown in ST-3 returns give strong indication that M/s. GTPL wanted to evade the payment of service tax

44.2. I further reiterate here that shri Anil Prakash Mal Bothra, CFO of the noticee company, who appeared during the investigation has deposited in his statement that the activities carried out by Nagra for his company was under the contract dated 19/04/2013 and the same contract was operative as on date with certain amendments regarding rates. **That, otherwise the activity remained same throughout the period April 2014 to June 2020. That, as on date his company is paying IGST on such transactions as the said activities are treated as services. That, service tax was not paid on the same activity carried out in the pre-GST era.** That, the applicability of service tax was decided by the management at the material time. Since he joined the company in October 2019, he was neither privy to the reasons for said decision nor a party to the said decision.

44.3. It may not be out of place to mention here that a Chief Financial Officer (CFO) ought to be considered as an expert and adept in taxation matter of a company and all such omissions and commissions, as discussed herein above in foregoing paras, had materialized only under supervision of a Chief Financial Officer or such a responsible person of a company.

44.4. At this juncture, it appears that the shri Jayanta Kumar Pani, was holding the post of Chief Financial Officer of the noticee company at the material time who had deliberately adopted the modus of non-compliance with obligations cast upon the said noticee (M/s. GTPL) company in service tax regime with a clear intention to evade the payment of service tax at the material time however the said noticee company had started paying GST on same transactions under same contract. It is well settled point under any statue that the same nature of transactions cannot be traveled in either side. It is also incumbent upon me to record here that even in the present era of self-assessment and tax friendly atmosphere, the government has made the taxpayers equal stakeholders and placed more trust upon them and they are expected to be more aware and honest towards the taxation issues and at the same time such behavior of non-compliance in taxation matters on part of the person holding higher position in the company have led to intentional loss to government revenue. In view of the above, I hold a view that shri Jayanta Kumar Pani, the then Chief Financial Officer of the noticee company has rendered himself liable to penalty under

Section 78A of the Finance Act, 1994, for the infractions committed by his company.

45. In view of the discussions and findings as recorded in the foregoing paragraphs, I pass the following order :-

ORDER

(i) I hold that the Services received by GTPL from M/s. Nagravision SA, Switzerland in respect of which they had paid **Rs.45,61,10,538/-** as license fees, are classifiable as declared services as stipulated under Section 66E(c) of the Finance Act, 1994.

(ii) I Confirm the demand of Service Tax amounting to Rs.**6,75,32,556/- (Rupees Six Crores Seventy Five Lakhs Thirty Two Thousand Five Hundred and Fifty Six Only)** and order to recover the same from M/s. GTPL Hathway Ltd, Ahmedabad under proviso to Section 73(1) of the Finance Act,1994 read with Section 68 of the Act ibid.

(iii) I order recovery of interest at the prescribed rate be charged under the provisions of Section 75 of the Finance Act, 1994, as applicable on the confirm demand of service tax as mentioned at (ii) above;

(iv) I impose a penalty of **Rs. 12,52,863/- (Rupees Twelve Lakhs Fifty Two Thousand Eight Hundred and Sixty Three Only)** being fifty per cent of the Service Tax of Rs. 25,05,725/- on M/s. GTPL Hathway Ltd, Ahmedabad under the first proviso to Section 78(1) of the Finance Act, 1994, as amended, for the period from October-2014 to 14.05.2015. However, in view of clause (ii) of the second proviso to Section 78 (1), if the amount of penalty is paid within thirty days of the receipt of this order, the penalty shall be twenty-five per cent of the service tax so determined subject to the condition that the amount of service tax alongwith interest and the amount of such reduced penalty is also paid within the said period of thirty days.

(v) I impose a penalty of **Rs. 6,50,26,831/- (Rupees Six Crores Fifty Lakhs Twenty Six Thousand Eight Hundred and Thirty One Only)** equal to hundred per cent of Service Tax of Rs. 6,50,26,831/- on M/s. GTPL Hathway Ltd, Ahmedabad under Section 78 (1) of the Finance Act, 1994, as amended, for the period from 15.05.2015 to June-2017. However, in view of clause (ii) of the second proviso to Section 78 (1), if the amount of penalty is paid within thirty days of the receipt of this order, the penalty shall be twenty-five per cent of the service tax so determined subject to the condition that the amount of service tax alongwith interest and the amount of such reduced penalty is also paid within the said period of thirty days.

(vi) I impose a penalty of **Rs.10,000/- (Rs. Ten Thousand Only)** under Section 77(2) of the Finance Act, 1994 in view of the contravention as discussed hereinabove.

In respect of Shri Jayanta Kumar Pani (the then Chief Financial Officer of the noticee company)

(vii) I impose Penalty of **Rs. 75,000/- (Rupees Seventy Five Thousand only)** on shri Jayanta Kumar Pani under Section 78A of the Finance Act, 1994.

46. Show Cause Notice No. No. DGGI/AZU/Gr.D/36-24/2020-21 dated 24.07.2020 issued to M/s. GTPL Hathway Ltd, Ahmedabad & Shri Jayanta Kumar Pani (the then Chief Financial Officer) of M/ s. GTPL Hathway Ltd, Ahmedabad stands disposed of in the above manner.

(UPENDRA SINGH YADAV)
COMMISSIONER

F. No.: STC/15-22/OA/2020 Date:- 30.10.2023

By Regd. Post A.D. / By Hand

To,

(1) M/ s. GTPL Hathway Ltd. having registered office at C-202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmedabad - 380004

(2) Shri Jayanta Kumar Pani (the then Chief Financial Officer), M/ s. GTPL Hathway Ltd. having registered office at C-202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmedabad – 380004.

Copy to:-

(i) The Principal Chief Commissioner, Central Excise & Central Goods and Service Tax, Ahmedabad Zone, Ahmedabad
(ii) The Additional Director General, DGGI, AZU, Ahmedabad.
(iii) The Assistant Commissioner, Central Excise & CGST, Division-II, Ahmedabad North
(iv) The Superintendent, Central Excise & CGST, Range-I, Division-II, Ahmedabad North for information and necessary action.
(v) The Superintendent (HQ, System) Central Excise & CGST, , Ahmedabad North with a request to upload the OIO on official website.
(vi) Guard File.