आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलेफैक्स07926305136

DIN : **20220364SW0000507942**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1624/2021/6907-11

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-112/2021-22**
दिनाँक Date : **08-03-2022** जारी करने की तारीख Date of Issue 08.03.2022

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **AHM-CEX-003-ADC-PMR-045-20-21** दिनाँक: **18.03.2021** issued by Additional Commissioner, CGST& Central Excise, HQ, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पताName & Address of the **Appellant / ~~Respondent~~**

M/s Radhika Construction
15, Prashanti Society,
Opp. Maruti Flat, Radhanpur Road,
Mehsana-384002

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार मे हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन, शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,BahumaliBhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होत`हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(20) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(Demand) एवं दंड(Penalty) का 10% पूर्व जमा करना अनिवार्य है।हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है.**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(xliii) amount determined under Section 11 D;
(xliv) amount of erroneous Cenvat Credit taken;
(xlv) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Radhika Construction, 15, Prashanti Society, Opposite Maruti Flat, Radhanpur Road, Mehsana – 384 002 (hereinafter referred to as the appellant) against Order in Original No. AHM-CEX-003-ADC-PMR-045-20-21 dated 18-03-2021 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, CGST, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant are holding Service Tax Registration No. AAEFR7352JST001 under the category of Commercial or Industrial Construction Services and are engaged in the business of Construction Services and providing services such as Civil Work of foundation for Drilling Rig Platform and approach roads etc. as per the contracts and agreements entered into with their clients. The appellant were not filing their ST-3 returns regularly and also not discharging service tax.

2.1 On the basis of intelligence gathered, an inquiry was initiated against the appellant during the course of which it was informed by the appellant that they were engaged in the construction work for M/s.ONGC, Mehsana, and the details of the work carried out by them during the last four years were furnished. On scrutiny of the documents and details submitted by the appellant, it appeared that they had been providing the services of Civil Work of foundation for Drilling Rig Platform and approach roads etc. as per the contracts/agreements for the past several years. The Director of the appellant, in his statement dated 02.12.2008, stated that they used to undertake contract for the works with materials and accordingly the payment was received from their clients inclusive of the cost incurred on the materials. He further stated that on being pointed out by the investigating officers, they had paid the entire service tax liability, for the period F.Y. 2004-05 to F.Y. 2007-08, amounting to Rs.16,63,552/- along with interest amounting to Rs.1,68,000/-.

2.2 The appellant was issued Show Cause Notice bearing F.No.V.ST/15-21/OFF/OA/09.PT.1 dated 04.09.2009 wherein it was proposed to :

- Demand and recover the service tax amounting to Rs.16,63,552/- under the proviso to Section 73 (i) of the Finance Act, 1994 and appropriate the amount already paid by them;
- Charge interest under Section 75 of the Finance Act, 1994 and appropriate the amount already paid by them;
- Impose penalty under Section 76, 77 and 78 of the Finance Act, 1994; .

3. The said SCN was adjudicated vide OIO No. 25/JC (KS)/2010 dated 31.08.2010 wherein the demand for service tax was confirmed along with interest. Penalties were also imposed under Section 76,77 and 78 of the Finance Act, 1994. Being aggrieved, the appellant filed an appeal before the Commissioner (Appeals), Ahmedabad who vide OIA No. 13/2011(Ahd-III)KCG/Commr.(A)/Ahd dated 28.01.2011 rejected the appeal and upheld the OIO. The appellant carried the matter in appeal before the Hon'ble Tribunal, Ahmedabad and the Hon'ble Tribunla vide Order No. A/11371/2019 dated 18.07.2019 allowed the appeal by way of remand.

3.1 In the denovo proceedings, the matter was adjudicated and the demand for service tax was confirmed along with interest. The amounts already paid by the appellant were appropriated and Penalties were also imposed under Section 76,77 and 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds :

i. They are engaged in undertaking composite contracts for which lump sum consideration is charged from the customers.

ii. From the classification of services as per Section 65A of the Finance Act, 1994, their various service, where turnkey projects have been carried out, can be classifiable as 'Works Contract Service'.

iii. The services under Section 65(39a) of the Finance Act, 1994 have been merged with the new levy of Works Contract Service w.e.f. 01.06.2007 and onwards.

iv. They are registered with the Gujarat VAT authorities and discharge the applicable VAT on the transaction undertaken by them. They have opted for the composition scheme for discharge of VAT on such Works Contract, if applicable. So the service rendered by them, fulfilling the condition of applicability of works contract service and falls under works contract service only. This was effective from 01.06.2007. During the impugned period, they were not liable for service tax, which they wrongly classified *suo moto* under the Construction of Commercial & Industrial Service and paid duty.

v. There are various judicial pronouncement which have consistently held that service tax authorities cannot vivisect a composite contract to levy service tax on the service component of a composite contract.

vi. They rely upon the decisions in the case of : 1) Delim Industrial Co. Vs. CCE – 2003 (155) ELT 457 (Tri.-Del); 2) Fire Pro System Pvt. Ltd. Vs. Commissioner of Service Tax – 2008 (10) STR) 36 (Tri.-Bang.); 3) Commissioner of Central Excise Vs. Indian Oil Tanking Ltd. – 2008 (10) STR 11 (Tri.-LB); 4) S.P.Sharma Vs. Commissioner of Central Excise – 2008 (9) STR 72 (Tri.-Del); 5) Emerson Process Management Power and Water Solution Inc. Vs. Commissioner of Central Excise – 2006 (3) STR 508 (Tri.-Del); 6) Commissioner of Central Excise Vs. Flex Engineering Ltd. – 2006 (1) STR 208 (Tri.-Del) and 7) Commissioner of Central Excise Vs. Shapporji Pallonji & Co. Ltd. – 2006 (1) 164 (Tri.-Del.).

vii. As per the classification rule, their service can be classifiable under Works Contract Service only.

viii. Works Contract Service came into effect only from 01.07.2007, therefore, for the prior period, they were not liable to service tax. Their liability to pay service tax started under works contract service only from 01.06.2007, therefore, the demand for service tax should be restricted to Rs.4,10,620/- and the excess amount deposited be refunded to them.

ix. They have some portion of bill where they have provided composite service of labour with material on which they are eligible for 67% abatement under Notification No.15/2004-ST dated 10.09.2004.

x. They rely upon the decisions in the case of : 1) Bhayana Builders (P) Ltd Vs. Commissioner of Service Tax, Delhi – 2013 (32) STR 49 (Tri-LB); 2) Chemex Engineers Vs. Commissioner of Service Tax, Cochin – 2010 (17) STR 534 (Tri.-Bang.).

xi. The value of goods and materials supplied free of cost by the service recipient being neither monetary on non-monetary consideration nor flowing from the service recipient, accruing to the benefit of the service provider, would be outside the taxable value or the gross amount charged.

xii. Value of free supplies does not comprise the gross amount charged under Notification No. 15/2004-ST, including the explanation introduced thereto by Notification No. 4/2005-ST.

xiii. The entire demand is time barred as the notice for the period from 01.04.2004 to 31.03.2008 was issued on 04.09.2009. The larger period of limitation cannot be invoked as there is no suppression, wilful misstatement on their part.

xiv. Penalty under Section 78 of the Finance Act, 1994 cannot be imposed upon them. The notice has baldly alleged suppression on their part without any evidence. They rely upon the judgment of the Hon'ble Gujarat High Court in the case of Steel Cast Ltd – 2011 (21) STR 500 (Guj.).

xv. Penalty also cannot be imposed under Section 76 and 77 of the Finance Act, 1994 as there is no short payment of service tax. They have always been under the bonafide belief that they are not liable for payment of service tax. There was no intention to evade payment of service tax. They rely upon the decision in the case of Hindustan Steel Ltd. Vs. The State of Orissa – AIR 1970 (SC) 253, Kellner Pharmaceuticals Ltd Vs. CCE – 1985 (20) ELT 80, Pushpam Pharmaceuticals Company Vs. CCE – 1995 (78) ELT 401 (SC), CCE Vs. Chemphar Drugs and Liniments – 1989 (40) ELT 276 (SC).

xvi. Penalties under Section 76 and 78 cannot be simultaneously imposed. They rely upon the decision in the case of : The Financers Vs. CCE, Jaipur- 2007 (8) STR 7 (Tri.-Del); Commissioner of Central Excise, Ludhiana Vs. Pannu Property Dealer – 2009 (14) STR 687 (Tri.-Del); Commissioner of C.Ex, Chandigarh Vs. City Motors – 2010 (19) STR 486 (P&H); CCE Vs. Cool Tech Corporation (P&H); amd CCE Vs First Flight Courier Ltd – 2011 (22) STR 622 (P&H).

xvii. The issue involved is of interpretation of statutory provision and therefore, penalty cannot be imposed. They rely upon the decision in the case of :- Bharat Wagon & Engg. Co Ltd. Vs. Commissioner of C.Ex., Patna – (146) ELT 118 (Tri.-Kolkata); Goenka Woolen Mills Ltd Vs. Commissioner of C.Ex., Shillong – 2001 (135) ELT 873 (Tri.-Kolkata); Bhilwara Spinners Ltd Vs. Commissioner of C.Ex, Jaipur – 2001 (129) ELT 458 (Tri._Del).

xviii. There was reasonable cause for failure, if any, on their part to pay service tax and to file returns. Hence, in terms of Section 80 of the Act, penalty cannot be imposed on them under Section 76 and 78 of the Act. They rely on the decision in the case of : 1) ETA Engineering Vs. CCE, Chennai – 2004 (174) ELT 19 (Tri.-LB); 2) Flyingman Air Courier Pvt. Ltd. Vs. CCE – 2004 (170) ELT 417 (T) and 3) Star Neon Singh Vs. CCE, Chandigarh – 2002 (141) ETL 770 (T).

4.1 In their additional written submissions the appellant submitted, inter alia, that :

- Since their transactions are admittedly Works Contract during the period from April, 2005 to March, 2007, there was no liability to discharge service tax at all. This view has been judicially accepted in the following cases : i) Diebold Systems (P) Ltd Vs. Commissioner of Service Tax- 2008 (9) STR 546 (Tri.-Mad); ii) BSBK Pvt. Ltd. Vs. Commissioner of C.Ex.-2009 (013) STR 026 (Tri.-Del); iii) Air Liquide Engg. India Pvt Ltd. Vs, C.C. & C.E. – 2008 (9) STR 486 (Tri.-Bang); iv) Jyoti Ltd. Vs. Commissioner of Central Excise – 2008 (9) STR 373 (Tri.-Ahmd); v) L&T Ltd. Vs. Commissioner of Central Excise – 2007 (7) STR 224 (Tri.-Ahmd); vi) Alstom Projects India Ltd., Vs.

Commissioner of Service Tax, Delhi – 2009 (13) STR 525 (Tri.-Del); vii) Newton Engg.& Chem Ltd. Vs. Commissioner of C.Ex., & Cus, Vadodara-II – 2009 (15) STR 303 (Tri.-Ahmd) ; viii) Bharat Heavy Electricals Ltd. Vs. Commissioner of C.Ex., Bhopal – 2009 (15) STR 239 (Tri.-Del).

5. Personal Hearing in the case was held on 12.01.2022 through virtual mode. Shri Vipul Khandar, Chartered Accountant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum as well as those in additional written submission.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, submissions made at the time of personal hearing and additional written submissions as well as material available on records. The issue before me for decision is whether the service provided by the appellant falls within the ambit of Commercial or Industrial Construction services, as contended by the department, or Works Contract Service, as claimed by the appellant, during the period from 10.09.2004 to 31.05.2007 or otherwise.

6.1 I find that with effect from 10.09.2004, construction service was made chargeable to service tax. The term 'Construction Service' was defined under Section 65 (30a) of the Finance Act, 1994, which is reproduced as under :

> " (30a) "construction service" means,--
> (a) construction of new building or civil structure or a part thereof; or
> (b) repair, alteration or restoration of, or similar services in relation to, building or civil structure which is—
> (i) used, or to be used, primarily for; or
> (ii) occupied, or to be occupied, primarily with; or
> (iii) engaged, or to be engaged, primarily in,
> commerce or industry, or work intended for commerce or industry, but does not include road, airport, railway, transport terminal bridge, tunnel, long distance pipeline and dam;"

6.2 From 16.06.2005, sub-section (25b) was inserted in Section 65 of the Finance Act, 1994 to define Commercial or industrial construction service, the same is reproduced as under :

> " (25b) "commercial or industrial construction service means—

(a) construction of a new building or a civil structure or a part thereof; or
(b) construction of a pipeline or conduit; or
(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or
(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit,

which is –

(i) used, or to be used, primarily for; or
(ii) occupied, or to be occupied, primarily with; or
(iii)engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;".

6.3 With effect from 01.06.2007, sub-section 105 (zzzza) was introduced in Section 65 of the Finance Act, 1994 and the same is reproduced as under :

" (zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation. — For the purposes of this sub-clause, "works contract" means a contract wherein, —

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
(ii) such contract is for the purposes of carrying out, —

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
(c) construction of a new residential complex or a part thereof; or
(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
(e) turnkey projects including engineering, procurement and construction or commissioning *(EPC)* projects;

6.4 From a conjoint reading of the above provisions, it is evident that in terms of the definition of 'Construction Service' and 'Commercial or Industrial Construction service', only the service involved in the said activity was covered by the said definitions. Whereas in terms of the definition of 'Works Contract Service', apart from service, transfer of property in goods involved in the execution of such contract and which is

leviable to tax as sale of goods was also covered. The service provided by the appellant is required to be examined in the light of the above provisions of law.

6.5 I find that the statement of the Director of the appellant is referred to in Para 1.3 of the impugned order and it is stated that the appellant are engaged in construction work and that they used to undertake the contract for the works with the materials and accordingly the payments received from the clients were inclusive of the cost incurred on the materials. These facts have not been disputed by the department. Since the activity undertaken by the appellant also involved supply of material for execution of the construction activity and the payment received by them from their clients was inclusive of the cost of materials, it is clear that the appellant was having a composite contract. Accordingly, in terms of the above provisions of law, the service provided by the appellant is outside the purview of 'Construction Service' and 'Commercial or Industrial Construction service' and is appropriately covered by the scope of 'Works Contract Service', which was introduced w.e.f 01.06.2007.

7. I find that impugned order has been passed in denovo proceedings arising out of Order No. A/11371/2019 dated 18.07.2019 passed by the Hon'ble Tribunal, Ahmedabad in the case of the appellant. The relevant Para 4 & 5 of the said Order is reproduced as under :

> "4. Heard both sides and perused the records. We find that, after further development in the law in the case of *Larsen & Toubro Limited (supra)* the issue needs reconsideration whether the service falls under the Works Contract service and if it is so, then the service tax for the period 01.04.2004 to 31.05.2007 is not payable. Therefore, the matter needs to be reconsidered whether the service falls under the Works Contract or otherwise. As regards the servicer tax liability for the period 01.06.2007 to 31.03.2008, the appellant is not contesting and they have already paid along with interest, therefore the same is maintained.
>
> 5. In view of our above discussion, the matter is remanded to the Adjudicating Authority."

7.1 I find that the Hon'ble Tribunal had remanded the case to reconsider the issue in light of the judgment of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. Vs. Commissioner of C.Ex.,& Cus., Kerala – 2015

(39) STR 913 (SC). It is therefore, pertinent to refer to the said judgment, the relevant Paragraphs are reproduced as under :

> **"14.** Crucial to the understanding and determination of the issue at hand is the second *Gannon Dunkerley* judgment which is reported in (1993) 1 SCC 364. By the aforesaid judgment, the modalities of taxing composite indivisible works contracts was gone into. This Court said :- .....
>
> **15.** A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. **This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.**
>
> **24.** A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "*any service provided*". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the

composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

41. We are afraid that there are several errors in this paragraph. The High Court first correctly holds that in the case of composite works contracts, the service elements should be bifurcated, ascertained and then taxed. The finding that this has, in fact, been done by the Finance Act, 1994 Act is wholly incorrect as it ignores the second *Gannon Dunkerley* decision of this Court. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. **We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts.**

42. It remains to consider the argument of Shri Radhakrishnan that post 1994 all indivisible works contracts would be contrary to public policy, being hit by Section 23 of the Indian Contract Act, and hit by *Mcdowell's* case.

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

44. We have been informed by counsel for the revenue that several exemption notifications have been granted *qua* service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. **Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of."** [Emphasis supplied]

7.2 It is clear from the above judgment of the Hon'ble Supreme Court that prior to 01.06.2007, there was no levy of service tax on indivisible works contract. Further, it was also held that prior to 01.06.2007 there was no charge or machinery to levy and assess service tax on indivisible composite works contract. It follows from the above judgment that in the absence of provision in the Finance Act, 1994 or in the rules made there under, it was not permissible to vivisect the indivisible work contract. The Hon'ble Supreme Court, therefore, held that prior to its amendment, levy of service tax is found to be non existent.

7.3 The implication of the above judgment of the Hon'ble Supreme Court is that even if the value pertaining to service component and the materials involved in the composite works contract are available, it is not permissible to separate the service component and charge service tax on the same as there was no mechanism or provision in the law for the same.

8. I find that the adjudicating authority has referred to the judgment of the Hon'ble Supreme Court at Para 3.8 of the impugned order. However, I find that the adjudicating authority has selectively read a few lines from Para 41 of the said judgment and wrongly concluded at Para 3.9 that *"I find that from the above observation of the Hon'ble Supreme Court, that the apex court is also of the view that in the case of composite contract, the service element should be bifurcated, ascertained and then taxed."*. The adjudicating authority has thereafter, proceeded to vivisect the composite contract, entered into by the appellant, and held that the services provided by the appellant is Commercial or Industrial Construction Service.

8.1 The adjudicating authority has apparently chosen to ignore the starting lines of Para 41 of the said judgment wherein the Hon'ble Supreme Court held that "*We are afraid that there are several errors in this paragraph*". Further, in the concluding lines of the said Para 41, the Hon'ble Supreme Court held that "*We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts*".

8.2 It, therefore, is clear that the adjudicating authority has by selectively reading the judgment of the Hon'ble Supreme Court arrived at an erroneous conclusion that it was permissible to vivisect a composite works contract. Prudence dictates that a judgment has to be read in the full to grasp its full and correct implication. Be that as it may, in view of the judgment, supra, of the Hon'ble Supreme Court, for the period prior to 01.06.2007, it is not permissible to vivisect a composite works contract. Accordingly, the services, inclusive of material, provided by the appellant

would be under the category of 'Works Contract' and not under Commercial or Industrial Construction service. Consequently, the demand for the period prior to 01.06.2007 is not legally sustainable and is accordingly set aside.

9. I find that the appellant have accepted their liability to pay service tax under Works Contract from 01.06.2007 and claimed their service tax liability for the period from 01.06.2007 to 31.03.2008 to be amounting to Rs.4,10620/-. However, in the absence of details and documents on record, it is not possible to verify and quantify the correct amount of service tax payable by the appellant. Therefore, the matter is being remanded back to the adjudicating authority to verify and quantify the service tax payable by the appellant for the period from 01.06.2007 to 31.03.2008. The issue of charging interest and penalties is to be decided considering the re-quantified demand of service tax.

10. In view of the facts discussed herein above, I set aside the impugned order and the appeal filed by the appellant is allowed by way remand.

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

The appeal filed by the appellant stands disposed off in above terms.

30 March, 2022

(**Akhilesh Kumar**)
Commissioner (Appeals)
Date: .03.2022.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Radhika Construction, — Appellant
15, Prashanti Society,
Opposite Maruti Flat,
Radhanpur Road, Mehsana – 384 002
The Additional Commissioner, — Respondent

CGST & Central Excise,
Commissionerate : Gandhinagar

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.
   (for uploading the OIA)
4. Guard File.
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