आयुक्त(अपील)काकार्यालय,

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

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DIN :20211064SW00000001E2

स्पीड पोस्ट

क फाइल संख्या File No : GAPPL/COM/STP/618/2020 / HOLD TO HOLD

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-33/2021-22**
दिनाँक Date : **23-09-2021** जारी करने की तारीख Date of Issue 20.10.2021

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

ग Arising out of Order-in-Original No.**GNR Comm'rate/ST/AC-MKS/Kadi/06/2020-21** दिनाँक:**12.06.2020** issued by Assistant Commissioner of CGST& Central Excise, HQ, Gandhinagar Commissionerate

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

M/s Suvarna Infrastructure
Karan Nagar Road, Kadi,
Mehsana, Gujarat-382715

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 शुल्कअधिनियम, 1994 की धाराअततनीचेबताए गए मामलों के बारेमेंपूर्वोक्त धाराको उप–धारा के प्रथमपरन्तुक के अंतर्गतपुनरीक्षणआवेदन अधीनसचिव, भारतसरकार, वित्तमंत्रालय, राजस्वविभाग, चौथीमंजिल, जीवन दीपभवन, संसदमार्ग, नईदिल्ली : 110001 को की जानीचाहिए।

(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) यदिमालकीहानि के मामलेमेंजब ऐसीहानिकारखानेसेकिसीभण्डागार या अन्य कारखानेमें या किसीभण्डागारसेदूसरेभण्डागारमेंमाललेजातेहुए मार्गमे, या किसीभण्डागार या भण्डारगेंचाहेवहकिसीकारखानेमें या किसीभण्डागारमेंहोमालकीप्रक्रिया के दौरानहुईहो।

(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 मामले 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 क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद 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 भीतर मूल-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 टी.आर-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 होती रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा होती 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 अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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

(क) उक्त लिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर 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 आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरणको एक अपील या केन्द्रीय सरकारको एक आवेदन किया जाता है।

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 अंतर्गतनिर्धारितकिए अनुसारउक्तआवेदन या मूलआदेश यथास्थितिनिर्णयनप्राधिकारी के आदेशमेंसेप्रत्येक की एक प्रतिपर रू.6.50 पैसेकान्यायालय शुल्कटिकटलगाहोनाचाहिए।

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) इनओरसंबंधितमामलोंकोनियंत्रण करनेवालेनियमों की ओरभी ध्यानआकर्षितकियाजाताहैजोशीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण (कार्यविधि) नियम, 1982 मेंनिहितहै।

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

(10) शीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामलेमेंकर्त्तव्यमांग(Demand) एवंदंड(Penalty) का10%पूर्वजमाकरनाअनिवार्यहै। हालांकि, अधिकतमपूर्वजमा10 करोडरुपएहै।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीयउत्पादशुल्कऔरसेवाकरकेअंतर्गत, शामिलहोगा "कर्तव्यकीमांग"(Duty Demanded)

(i) *(Section)* खंड 11D केतहतनिर्धारितराशि;
(ii) लियागलतसेनवैटकेडिटकीराशि;
(iii) सेनवैटकेडिटनियमोंकेनियम 6 केतहतदेयराशि.

➪ **यहपूर्वजमा 'लंबितअपील' मेंपहलेपूर्वजमाकीतुलनामें, अपील' दाखिलकरनेकेलिएपूर्वशर्तबनादियागयाहै.**

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:
(xiii) amount determined under Section 11 D;
(xiv) amount of erroneous Cenvat Credit taken;
(xv) amount payable under Rule 6 of the Cenvat Credit Rules.

इसइस 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. Suvarna Infrastructure, Karan Nagar Road, Kadi, Mehesana, Gujarat - 382 715 (hereinafter referred to as the appellant) against Order in Original No. GNR Comm'ate/ST/AC-MKS/Kadi/06/2020-21 dated 12.06.2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, Hqrs., CGST, Gandhinagar Commissionerate [hereinafter referred to as "*adjudicating authority*"].

2. The facts of the case, in brief, is that the appellant was having Service Tax Registration No. AOGPP7592ASD001 for providing "Construction of Residential Complex Services". During the course of audit of the records of the appellant by departmental officers covering the period from July, 2013 to March, 2017, a specimen set of documents was submitted by the appellant and it was observed that the appellant had made a development agreement with one Lilaben Chimanbhai Darji and one Saileshbhai Baldev Patel (Land Owner), who made a sales agreement with Lilaben Chimanbhai Darji separately. The development agreement indicated that the appellant had developed/constructed the above house and also provided the material, which was required for construction. The total cost of construction/development of the house alongwith material is Rs.17,98,000/-. Examination of the sale agreement indicated that the Saileshbhai Baldev Patel (Land Owner) had made sale agreement of residential plot to Lilaben Chimanbhai Darji for Rs.1,02,000/-.

2.1 The department was of the view that the appellant had developed/constructed the above house and also provided the material required for construction. Therefore, as per the Service Tax Rules, 1994 it appeared that the service provided by the appellant falls under the category of Works Contract Service and not under Construction of Residential Complex Services.

2.2 The appellant did not agree with the audit objection and contended that they are doing development/construction of building/complex and they are providing the construction services. They had made construction agreement with the buyers of residential and commercial properties. They make a land agreement along with the construction agreement. There was no row house above 2000 Sq. Ft and therefore, they are not liable to pay service tax in view of Budget, 2013.

2.3 As per Sr.No.12 of Notification No. 26/2012 dated 20.6.2012, the builder or developer undertaking construction of commercial or residential unit can pay service tax on 30%/25% of the value if the value includes the land value. Therefore, the reply of the appellant was not accepted by the audit and it was found that the service provided by them appeared to fall under Works Contract Service. The appellant had allegedly not/short paid Service Tax amounting to Rs.30,67,298/- during the period from July, 2013 to March, 2017. Accordingly, the appellant was issued a Notice bearing No. VI/1(b)-13/AP-68/Cir-X/17-18 dated 10.08.2018 calling upon them to Show Cause as to why :-

i) Service Tax amounting to Rs.30,67,298/- should not be demanded and recovered from them under the proviso to Section 73 (1) of the Finance Act,1994 ;

ii) Interest at the appropriate rate should not be recovered under Section 75 of the Finance Act, 1994;

iii) Penalty should not be imposed on them under Section 77 and 78 of the Finance Act, 1994.

3. The said SCN was adjudicated by the adjudicating authority vide the impugned order wherein he has :

A) Confirmed the demand of Service Tax amounting to Rs.30,67,298/- and ordered recovery under the provisions of Section 73(2) of the Finance Act, 1994 by invoking the extended period;

B) Ordered recovery of interest under Section 75 of the Finance Act, 1994;

C) Imposed penalty of Rs.10,000/- under the provisions of Section 77(2) of the Finance Act, 1994; and

D) Imposed penalty of Rs.3,04,780/- @ 50% as per the proviso to Section 78 (1) of the Finance Act, 1994 for the period from July, 2013 to 14.05.2015;

E) Imposed a penalty of Rs.24,57,739/- @ 100% as per Section 78 (1) of the Finance Act, 1994 for the period from 15.05.2015 to 31.03.2017.

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

i) They had a contract service for one project named "Kanha Sparsh" of M/s.Janaki Developers, a partnership firm, for construction of the flat and got registered under the category of residential complex service and discharged service tax.

ii) The impugned explanation was to principally bring about parity in various forms of arrangements entered into between the builders and prospective buyers for the purpose of levy of service tax. The object was to obliterate the distinction between a person who engages a builder to construct a unit for him and a person who enters into an arrangement to purchase a unit in a complex, which is under development, from a builder. The purpose of introducing the impugned explanation has been explained in a Circular dated 26/02/2010 issued by the CBEC.

iii) The measure of tax must have a nexus with the object of tax and it would be impermissible to expand the measure of service tax to include elements such as the value of goods because it would result in extending the levy of service tax beyond its object and would impinge in the legislative fields reserved for State Legislatures. They rely upon the decision of the Hon'ble Supreme Court in the case of BSNL Vs. UOI reported at (2006) 3 SCC 1 = 2006 (2) STR 161 (SC).

iv) Undisputedly, the contract between a buyer and a builder/promoter/developer in development and sale of a complex

is a composite one. The arrangement is not for procurement of services simplicitor. An agreement between a flat buyer and the developer/builder is essentially one of purchase and sale of developed property. But by legislative fiction agreements entered into prior to completion of a project and/or construction of a unit are imputed with a character of a service contract. However, indisputably the arrangement between the buyer and builder is a composite one which involves not only the element of services but also goods and immovable property. Thus, while the legislative competence of the Parliament to tax the element of service involved cannot be disputed, the levy itself would fail, if it does not provide for a mechanism to ascertain the value of the services component which is the subject of levy. Clearly service tax cannot be levied on the value of the undivided share of land acquired by the buyer of a dwelling unit or on the value of goods which are incorporated in the project by the developer. Levying tax on the constituent goods or land would intrude into the legislative field reserved for the States under List-II of the 7th Schedule to the Constitution of India.

v) Rule 2A of the Rules provides for mechanism to ascertain the value of services in a composite works contract involving services and goods, it however, does not cater to determination of value of services in case of composite contract which also involves sale of land. The gross consideration charged by a builder/developer from a buyer would not only include an element of goods and services but also the value of undivided share of land which would be acquired by the buyer.

vi) It was stated that the appellant is entitled to abatement to the extent of 75% and only 25% of the gross amount charged by a builder from a flat buyer is charged to service tax. It was suggested, on behalf of the Revenue, that the value of the immovable property in goods incorporated in the works contract stood excluded. This issue stands concluded against the Revenue in the case of Commissioner of C.Ex. Vs. Larsen and Toubro limited. In that case the Supreme Court had affirmed the decision of the Orissa High Court reported at (2008) 12 VST 31 (Orissa) wherein it was held that Circulars or

other instructions could not provide the machinery or provisions for levy of tax.

vii) In the present case neither the Act nor the Rules framed therein provide for a machinery for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory provisions to ascertain the value of services involved in a composite contract.

viii) Notwithstanding any contrary to supra, if differential service tax has been paid under WCT then recipient of service has been eligible to Cenvat Credit so it amount to revenue neutral situation. They rely on the decisions in the following cases : (i) Popular Vehicles & Services Ltd Vs. Commissioner of C.Ex.,Kochi reported at 2010 (18) STR 493 (Tri.-Bang); (ii) R.Agarwal Infracon Pvt Ltd Vs. CCE, Ahmedabad reported at 2010 (18) STR 39 (Tri.Ahmd); (iii) Sakthi Auto Components Ltd Vs. Commissioner of C.Ex., Salem reported at 2009 (14) STR 694 (Tri.-Chennai).

ix) Entire demand is time barred. The SCN covers the period of 01.07.2013 to 31.03.2017 and was issued on 10.08.2018 whereas fact was in the knowledge of the department since 2014 and onwards. Thus the SCN has invoked extended period of limitation based on the allegation that the appellant has suppressed information from the department.

x) The appellant had not suppressed any information from the department and there was not willful mis-statement on their part. The SCN has not given any reason whatsoever for imposing penalty under Section 78 and baldly alleges that there is suppression on their part. Hence penalty cannot be imposed under Section 78. They rely on the decision of the Hon'ble High Court of Gujarat in the case of Steel Cast Ltd reported at 2011 (21) STR 500 (Guj).

xi) Penalty cannot be imposed under Section 77 of the Finance Act since there is no short payment of Service Tax. For imposing penalty there should be an intention to evade payment of Service Tax. Since there was no intention on their part to evade Service Tax, no penalty is imposable. They rely upon the decision of the

Hon'ble Supreme Court in the case of Hindustan Steel Ltd Vs. State of Orissa reported at AIR 1970 (SC) 253.

xii) The issue involved in the present case is of interpretation of statutory provisions and for that reason not penalties can be imposed. They rely upon the following case laws : (1) Bharat Wagon & Engg. Co Ltd vs. Commissioner of C.Ex., Patna reported at 2002 (146) ELT 118 (Tri.-Kolkata); (2) Goenka Woolen Mills Ltd Vs. Commissioner of C.Ex., Shillong reported at 2001 (135) ELT 873 (Tri.-Kolkata); (3) Bhilwara Spinners Ltd Vs. Commissioner of C.Ex., Jaipur reported at 2001 (129) ELT 458 (Tri.-Del.)

5. Personal Hearing in the case was held on 16.09.2021 through virtual mode. Shri Vipul Khandhar, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum and written submission dated 15.09.2021.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and evidences available on records. The issue to be decided is whether the service provided by the appellant is "Construction of Residential Complex Services" as contended by them or "Works Contract Services" as contended by the department. The demand pertains to period from July, 2013 to F.Y. 2016-17. I find that w.e.f. 01.07.2012, Section 65 has been replaced by Section 65B of the Finance Act, 1994. 'Works Contract' is defined under Section 65B (54) of the Finance Act, 1994 as :

> " "works contract" means a contact wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property".

6.1 Further, Section 66E of the Finance Act, 1994 specifies the Declared Services which are subject to levy of Service Tax and sub-section (b) reads as :

> " construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority".

6.2 From a reading of both definitions, I find that if the service is involving only construction activity without supply of goods or material the same would be covered by the Section 66E (b) of the Finance Act, 1994 and be chargeable to Service Tax as Construction Services. However, if the construction activity involves supply of goods or materials used in such construction then such activity would be covered under Works Contract Service in terms of Section 65B (54) of the Finance Act, 1994.

6.3 In the present case, I find that the construction service provided by the appellant is in terms of a development agreement and as per the conditions of the agreement, all the material, goods, instruments etc. that are required to construct the said property will be purchased by the appellant. Items like bricks, cement, iron and steel etc. will be purchased by the appellant. I find that the appellant has not disputed or contested these facts. Therefore, it is evident that the activity of the appellant is not merely a construction service, but the same is a composite works contract involving construction service as well as supply of goods used in providing the construction service. Therefore, the service provided by the appellant is appropriately covered by the scope of 'Works Contract' service as defined under Section 65B (54) of the Finance Act, 1994.

7. The judgements cited by the appellant in their support are not applicable to the facts of the present case as the said judgements were in respect of Section 65 of the Finance Act, 1994 as it stood prior to its amendment by the Finance Act, 2007. A new sub-section (zzzza) was

inserted in Section 65 (105) in Finance Act, 2007 and works contract was defined as a taxable service w.e.f 01.6.2007.

7.1 I find that the Hon'ble Tribunal had in the case of Emaar MGF Construction Pvt Ltd. Vs. Commissioner of C.Ex., & Cus, New Delhi reported at 2020(034) GSTL 0509 (Tri.Del.) held that :

> **22.** The Supreme Court in *Larsen & Toubro* examined as to whether Works Contract Service can be classified under Section 65(105)(zzzh) and held that the scope of Section 65(105)(zzzh) is limited to cover contract of service simplicitor only and not a composite works contract. The Supreme Court noticed that it is only w.e.f. 1 June, 2007 that Section 65(105)(zzzza) was introduced to cover composite works contract and so works contract cannot be covered under any other category of services prior to 1 June, 2007. The relevant portion of the judgment is reproduced below :
>
> > "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 simplicitor and not composite indivisible works contracts.
>
> > xxxxxxx xxxxxxx
> > xxxxxxx

> 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 simplicitor 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 simplicitor 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 simplicitor 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."
>
> **23.** It is, therefore, clear from the aforesaid judgment of the Supreme Court in *Larsen & Toubro* that a Composite Works Contract cannot be taxed under CCS under Section 65(105)(zzzh) as the scope is limited to cover contract of service simplicitor only.

8. In view of the above discussions and the decision of the Hon'ble Tribunal, I find that the service provided by the appellant is a composite work contract falling within the scope of Works Contract as defined under Section 65B (54) of the Finance Act, 1994 and chargeable to Service Tax accordingly. I, therefore, find that the appellant are liable to pay the amount of Service Tax demanded and confirmed by the impugned order.

9. The appellant have also contended that if differential service tax is held to be payable under Works Contract, the recipient of service would be eligible to Cenvat Credit and it amounts to revenue neutral situation. I do not find any merit in this contention of the appellant. In terms of Rule 2(l) (i) (A) of the Cenvat Credit Rules, 2004, service portion in the execution of works contract and construction services are excluded from the scope of 'input service'. Therefore, the contention of the appellant in this regard is not tenable.

10. The appellant have also raised the issue of limitation. I find that the appellant had despite being engaged in providing service under a composite

works contract intentionally mis-classified the service provided by them as merely construction services. The fact of the construction service being provided along with supply of goods and materials was not disclosed to the department. These relevant facts came to the notice of the department only in the course of the Audit of records of the appellant and therefore, this is a clear case of suppression of facts. Therefore, the extended period of limitation has been rightly invoked.

11. The appellant have also contended that penalty is not imposable upon them as there was no intent to evade service tax and have relied upon various judgements in their support. However, I find that the actions of the appellant in suppressing the facts and mis-classifying the composite works contract provided by them as Construction services is indicative of their intent to not pay appropriate service tax on the Works Contract service provided by them. Therefore, their claim on lack of intent to evade payment of service tax is without merit.

12. In view of the above discussions, I reject the appeal filed by the appellant and uphold the impugned order.

13. 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.

23rd September, 2021.

(Akhilesh Kumar)

Commissioner (Appeals)

Date: .09.2021.

Attested:

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

BY RPAD / SPEED POST

F No.GAPPL/COM/STP/618/2020

To

Appellant

M/s.Suvarna Infrastructure,
Karan Nagar Road,
Kadi, Mehesana, Gujarat – 382 715.

Respondent

The Assistant Commissioner,
Hqrs., CGST,
Gandhinagar Commissionerate

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Mehesana.

(for uploading the OIA)

4. Guard File.
5. P.A. File.