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 : **20220264SW000000D507**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1508/2021 /5973-77

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-95/2021-22**
दिनाँक Date : **21-01-2022** जारी करने की तारीख Date of Issue 07.02.2022

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

ग Arising out of Order-in-Original No. **GNR Comm'ate/ST/DC-DK/Kadi/30/2020-21** दिनाँक: **27.02.2021** issued by Deputy Commissioner, CGST& Central Excise, Division Kadi, Gandhinagar Commissionerate

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

M/s Shayar Construction Co.
158/1, Opp. O.N.G.C Colony,
At-Merda, Taluka-Kadi, Dist-Mehsana

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 पूर्वोक्त 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 और 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.

(72) 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:
(cxcix) amount determined under Section 11 D;
(cc) amount of erroneous Cenvat Credit taken;
(cci) 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. Shayar Construction Co., 158/1, Opp. ONGC Colony, At: Merda, Taluka : Kadi, District : Mehsana, Gujarat (hereinafter referred to as the appellant) against Order in Original No. GNR Comm'ate/ST/DC-DK/Kadi/30/2020-21 dated 27.02.2021 [hereinafter referred to as "*impugned order*"] passed by the Deputy Commissioner, CGST, Division : Kadi, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant are engaged in the business of laying of underground and over ground pipelines etc. for their clients M/s.ONGC, M/s.IOCL etc. for which they are holding Service Tax Registration No. ABEPR1777NST001 under the category of Commercial or Industrial Building and Civil Structures. The appellant had availed the benefit of Notification No. 01/2006-ST dated 01.03.2006 and availed abatement of value @ 67% during the F.Y. 2011-12 without fulfilling the condition of the notification inasmuch as they failed to include the value of the goods and materials supplied or provided or used by them in the gross value charged by them for arriving at the service tax liability. Hence, the appellant was issued SCN No. V.ST/15-61/Dem/OA/13 dated 07.06.2013 demanding service tax amounting to Rs.45,48,179/-. Further, periodical SCN bearing No. STC/Kadi/SCN-01/2013-14 dated 05.05.2014 for the period April, 2012 to June, 2012 and SCN bearing No. STC/Kadi/SCN-02/2013-14 dated 30.09.2014 for the period July, 2012 to September, 2012 were issued to the appellant.

2.1 On scrutiny of the ST-3 returns for the period from October, 2012 to March, 2013 filed on 08.09.2013, it was noticed that the appellant had filed the return under the category of 'Construction services other than residential complex, including commercial/industrial buildings or civil structures' declaring gross amount received as Rs. 1,34,20,635/- and service tax payable as Rs.5,31,458/- claiming benefit of Notification No. 26/2012-ST dated 20.06.2012.

2.2 It appeared that the appellant was awarded a three year rate contract by ONGC for the work of 'laying of flow lines, leakage repair work along with miscellaneous modification works in fields of Ahmedabad Asset'. As per the work order the rates indicated in Schedule-A are inclusive of service tax @ 3.399% and in case of change in rate of service tax from 10.30%, the rate of 3.399% will also get amended accordingly. It, thus, appeared that the service tax rate of 3.399% of taxable value was worked out after availing abatement of 67% of the taxable value under Notification No. 01/2006-ST dated 01.03.2006 under the category of 'Commercial or Industrial Construction Service'. Further, from the work order it appeared that for laying underground pipe line, laying of over ground pipe line, leakage repair works, etc. pipes used have been supplied by ONGC free of cost.

2.3 It was observed that Notification No. 26/2012-ST dated 20.06.2012 is conditional and exempts service tax as is in excess of the service tax calculated on a value which is equivalent to 25% of gross amount charged by the service provider for providing the taxable service. The amount charged shall be the sum total of the amount charged for the service, including the fair market value of all goods and services supplied by the recipient in or in relation to the service, whether or not supplied under the same contract or any other contract, after deducting the i) amount charged for such goods or services supplied to the service provider, and ii) the value added tax or sales tax, if any levied thereon. It appeared that the appellant is not entitled to the benefit of the said notification as they failed to fulfill the conditions of the said notification by not including the value of goods or materials supplied free of cost by the service recipient.

2.4 It appeared from the ST-3 returns filed by the appellant for the period from October, 2012 to March, 2013 that they had claimed abatement of Rs.89,91,825/- from the total value of service amounting to Rs.1,34,20,635/- and declared taxable value of Rs.44,28,810/-, which is 33% of the total value charged by the appellant. It, therefore, appeared that the

appellant had availed the benefit of Notification No. 1/2006-ST dated 01.03.2006. The said notification is conditional and exempts service tax as is in excess of the service tax calculated on a value which is equivalent to 33% of gross amount charged by the service provider for providing the taxable service, provided that the gross value charged shall include the value of goods and material supplied or provided or used by the provider of service and that the service provider should not have availed cenvat credit. It appeared that the appellant is not entitled to the benefit of the said notification as they failed to fulfill the conditions of the said notification by not including the value of goods or materials supplied free of cost by the service recipient.

3. Further, the appellant had also entered into a contract with IOCL and were issued work order by IOCL. The appellant contended that IOCL had not supplied goods or material free of cost for execution of the work order. However, as per the work order and from the statement of the Manager of the appellant firm, it appeared that all the goods or material required for execution of work were supplied by IOCL free of cost. Hence, the appellant was required to pay service tax @ 12.36% on the gross amount charged.

4. It, therefore, appeared that the appellant had short paid service tax amounting to Rs.11,11,389/- during the period from October, 2012 to March, 2013. The appellant was issued a SCN bearing no. V.ST/15-214/DEM/OA/14 dated 03.03.2015 wherein it was proposed to demand and recover service tax amounting to Rs.11,11,389/- under Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Imposition of penalty was also proposed under Section 76, 77(2) and 78 of the Finance Act, 1994.

5. The said SCN was adjudicated vide the impugned order and the demand for service tax was confirmed along with interest. Penalty was also imposed under Section 77 (2) and 78 of the Finance Act, 1994.

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

i. They are involved in undertaking composite contracts for supply and construction, procure the construction material and construct the site for which a lump sum consideration is charged from the customer. Despite the fact that there can be no vivisection of a composite contract, the government notified 'Commercial Construction Services' and issued Notification No. 15/2004-ST dated 10.09.2004 granting abatement of 67% towards the material component. The said notification was later consolidated into Notification No. 1/2006-ST dated 01.03.2006.

ii. They have some portion of bill amount for which they have provided composite service of labour with material on which they were eligible for 67% abatement under Notification No. 15/2004-ST dated 01.03.2004.

iii. The conflicting positions of the judiciary and the government resulted in substantial confusion. They decided to adopt a conservative approach and registered themselves under 'Commercial Construction Services' and accordingly discharged service tax.

iv. They rely on the decision of the Larger Bench of the Hon'ble Tribunal in the case of Bhayana Builders from which it is clear that free supply value is not within the scope of the contractee, for availment of abatement benefit it is not required to be added in gross value. Without inclusion of the value of free supply material, the service provider can avail the benefit of abatement.

v. Vide Notification No. 26/2012-ST, they are liable to pay service tax @ 50% of the total liabilities as they are a body corporate.

vi. By allowing abatement, their service tax liability is Rs.3,31,758/- against which they have paid Rs.5,47,401/-. They have paid excess service tax amounting to Rs.2,15,643/- which is refundable to them.

vii. 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.).

viii. The value of goods and materials supplied free of cost by the service recipient being neither monetary on non-monetary consideration b or flowing from the service recipient, accruing to the benefit of the service provider, would be outside the taxable value or the gross amount charged.

ix. 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.

x. With the introduction of the Negative list of service w.e.f 01.07.2012 the requirement of service category became redundant. They have not opted for that particular service and they were engaged in execution of contract with IOCL where material, labour and service was involved. So they opted for Rule 2A of the Valuation Rules, 2006 and discharge the service tax accordingly. The department contention regarding opting for the abatement and non grossing up the free supply value of material in the service tax value is not tenable. Further, the material supplied by IOCL were not in the scope of the appellant.

xi. The SCN for the period from October, 2012 to March, 2013 was issued on 03.03.2015 whereas the facts were in the knowledge of the department since 2012 onwards. Extended period cannot be invoked in the present case as there is no suppression or willful mis-statement on their part.

xii. Penalty also cannot be imposed 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).

xiii. No case has been made out by the department that the demand of service tax is on account of fraud, collusion, willful mis-statement, suppression of facts or contraventions with intent to evade payment of service tax.

xiv. 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).

7. Personal Hearing in the case was held on 17.11.2021 through virtual mode. Shri Vipul Khandhar, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

8. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the submissions made at the time of personal hearing. The issue before me for decision is whether the abatement in respect of the taxable value of services availed by the appellant in the facts and circumstances of the case is proper or otherwise. The demand for service tax is for the period from October, 2012 to March, 2013.

9. I find that the appellant is engaged in providing the service of laying of over ground and underground pipelines, leakage repair works etc. The appellant were registered with the Service Tax department under the category of 'Construction services in respect of Commercial or Industrial Building and Civil Structures'. With the introduction of the Negative List of Services regime w.e.f. 01.07.2012, the classification of services was no more relevant to the levy and payment of service tax. The applicability of service tax was determined on the basis of Section 65B of the Finance Act, 1994, the Declared Services in terms of Section 66E of the Finance Act, 1994 and the Negative List of Services in terms of Section 66D of the Finance Act, 1994. Therefore, the definitions of services under Section 65

of the Finance Act, 1994 are not relevant to the issue as the demand pertains to the period post introduction of the negative list of services regime.

9.1 Despite the above legal position, I find that the impugned SCN has proceeded to deal with the eligibility of abatement under the said notifications by applying the definition of services as it stood prior to 01.07.2012. At the same time, I find that the appellant too have not come forward with the proper description of the services being provided by them.

9.2 From the SCN and the impugned order, I find that the department has sought to deny the benefit of Sr. No.12 of Notification No. 26/2012-ST dated 20.06.2012 on the grounds that the value of the goods/material supplied free of cost by the service recipient has not been included in the gross value charged by the appellant. However, I find that the said notification is not applicable to the facts of the present case. The taxable service covered by Serial Number 12 of Notification No. 26/2012-ST dated 20.06.2012 is reproduced as under :

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

9.3 From a plain reading of the above entry, it is clear that the same is in respect of construction service of a complex, building, civil structure or a part thereof, **intended for sale** to a buyer. I find that in the instant case there is no sale or intention of sale involved in service provided by the appellant and, therefore, Sr.No.12 of the said notification has no applicability.

10. I find that the appellant have in their appeal memorandum contended that they have claimed the abatement in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006. I find that the said Rule 2A is applicable to Works Contract Service. Therefore, the appellant

are contending that the service provided by them is in the nature of Works Contract service. Works Contract has been defined under Section 65B (54) of the Finance Act, 1994, which is reproduced as under :

> " "works contract" means a contract 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".

10.1 From a reading of the definition of Works Contract as per Section 65B(54) of the Finance Act, 1994, it emerges that there are two primary ingredients which are required to be satisfied so as to fall within the scope of Works Contract :

1) The contract should involve transfer of property in goods, involved in the execution of such contract, which is leviable to tax as sale of goods; and
2) Such contract is for the purpose of carrying out construction, erection, etc...

10.2 In the instant case, the SCN, the impugned order and the submissions of the appellant brings out the fact that there is free supply of goods/material by the service recipient to the appellant which is used by them for providing the service. However, I find that it is not clearly forthcoming from either the impugned order or the submissions of the appellant whether in execution of the contract, transfer of property is involved, which is leviable to tax as sale of goods. If there is no transfer of property involved, then the service would be outside the purview of Works Contract Service. Therefore, this issue needs verification before considering the claim of the appellant that the service provided by them is in the nature of Works Contract Service.

10.3 I also find that the abatement of 67% claimed by the appellant is not consistent with the provisions of the said Rule 2A inasmuch as the same provides for different rates of abatement as provided in sub-rule (ii) of Rule 2A, as it stood at the relevant point of time. The said Rule 2A (ii) is reproduced as under :

> "(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-
>
> (A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;
> (B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;
> (C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;"

10.4 From the above it is clear that Rule 2A (ii) provided for abatement of 60%, 30% and 40% abatement on three different kinds of works contract service. However, there is no provision of abatement @ 67% as claimed by the appellant.

10.5 I further find that the three year Rate Contract issued by ONGC vide No. AMD/MM/ASSET/SC/07/2009-10/L-5/16/P-7(A) is dated 29.07.2010 and as per the said contract, the rates are inclusive of Service Tax @ 3.399%. Therefore, the contract was issued prior to introduction of the negative list of services regime w.e.f. 01.07.2012, and the service tax was calculated on the abated value available in terms of Sr.No.7 of Notification No. 1/2006-ST dated 01.03.2006. The said Serial number 7 is in respect of Commercial or Industrial Construction services classifiable under the erstwhile Section 65 (105) (zzq) of the Finance Act, 1994. However, the appellant have, subsequent to 01.07.2012, in respect of the same contract claimed that the service provided by them was 'Works Contract'. I am of the view that there being no change in the terms of the

contract, the appellant cannot seek to change the nature of the service from Commercial or Industrial Construction services to Works Contract services and discharge service tax accordingly. This is neither proper nor permissible in law.

11. Having considered the view of the department as enunciated in the SCN and the impugned order as well as the submissions of the appellant, I am of the considered view that the contention of both the department as well as the appellant are mis-directed. While the claim of the appellant to the service being works contract and abatement is not tenable, the contention of the department too, as regards applicability of Notification No. 26/2012-ST dated 20.06.2012, is not proper. The extent of abatement, if any, admissible to the appellant in terms of the extant notification has to be decided afresh.

12. The appellant have also contested the demand confirmed vide the impugned order on the grounds of limitation. In this regard, I find that the issue has been dealt with by the adjudicating authority at Para 7.1.2 of the impugned order and it has been clearly stated that the SCN was issued within the normal period of limitation. I do not find any infirmity in the finding of the adjudicating authority and, therefore, I reject the contention of the appellant as regards limitation.

13. I find that the demand, confirmed by the impugned order, was raised by a SCN which was issued periodically to the appellant. That being the case, it cannot be alleged that the appellant has indulged in fraud, willful mis-statement or suppression of facts. Further, the SCN has been issued under Section 73 (1) of the Finance Act, 1994. Therefore, the ingredients for imposing penalty under Section 78 (1) of the Finance Act, 1994 are not present in the instant case. I am of the view that the adjudicating authority has erred in imposing penalty under Section 78 of the Finance Act, 1994. Accordingly, the penalty imposed under Section 78 of the Finance Act, 1994 in the impugned order is set aside. I find that penalty has not been imposed under Section 76 of the Finance Act, 1994 in view of

the penalty imposed under Section 78 of the Finance Act, 1994. As the matter is being remanded back to the adjudicating authority for denovo proceedings, the issue of imposition of penalty under Section 76 of the Finance Act, 1994 is left open for the adjudicating authority to decide upon.

14. In view of the above findings and discussions, I am of the view that the issue is required to be re-examined afresh in light of the observations recorded hereinabove. I, therefore, set aside the impugned order and remand back the case to the adjudicating authority for denovo adjudication in light of the directions contained hereinabove.

15. 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.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: .01.2022.

Attested:

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

BY RPAD / SPEED POST

To

M/s. Shayar Construction Co., Appellant
158/1, Opp. ONGC Colony,
At: Merda, Taluka : Kadi,
District : Mehsana, Gujarat

The Deputy Commissioner, Respondent
CGST & Central Excise,
Division- Kadi,
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.
5. P.A. File.