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

सत्यमेव जयते

NATION TAX MARKET

DIN : **20220764SW0000000ABA**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2318/2021 / 2429 TO 2433

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-31/2022-23**
दिनाँक Date : **07-07-2022** जारी करने की तारीख Date of Issue 08.07.2022

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

ग Arising out of Order-in-Original No. **GNR Comm'ate/ST/AC-MKS/Kadi/25/20-21** दिनाँक: **17.12.2020** passed by Assistant Commissioner, CGST& Central Excise, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Shayar Construction Co.**
   158/1, Opp. O.N.G.C Colony,
   Merda, Kadi, 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 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.

कार्यालय, केन्द्रीय वस्तु एवं सेवाकर (अपील) आयुक्तालय OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

(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.

(54) 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:
(cxlv) amount determined under Section 11 D;
(cxlvi) amount of erroneous Cenvat Credit taken;
(cxlvii) 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/AC-MK/Kadi/25/20-21 dated 17.12.2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, 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 Construction services in respect of Commercial or Industrial Building and Civil Structures. An inquiry was initiated against the appellant and information and documents for the F.Y. 2011-12 was called for from them. On scrutiny of the ST-3 returns filed by the appellant for the period F.Y. 2011-12, it was observed that the appellant was providing the services of laying of Gas and Water pipeline etc. without claiming the benefit of abatement under Notification No. 01/2006-ST dated 01.03.2006. It was further observed that the service tax amounting to Rs.37,17,059/- on the taxable value of Rs.3,60,87,946/-, as per the ST-3 returns filed by them, was not paid by the appellant. Therefore, the appellant was asked vide letter dated 18.04.2013 to pay the service tax along with interest. The appellant vide letter dated 23.04.2013 submitted a reconciliation of income claiming 67% abatement of value and worked out the service tax payable as amounting to Rs.19,90,199/- on payment receipt basis.

2.1 The inquiry revealed that in terms of the contract of the appellant with ONGC, pipes were supplied by ONGC free of cost for execution of work. Further, scrutiny of the invoices issued by the appellant to their clients revealed that service tax element was considered while issuing invoices and the same was calculated at different rates and the total value of the invoices have been shown as income in their books of accounts. It appeared from the

invoices that the appellant had charged service tax on the abated value and in some cases, the service tax charged was not clear. It further appeared that the appellant had been charging service tax calculated on 33% of the gross value received by them after availing abatement of 67% of the gross value in terms of Notification No. 01/2006-ST dated 01.03.2006 without considering the value of material/goods received free of cost from the customer. The appellant appeared to be liable to pay service tax amounting to Rs. 53,10,636/-, out of which service tax amounting to Rs.7,62,457/- was already paid by them. Therefore, the balance amount of service tax amounting to Rs.45,48,179/- was recoverable from them.

2.2 Further, the appellant had received amount of Rs.9,41,089/- and Rs.5,11,360/- towards renting of JCB machine and DG set respectively. The service provided by the appellant in this regard appeared to be taxable under the category of Supply of Tangible Goods service for which the appellant had not obtained service tax registration and neither had they paid the service tax amounting to Rs.1,35,632/-.

3. The appellant was issued SCN No. VST/15-61/Dem/OA/2013 dated 07.06.2013 wherein it was proposed to

a) Deny the benefit of Notification No.01/2006-ST dated 1.03.2006 and charge service tax on the gross value charged towards Commercial or Industrial construction service.
b) Consider the income of Rs.5,15,59,571/- earned during F.Y.2011-12 as taxable value for providing Commercial or Industrial construction service.
c) Demand and recover service tax amounting to Rs. 45,48,179/-, not paid by them under Commercial or Industrial construction service, under Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.
d) The income of Rs.13,16,817/- received during F.Y. 2011-12 towards renting of JCB and DG set should not be considered as taxable income for providing Supply of Tangible Goods service.
e) Demand and recover service tax amounting to Rs.1,35,632/- under Section 73 (1) of the Finance Act, 1994 along with interest under

Section 75 of the Finance Act, 1994 in respect of the Supply of Tangible Goods service.

f) Impose penalty under Section 76, 77(1) (a) and 77(2) of the Finance Act, 1994.

4. The said SCN was adjudicated vide the impugned order wherein :

A. The benefit of Notification No.01/2006-ST dated 01.03.2006 was allowed in respect of Commercial or Industrial Construction services.

B. The service tax payable was ascertained as amounting to Rs.17,52,510/- out of which service tax amounting to Rs.7,62,457/- was paid and therefore, the remaining service tax amounting to Rs.9,90,053/- was held to be payable.

C. The service tax amounting to Rs.4,43,058/- paid vide Challan dated 28.02.2014 was appropriated and the remaining service tax amounting to Rs.5,46,995/- was ordered to be recovered under Section 73 (2) of the Finance Act, 1994.

D. The demand for service tax amounting to Rs.27,95,660/- was dropped.

E. The income of Rs. 13,16,817/- was held to be taxable value towards providing Supply of Tangible Goods service.

F. The demand for service tax amounting to Rs.1,35,632/- was confirmed and ordered to be recovered under Section 73 (2) of the Finance Act, 1994 and the amount of Rs.1,35,632/- paid by them vide Challan dated 28.02.2014 was appropriated.

G. Interest was ordered to be recovered under Section 75 of the Finance Act, 1994 and the amount of Rs.11,810/- paid vide Challan dated 28.02.2014 was appropriated.

H. Total penalty amounting to Rs.5,62,842/- was imposed under Section 76 of the Finance Act, 1994.

I. Penalty amounting to Rs.10,000/- was imposed under Section 77(2) of the Finance Act, 1994.

J. Penalty amounting to Rs.10,000/- was imposed under Section 77(1)(a) of the Finance Act, 1994.

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

i. They had entered into supply of material contract with ONGC, IOCL, GSPC etc. which are separately identifiable from the bills raised to these parties and they claim the benefit of Notification No.12/2003-ST dated 20.06.2003.

ii. The SCN does not indicate the activity undertaken by them and on which ground the benefit of the said notification is sought to be denied.

iii. They rely upon the decision in the case of Amrit Foods Vs. CCE – 2005 (190) ELT 433 (SC) wherein it was held by the Hon'ble Supreme Court that the assessee has to be put to notice as to the exact nature of contravention for which he is liable.

iv. In Para 14 of the SCN it is alleged that they are not entitled to the benefit of the said notification as they had failed to fulfill the conditions and it has been alleged that they had not produced any documentary evidence indicating that the value of such goods and materials sold to the recipient of service. It is submitted that they had fulfilled all the conditions of the said notification. They had a contract for supply of material and providing service also. They rely upon the decision in the case of Sobha Developers Ltd. – 2010 (19) STR 75 (Tri.-Bang.)

v. They had credited the ledger accounts of the customer to the extent of 70% as material consumption value and the same is clear from Para 6.2 and 6.3 of the SCN. This in itself is proof to claim the benefit of the said notification. The notification does not contemplate that they must issue invoice and the value of material must be mentioned on the invoice. It only contemplates that there should be documentary proof for consumption of material. They rely upon the decision in the case of Shilpa Color Lab – 2007 (5) STR 423 (Tri.-Bang.). This decision was confirmed by the Hon'ble Supreme Court – 2009 (14) STR J163 (SC).

vi. During the impugned period, they had raised separate invoice for supply of material value. During the impugned period they were working as supplier of material, service provider and composite contract involving labour and material.

vii. If the deduction is allowed for material sale value, the total service tax payable is amounting to Rs.12,79,729/- out which they have already paid service tax amounting to Rs.7,62,457/- prior to issuance of SCN. The balance service tax has been started to be deposited by them.

viii. Service Tax chargeable on any taxable service is on the basis of gross amount charged for 'such' service provided or to be provided. Thus, 'such service' means taxable service on which service tax is payable. Service tax is payable only on the amount charged for service which is defined as taxable service. Tax cannot be levied on any other amount charged to the customer.

ix. In case of indivisible contract involving sale of goods and provision of service, it is difficult to identify service portion. They rely upon the decision in the case of Bharat Sanchar Nigam Ltd Vs. UOI – (2006) 3 SCC 1; Imagic Creative Pvt. Ltd. Vs. CCT – (2008) 2 SCC 614. Service tax can be imposed only on value of service and not on material cost.

x. Reliance is also placed upon the decision in the case of Kone Elevators Vs. CST – (2007) 10 STT 133 (CESTAT); Super Transports Vs. CCE – (2008) 13 STT 94 (CESTAT).

xi. Regarding service tax under the category of Supply of Tangible Goods it is submitted that as per the definition under Section 65(105)(zzzzj) of the Finance Act, 1994, it may also be possible to argue that what is liable is service in relation to supply of tangible goods without transferring right of possession and effective control of such machinery and not the supply itself.

xii. Transfer of goods may take place from one person to another but should be without transfer of possession or control. Normally such goods require special skills to operate the goods or assets under question. If there is a transfer of possession or control, it would not be covered as taxable service.

xiii. During the impugned period they had give JCB on rental basis, where the JCB was under the control of the principal, they in turn were receiving rent for the same. So their activities were not classifiable under supply of tangible goods and hence, not liable for service tax under the category of supply of tangible goods.

xiv. They rely upon the decision in the case of Aggarwal Brothers Vs. State of Haryana – (1999) 113 STR 317 (SC); Essar Telecom Infrastructure (P) Ltd. Vs. UOI – (2012) 35 STT 453 (Karnataka); Indian National Shipowners Association Vs. UOI – 2009 (14) STR 289 (Bom.); Hardy Exploration & Production (I) Inc – 2012 (28) STR 513 (Commr.Appl).

xv. The entire demand is time barred. The SCN covers the period from 01.04.2011 to 31.03.2012 and the SCN was issued on 07.06.2013. Thus, the SCN has invoked the extended period of limitation and has baldly alleged that they have suppressed information from the department. Extended period cannot be invoked as there is no suppression, wilful mis-statement on their part. They clearly indicated from the past SCN issued by the department that they are availing benefit of Notification No.1/2006-ST. Therefore, question of suppression or wilful mis-statement on their part does not arise.

xvi. The department has issued Circulars clarifying the scope of service and applicability of service tax to the sub-contractor wherein it is specifically mentioned that the kind of services provided by them are not taxable.

xvii. Penalty is not imposable under Section 76 and 77 as there is no short payment of service tax. For imposing penalty, there should be intention to evade 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).

xviii. The present case is covered by Section 80 of the Finance Act, 1994 which expressly provides that no penalty shall be imposed under Section 76 and 77 if the appellant had reasonable cause for default.

xix. 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).

xx. They are not liable for penalty on the amount of service tax which has already been paid prior to issuance of SCN. They rely on Trade Notice

No. 48/2008 dated 03.10.2008 issued by Commissioner of Central Excise, Madurai.

6. The appellant filed additional written submissions on 19.04.2022 wherein it was submitted, inter-alia, that :

- During the impugned period they were involved in supply of material. The adjudicating authority has demanded service tax without classifying their service under proper head and allowing relevant benefit. They refer to the classification of service as per Section 65A of the Finance Act, 1994 as well as the definition of Commercial Construction services. Nowhere their service has been defined as a part of civil construction.
- Attention is also drawn towards definition of works contract service as per Section 65 (105) of the Finance Act, 1994. Their construction service income can be classifiable as Works Contract Service. Accordingly, the demand under the category of Construction of Commercial and Industrial service is not sustainable.
- Penalty under both Section 76 and 77 of the Finance Act, 1994 cannot be 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); and CCE Vs First Flight Courier Ltd – 2011 (22) STR 622 (P&H).
- 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).

7. Personal Hearing in the case was held on 24.05.2022 through virtual mode. Shri Vipul Khandhar, 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.

8. I have gone through the facts of the case, submissions made in the Appeal Memorandum, in the additional written submissions as well as the submissions made at the time of personal hearing. The issues before me for decision are :

I. Whether the appellant are eligible for the benefit of Notification No. 12/2003-ST dated 20.06.2003 or otherwise.

II. Whether the renting of JCB and DG set is Supply of Tangible Goods service or otherwise.

9. I find that the demand for service tax pertains to the period F.Y. 2011-12. The SCN was issued to the appellant demanding service tax by denying benefit of abatement in terms of Notification No.01/2006-ST dated 01.03.2006. The adjudicating authority has vide the impugned order held that the appellant was eligible for abatement under the said notification and accordingly reduced the demand for service tax and confirmed the demand on the abated value in terms of the said notification. The appellant had in their submission before the adjudicating authority claimed that that they had also supplied only material to their customers for which for which separately identifiable bills were raised by them and therefore, they were eligible for the benefit of exemption under Notification No. 12/2003-ST dated 20.06.2003. It is the claim of the appellant that they had during the impugned period supplied materials valued at Rs.1,63,59,191/- to their customers. The adjudicating authority has at Para 6.4.1.1 of the impugned order recorded that the appellant had not provided any documentary evidences in support of their claim of supply of materials.

9.1 At this juncture it is relevant to refer to the provisions of Notification No. 12/2003-ST dated 20.06.2003, which is reproduced as below :

> "In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."

9.2 It is evident that the said notification is applicable in cases where the provision of service also involves supply of goods and material. If an assessee has also sold goods along with providing service and produces documentary

proof indicating the value of the goods and material sold, then such value is excluded for the purpose of levy of service tax. The cases where there does not exist any documentary proof indicating the value for the goods sold, in the course of provision of service, they are is covered by Notification No. 01/2006-ST dated 01.03.2006. The said notification provides for abatement from the gross amount charged for provision of service and accordingly service tax is payable only on the abated value. However, the benefit under this notification is subject to conditions, which are reproduced below :

> "Provided that this notification shall not apply in cases where, -
>
> (i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or
>
> (ii) the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003]".

9.3 In terms of the second proviso, the benefit of abatement is not available if the benefit of Notification No.12/2003-ST dated 20.06.2003 has been availed. This makes it abundantly clear that both the said notifications provide for the same benefit i.e. excluding the value of goods and material supplied in the course of provision of taxable service and the assessee can chose to avail either of the said notifications depending upon the facts and circumstances. Where it is not possible to produce documentary proof showing the value of the goods sold, abatement of the gross amount charged for the taxable service is provided under Notification No.01/2006-ST dated 01.03.2006. In cases where documentary proof of the value of good and material sold during the course of the provision of service is available, exemption can be availed in respect of the value of the goods and material sold. However, the benefit of exemption in respect of both the said notifications is not admissible simultaneously.

10. In view of the above legal provisions, I proceed to examine the claim of the appellant for benefit of exemption under Notification No. 12/2003-ST dated 20.06.2003. I find that the appellant have claimed that they had entered into contract for supply of material with their customers. However, they had not submitted any contract either before the adjudicating authority or in the appeal memorandum filed by them. Further, the appellant have,

despite claiming that during the impugned period they had raised separate invoice for supply of material value, not produced any invoice either before the adjudicating authority or in their appeal memorandum.

10.1 The appellant have along with their additional written submission enclosed a document titled as 'Bill wise working'. On perusal of the same, I find that it contains customer wise details of the amount billed towards Labour, Supply of material and Service plus supply of material. However, it does not contain the details of the contract/agreement under which the said material are supplied by the appellant to their customers. It is also not clear whether the material supplied is part of the contract involving provision of service. For instance at Sr. No.13 of the said document is in respect of ONGC and the name of work is described as "*Upgradation/Enhancement of water injection / Surface facilities and providing Effluent handling / wash tank system facilites in Area - IV (Limbodra & Gamij) of ONGC Ahmedabad Asset".* The provision of labour, supply of material and provision of service with material are all under this work description. Under the description of "*Supply & Fixing of 'Y' type Strainer with Companion flanges*", the supply of only material is claimed as amounting to Rs.1,54,000/- and Rs. 1,65,200/-. The very description indicates that the appellant are not merely supplying goods but the same are also being fixed/installed by them. Further, the narration against these entries is mentioned as "*SUP.& INST.OF EFF.TRANSFER PUMP (Cap. 50 M3/Hr & dis.pr. 5 Kg/sq.cm)*" and "*SUP.& INST.OF OIL TRANSFER PUMP (Cap. 5 M3/Hr & dis.pr. 5 Kg/sq.cm)* " respectively. The narration indicates that the amount billed is for supply and installation of pumps. Despite this, the appellant have claimed that the same is only supply of material. There are many other such entries where in it is clearly stated that it is installation of the material. Despite this, the appellant have claimed that these are only supply of material without involving any service. It is observed that the document submitted by the appellant themselves do not support their contention. Accordingly, I do not find any merit in their claim for benefit of exemption under Notification No.12/2003-ST dated 20.06.2003 and therefore, I reject the same as legally not sustainable.

10.2 It is now a settled position in law that the value of the material supplied in provision of the taxable service is to be excluded from the taxable value of the service. Accordingly, the adjudicating authority has extended the benefit of abatement, from the gross amount charged for provision of service, in terms of Notification No.01/2006-ST dated 01.03.2006. The service tax confirmed vide the impugned order is on the abated value. The appellant have, by claiming the benefit of Notification No.12/2003-ST dated 20.06.2003, wrongly sought to claim exemption from payment of service tax even in respect of the service portion of the contract involving service and supply of material.

10.3 The appellant have in support of their contention relied upon the judgment of the Hon'ble Tribunal in the case of Shilpa Color Lab Vs. Commissioner of Central Excise, Calicut – 2007 (5) STR 423 (Tri.-Bang.). In the said case, it was held that when an item is sold by the service provider, the Revenue cannot demand service tax. In the present case, the adjudicating authority has allowed abatement, from the gross amount charged by the appellant, in terms of Notification No. 01/2006-ST dated 01.03.2006. Therefore, it cannot be said that that goods/material supplied by the appellant are charged to service tax. Further, at Para 8.3 of the said judgment, the Hon'ble Tribunal had held that :

> "There should be a documentary proof specifically indicating the value of the said goods and materials. In the absence of documentary proof, a service provider may claim deduction in an arbitrary manner. In order to avoid that the above condition has been stipulated, it should be borne in mind that there is no requirement that in each and every invoice, such values of goods and materials should be indicated."

However, as stated in the preceding paragraphs, the appellant have not submitted any documentary proof indicating the value of the goods and materials claimed to have been supplied by them without involving any service. On the contrary, the details submitted by them in the form of the document titled as 'Bill wise working' clearly indicates that the supply of goods and material by the appellant also involved service element. Since the adjudicating authority has allowed abatement in terms of Notification No.01/2006-ST dated 01.03.2006, no service tax has been charged in respect of the value of the goods and material. In view of the above, the appellant's claim for benefit of exemption under Notification No.12/2003-ST dated

20.06.2003 is rejected as the same is devoid of any merit and I uphold the demand for service tax confirmed vide the impugned order.

11. Regarding the issue of whether the renting of JCB and DG set is Supply of Tangible Goods service or otherwise, it would be fruitful to refer to Section 65 (105 (zzzzj) of the Finance Act, 1994, which is reproduced below :

> "to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances;".

11.1 The appellant have contested the demand for service tax on the grounds that the JCB was under the effective control of the principal. The adjudicating authority has recorded his findings in this regard at Para 7.2.1 of the impugned order. In coming to the conclusion that the renting of JCB and DG set by the appellant is Supply of Tangible Goods, the adjudicating authority has also relied upon Circular No. 334/1/2008-TRU dated 29.02.2008 issued by the CBIC wherein it was clarified that "*Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.*" I find that it is not disputed by the appellant that the JCB and DG set were given on rent by them. The very fact that the JCB and DG set were given on rent is clearly indicative of the fact that the right of possession was not transferred to any other person. Giving the JCB and DG set on rent merely allows the other person the right to use them.

11.2 I also find it relevant to refer to the judgment of the Hon'ble High Court of Bombay in the case of Indian National Shipowners' Association Vs. UOI – 2009 (14) STR 289 (Bom.). The relevant Paragraphs of the said judgment are reproduced below:

> **"37.** Entry (zzzzj) is entirely a new entry. Whereas entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by entry (zzzzj) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. **They give vessels on time**

charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession in and effective control of such machinery, equipment and appliances is not parted with. Therefore, those activities clearly fall in entry (zzzzj) and the services rendered by the members of the 1st petitioner have been specifically brought to the levy of Service Tax only upon the insertion of this new entry.

48. Applying the above conclusions to the instant case, we hold that the services rendered by the members of the 1st petitioner are either pre-mining or post-mining activities. They have no direct relation to mining. **They were, therefore, rightly not brought to tax till entry (zzzzj) was introduced to cover transport of tangible goods by sea without transferring right of possession and effective control thereof. The services rendered by the members of the 1st petitioner are covered by entry (zzzzj) because they *inter alia* supply vessels offshore support vessels, barges, tugs etc. without transferring right of possession and effective control over them.** In contrast entry (zzzy) was introduced to comprehensively bring under the service tax net activities having a direct nexxis to mining activities. Entry (zzzzj) is not a carve out of entry (zzzy). Both entries are independent. Entry (zzzzj) was not inserted into the Finance Act by amending entry (zzzy). It is not possible to invent a remote connection of the services rendered by the members of the 1st petitioner to mining activities and hold that they fall in entry (zzzy). Entry (zzzzj) is not a specie of what is covered by entry (zzzy). Nature of the services rendered by the members of the 1st petitioner, legislative history of the two entries, various circulars to which, we have made reference and the relevant judgments which we have noted hereinabove lead us to hold that the entry contained in Section 65(105)(zzzy) of the Finance Act, 1994 does not apply to services provided by the members of the 1st petitioner. Needless to say that respondents 1 to 4 and respondent 6 cannot demand service tax from the members of the 1st petitioner on the services rendered by them to the 5th respondent. As a consequence of this view of ours proceedings leading to issuance of letters dated 17-12-07, 19-2-08 and 5-3-08 annexed as Exhibits H, N and R respectively to the petition stand quashed and set aside." [Emphasis supplied]

11.3 In the instant case, I find that the appellant has merely rented out the JCB and DG set. In such a scenario, it cannot be said that the right of possession and effective control has also been transferred by the appellant. Further, as rightly held by the adjudicating authority at Para 7.2.1 of the impugned order, the appellant have not submitted any evidence in the form of contract/agreement to support their contention that the right of possession and effective control of the JCB and DG set were also transferred. In view thereof, I do not find any merit in the contention of the appellant and am of the considered view that the adjudicating authority has rightly held the renting of JCB and DG set by the appellant to be Supply of Tangible Goods service and chargeable to service tax.

12. The appellant have also raised the issue of limitation. However, I find that the adjudicating authority has categorically held at Para 9.1.3 of the impugned order that the SCN was issued to the appellant within the normal period of limitation and the relevant date was reckoned from the date of filing

of ST-3 returns by the appellant. Therefore, the contention of the appellant in this regard is devoid of merit and hence, rejected.

13. The appellant have also contested the imposition of penalty under Section 76, 77 (1) (a) and 77 (2) of the Finance Act, 1994. Section 76 of the Finance Act, 1994 as it stood at the relevant point of time is reproduced as below :

> "76. Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than one hundred rupees for every day during which such failure continues or at the rate of one per cent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:
>
> Provided that the total amount of the penalty payable in terms of this section shall not exceed fifty per cent of the service tax payable."

As the appellant have failed to pay service tax in accordance with the provisions of the Finance Act, 1994, they are liable to penal action under Section 76 of the Finance Act, 1994. Therefore, I do not find any infirmity in the imposition of penalty under Section 76 by the adjudicating authority.

13.1 As regards the imposition of penalty under Section 77(2) and 77 (1) (a) of the Finance Act, 1994, I find that the appellant have not correctly self assessed the service tax payable by them in respect of the services provided by them and neither have they reported the correct taxable value of the services provided by them. The appellant have also not obtained registration under the category of Supply of Tangible Goods, though providing the said taxable service. Therefore, the appellant are liable to penalty under Section 77(2) and 77 (1) (a) of the Finance Act, 1994 as held by the adjudicating authority. Hence, I do not find any infirmity in the imposition of penalty vide the impugned order.

13.2 The appellant have also contended that simultaneous penalty cannot be imposed under Section 76 and 77 of the Finance Act, 1994. However, this is an entirely erroneous interpretation of the provisions of law. The adjudicating authority has rightly held at Para 9.7.2 of the impugned order that it is penalties under Section 76 and 78 which are mutually exclusive. In

terms of the sixth proviso to Section 78 of the Finance Act, 1994, as it stood at the relevant point of time, if penalty is payable under Section 78, the provisions of Section 76 shall not apply. However, there is no such bar in respect of penalty under Section 76 and 77 of the Finance Act, 1994. Therefore, I do not find any merit in the contention of the appellant in this regard and hence, reject the same.

14. The appellant have also contended that they were not liable to pay penalty on the amount of service tax which was paid prior to issue of SCN. In this regard, I find that penalty under Section 76 of the Finance Act, 1994 was imposed upon the appellant vide the impugned order. As can be seen from the provisions of Section 76 of the Finance Act, 1994 as it stood at the relevant point of time, there was no provision for non imposition of penalty in respect of any service tax paid either before or after issuance of SCN. In any case, I find that the service tax was paid by the appellant only after issuance of SCN as is evident from the date of the Challan vide which service tax was paid by them. Therefore, the contention of the appellant in this regard is baseless and devoid of any merit.

15. In view of the facts discussed herein above, I uphold the impugned order and reject the appeal filed by the appellant.

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

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

(Akhilesh Kumar) 15 July, 2022.
Commissioner (Appeals)
Date: .07.2022.

Attested:

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

BY RPAD / SPEED POST

To

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

Appellant

The Assistant Commissioner,
CGST & Central Excise,
Division- Kadi,
Commissionerate : Gandhinagar

Respondent

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.