



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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By Regd. Post

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(क)	फाइल संख्या / File No.	GAPPL/COM/STD/244/2022-APPEAL / 917 - 21
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-014/2023-24 and 25.04.2023
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	28.04.2023
(ङ)	Arising out of Order-In-Original No. AC/S.R./16/ST/KADI/2022-23 dated 29.06.2022 passed by the Assistant Commissioner, CGST & CE, Division-Kadi, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	Office of the Assistant/Deputy Commissioner, CGST & CE, Division-Kadi, Gandhinagar Commissionerate, 4 th Floor, Janta Super Market, Kalol, Gandhinagar-382715
(छ)	प्रतिवादी का नाम और पता / Name and Address of the Respondent	M/s Vimal Mahendraprasad Thakar, 3/Nirmannagar Society, Detroj Road, Kadi, Gujarat

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 :-

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-

ibid :-



(क) 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 में हो माल की प्रक्रिया के दौरान हुई हो।

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.

(ख) 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 मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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.

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

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

(घ) अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी 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 में वित्त अधिनियम (नं 2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

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.

(2) 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 दिनांक 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम होतो रुपये 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 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 :-

(2) उक्तलिखित परिच्छेद 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।

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



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. Registrar 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 न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को 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 notwithstanding 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 शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु 6.50 पैसे का न्यायालय 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपील 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)।

- (1) खंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिया गलत सेनवैट क्रेडिट की राशि;
- (3) 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:

- (i) amount determined under Section 11.D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

(6)(i) 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."



अपीलिय आदेश / ORDER-IN-APPEAL

The Assistant Commissioner, Central GST, Division-Kadi, Gandhinagar Commissionerate, (hereinafter referred to as the "Department"), in pursuance of the Review Order No. 13/2022-23, dated 29.09.2022, issued from F.No. GEXCOM/REV/ST/OIO/19440/2022-REV- O/o COMMR-CGST-GANDHINAGAR, by the Commissioner, CGST & Central Excise, Gandhinagar (hereinafter referred to as the "Reviewing Authority"), has filed the present appeal under Section 84 of the Finance Act, 1994 against the Order-In-Original No. AC/S.R./16/ST/KADI/2022-23, dated 29.06.2022 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, CGST, Division-Kadi, Gandhinagar Commissionerate (hereinafter referred to as the "adjudicating authority") in the matter of M/s. Vimal Mahendraprasad Thakar [Proprietor of M/s Thakar Enterprise], 3/Nirmannagar Society, Detroj Road, Opposite Petrol pump, Kadi (hereinafter referred to as the "respondent").

2. Briefly stated, the facts of the case are that the respondent were having Permanent Account Number (PAN) AHCPT1523C with the Income Tax Department. On analysis of 'Sales / Gross Receipt from Services (value from Income Tax Return)' and 'Gross Value of Service provided', it was noticed that gross value of Sale of services declared in Income Tax Return / TDS Return was Rs. 89,35,487/- during the Financial Year 2015-16, which was above Service Tax exemption limit of Rs. 10 Lakh in terms of Notification No. 33/2012-ST, dated 20.6.2012, however, Service Tax Registration was not obtained by the Respondent. Subsequently, Show Cause Notice F.No. GEXCOM/ADJN/ST/312/2020-CGST-DIV/KADI-COMMRTE-GANDHINAGAR, dated 30.9.2020 was issued to the respondent, proposing -

- (i) demand of Service Tax amount of Rs. 12,95,646/- for F.Y. 2015-16 under Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994; and
- (ii) penalties under section 77, 78 and 70 of the Finance Act, 1994.

3. The said Show Cause Notice was adjudicated vide the impugned order whereby proceedings initiated vide Show Cause Notice F.No. GEXCOM/ADJN/ST/312/2020-CGST-DIV/KADI-COMMRTE-GANDHINAGAR, dated 30.9.2020 against the respondent was dropped.

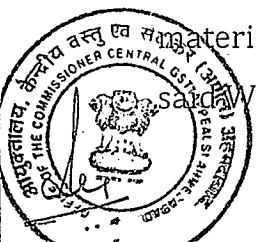
4. Upon examination and review in terms of legality and propriety of the impugned order, the Reviewing Authority found that the impugned order is not legal, correct and proper. Being aggrieved with the impugned order, the department was directed to prefer the present appeal on the grounds mentioned herein below, with a request to set aside the impugned order. Grounds of the appeal are as under:-



4.1 A work Order dated 30.1.2015 had been issued by M/s. Silver and Sand Developers to the Respondent to carry out *earthwork in embankment using selected soil, soft and hard murrum excavated from approved borrow area / village tanks etc. with all lead and all lifts*. The original work was awarded to M/s. Hardware Tools & Machinery Projects Pvt. Ltd. by M/s. Sardar Sarovar Narmada Nigam Limited, which was sub-contracted to M/s. Silver and Sand Developers, who in turns sub-contracted the part of the said work to the Respondent vide Work Order dated 30.1.2015. The Respondent had issued Invoice No. 35, dated 07.03.2016, for charging labour charges (without material) for Rs. 24,81,196/- to M/s. Silver and Sand Developers, Ahmedabad, wherein VAT had not been charged and paid as they charged labour charges only for said pure services. Thus, Respondent, being a sub-contractor, provided pure labour services (without materials) i.e. earthwork in embankment to M/s. Silver and Sand Developers.

4.2 Another Work Order dated 09.4.2015 had been awarded by M/s. Hardware Tools & Machinery Projects Pvt. Ltd. to the Respondent for carrying out the work of (i) *stripping the canal construction width and borrow areas in all sorts of soil, soft and hard murrum including depositing the stripped material as and when where directed within a lead up to 200 m. and (ii) Earth Work in embankment using selected soil, soft and hard murrum excavated from approved borrow area / village tanks etc. with lead up to 1 km. and all lift*. For this Work Order, the Respondent had issued Invoice No. 38, dated 01.07.2015 for charging labour charges (without material) for Rs. 37,75,800/- to M/s. Hardware Tools & Machinery Projects Pvt. Ltd., Ahmedabad wherein neither VAT was charged nor paid, as they charged labour charges only for the said pure services. Thus, Respondent, being a sub-contractor, had provided pure labour serviced (without material) i.e. work of stripping the canal construction width and borrow areas and Earth work in embankment to M/s. Hardware Tools & Machinery Projects Pvt. Ltd.

4.3 M/ s. Gujarat Urban Development Company Limited had awarded Work Order to carry out *"Excavation work of Kadi underground drainage scheme phase III under Swarnim Jayanti Mukhya Mantri Saheri Vikash Yojna (SJMMSVY), GUDC"* to M/s. Kevadia Infra Projects Private Limited, who, in turn, vide Work Order dated 15.1.2015, had sub-contracted part work i.e. earth work only to the Respondent. For this work order, the Respondent had issued Invoice No. 34, dated 05.3.2016 and charged labour charges for Rs. 1,54,400/- from M/s. Kevadia Infra Projects Pvt. Ltd., Ahmedabad. It has been observed that the Respondent had neither charged VAT in the said invoice nor paid VAT thereon, as they charged labour charges only for said pure services. Thus, the Respondent, being a sub-contractor, had provided pure labour services (without materials) i.e. the Earth Work to M/s. Kevadia Infra Projects Private Limited under the Work Order.



4.4 The adjudicating authority had grossly erred in dropping the demand of Service Tax of Rs. 12,95,646/- holding that the said works were exempted vide Sr. No. 12(e) of Notification No. 25/2012-S.T. , dated 20.6.2012 and, consequently, the Respondent being a sub-contractor, was also exempted vide Entry No. 29(h) of the said Notification, without properly appreciating the provisions of exemption Entry No. 29(h) of the said Notification, which is reproduced below -

"29. Services by the following persons in respective capacities -

(h) Sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt.

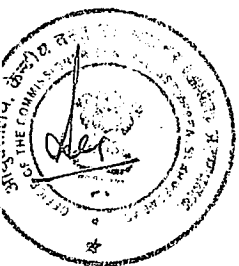
4.5 It appeared from the Work Orders that the Respondent had provided only labour services without supply of materials as also clearly revealed from the copies of Bills and Profit & Loss Accounts of relevant period, as the Respondent had neither purchased nor used / supplied any materials for execution of said works. If any material used / supplied for said work, the Respondent should have charged and paid applicable VAT in respective Bill / Invoice raised to said clients viz. M/s. Hardware Tools & Machinery Projects Pvt. Ltd., M/s. Silver and Sand Developers & M/s. Kevadia Infra Projects Private Limited. Thus, the services provided by the Respondent under the capacity of a sub-contractor to aforesaid clients do not fall under "Works Contract" as defined under clause 54 of Section 65B of the Finance Act, 1994 and subsequently under "Works Contract Service".

4.6 The definition of "Works Contract", as provided at clause 54 of Section 65B of the Finance Act, 1994 is as follows -

(54) "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;

As per above definition of "Works Contract" for the purpose of Service Tax, two conditions must be satisfied before a contract may be called a Works Contract, i.e.

- (i) There is a transfer of property in goods involved in the execution of such contract, and
- (ii) Such transfer or property in goods is leviable to tax as sale of goods (such as Sales Tax, VAT or WCT, etc.)



As discussed above, aforesaid both the conditions are not fulfilled in respect of aforesaid three Works Orders. Even though, the adjudicating authority has straight away extended the exemption for said work orders vide Entry at Sr. No. 29(h) of Notification No. 25/2012-S.T., dated 20.6.2012.

4.7 In view of the above provisions and in light of Entry No. 29(h) of Notification No. 25/2012-S.T., dated 20.6.2012, the adjudicating authority has made gross error by considering the services provided by the Respondent under the capacity of a sub-contractor to aforesaid clients under "Works Contract", ignoring the nature and scope of services provided by the Respondent under said contract wherein transfer of property in goods is not at all involved in the execution of such contract is leviable to tax as sale of goods. The exemption is available to sub-contractors engaged in works contracts and not to other outsourced services.

4.8 As per clause (1) of Section 66F of the Act, reference to a service by nature or description in the Act will not include reference to a service used for providing such service. Therefore, if any person is providing services, in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., such as architect service, consulting service, which are used by the contractor in relation to such construction, the benefit of the specified entries in the Notification would not be available to such persons unless the activities carried out by the sub-contractor independently and by itself fall in the ambit of the exemption. "Pure labour Services" provided by sub-contractor are not qualified as "Works Contract Services" and hence become liable for service tax.

4.9 The service provided by the Respondent is not Works Contract Service as discussed above. The benefit of Notification No. 25/2012-S.T., Sr. No. 29(h) is available only in the case of service provided by the service provider as sub-contractor is Works Contract Service.

4.10 In view thereof, the impugned order is bad in law and deserves to be set aside.

5. The Respondent vide letter dated 17.04.2023 provided his written submission against the aforesaid appeal filed by the department, wherein it has been contended as follows:-

5.1 It is not in dispute that the Respondent is a sub-contractor providing services to another contractor. It is also not in dispute that such other contractors are providing Works Contract services, which are exempt. The only dispute in this case is whether the Respondent, as sub-contractor, has provided services by way of "Works Contract" to another contractor providing Work Contract Services, as held by the



adjudicating authority or the Respondent has provided pure labour service to another contractor providing Work Contract Services, as argued by the department in the appeal.

5.2 The Respondent, during the F.Y. 2015-16, had provided services to following three contractors, who had undisputedly provided Works Contract services which were exempt.

- | | | |
|-------|---|--------------------|
| (i) | Hardware Tools & Machinery Projects Pvt. Ltd. | - Rs. 37,87,037/-. |
| (ii) | Silver Sand Developers | - Rs. 47,90,800/-. |
| (iii) | Kevadiya Infra Projects Pvt. Ltd. | - Rs. 3,56,323/-. |

5.3 The scope of the work of Work Order issued by Hardware Tools & Machinery Projects Pvt. Ltd. included "Earth work in embankment using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc." The scope of work also included "spreading of earth in uniform layers, breaking clods and dressing to the designed canal section etc." Bill No. 32 dated 1.7.2015 for Rs. 37,75,800/- issued by the respondent to M/s Hardware Tools & Machinery Projects Pvt. Ltd. shows the particulars of work carried out by the Respondent as follows -

"Earth Work in embankment using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc."

Thus, the work carried out by the Respondent was "earth work in embankment, using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc.

The Work Order issued by Hardware Tools & Machinery Projects Pvt. Ltd. to the Respondent clearly included the earth work in embankment using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc., in the scope of work. The invoice issued by the Respondent also clearly mentions the particulars of work carried out by it as earth work in embankment, using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc. It is, therefore evident that the Respondent, as a sub-contractor, has provided Works Contract service wherein property in goods i.e. soil (earth), has transferred. The Respondent has **not** provided pure labour services, as has been contended by the department in the appeal.

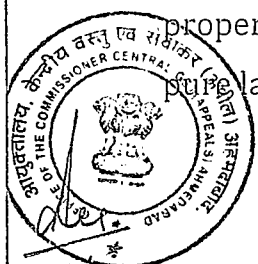
5.4 In case of Work Order dated 30.1.2015 issued by M/s. Silver Sand Developers, the scope of work included Earthwork in Embankment using selected soil, soft and hard murrum excavated from approved borrow area / village tanks etc. with all lead & all lifts (Copy of Work Order enclosed herewith). Bill No. 35, dated 07.03.2016 for Rs. 24,81,196/- issued by the Respondent to M/s Silver Sand Developers shows the



particulars of work carried out by the respondent as "Canal Work Namada - Italiya District - 42779.237 X 58 = 24,81,186/-. Thus, the work carried out by the Respondent was "earthwork in embankment of Narmada Canal using selected oil, soft and hard murrum", in respect of which Rate of Rs. 58/- per CMT was charged in the said Bill No. 35, dated 07.03.2016. The Work Order issued by M/s Silver Sand Developers to the Respondent clearly included the Earthwork in Embankment using selected soil, soft and hard murrum excavated from approved borrow area / village tanks etc. with all lead & all lifts, in the scope of work. The invoice issued by the Respondent described the work carried out as "Canal Work Narmada" and rate charged was Rs. 58/- per CMT, which is the rate for earthwork in embankment using selected soil, soft and hard murrum. It is, therefore evident that the Respondent, as a sub-contractor, has provided Works Contract service wherein property in goods i.e. soil (earth), has been transferred. The Respondent has **not** provided pure labour services, as has been contended by the department in the appeal.

5.5 The Work Order cum Agreement dated 15.1.2015 between Kevadiya Infra Projects Private Limited and the Respondent. The said Work Order cum Agreement mentions that the work is given by Gujarat Urban Development Ltd., Gandhinagar to Kevadiya Infra Projects Pvt. Ltd.; the earthwork of which has been given to Thakar Enterprise; which is agreed to by both the parties as per below mentioned conditions. One of the conditions of the said Work Order cum Agreement is that from the Bill presented by the Work Undertaker, **TDS as per Works Contract Rules would be deducted by the Work Giver**, and after depositing in Government as per Rules, its TDS Certificate would be given to Work Undertaker. Thus, as per Work Order cum Agreement, scope of work included earthwork for Kadi Underground Drainage Scheme Phase-III. Bill No. 34, dated 5.3.2016 for Rs. 1,54,400/- issued by the Respondent to M/s Kevadiya InfraProjects Private Limited shows the particulars of work as "Kadi Drainage Project Works". Though the rate has been charged on the basis of JCB machine used for earthwork, the fact remains that the work carried out by the Respondent was earthwork only, using JCB machine.

The Agreement cum Work Order between M/s Kevadiya Infra Projects Private Ltd. and the Respondent clearly shows that the work carried out by the Respondent was earthwork and one of the conditions clearly mentions that it was a Works Contract on which TDS as per Rules would be deducted. It is, therefore, evident that the Respondent, as a sub-contractor, has provided Works Contract service wherein property in goods i.e. soil (earth), has transferred. The Respondent has **not** provided pure labour services, as has been contended by the department in the appeal.



5.6 From the aforesaid documentary evidences, it may be seen that the Respondent, as sub-contractor, has provided services by way of "Works Contract" service to another contractors providing Work Contract Services, wherein transfer of property in goods (soil or earth) in execution of such contract was leviable to tax and none of the work was for providing pure labour service, as has been contended in the appeal filed by the department.

5.7 As the earthwork in embankment was carried out by using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc. and not by purchase from someone, obviously the same has not been shown as purchase in the Profit and Loss Account of the respondent.

5.8 The Respondent cited and relied upon the decision of *the Appellate Authority for Advance Ruling, Goods and Services Tax, West Bengal*, in the case of *Ashis Ghosh [2020 (32) G.S.T.L. 225 (App. A.A.R. - GST - WB)]*, wherein it has been held that as per the work orders, the appellant therein was required to fill in the foundation or plinth by silver sand in layers and consolidate the same; that the job also involved filling in the compound, tank and other low lying areas with sand and good earth and consolidating the same by ramming and dressing; that the activities undertaken by the appellant amounted to improvement and modification of land for future construction,; in the circumstances, it was a case of transfer of property in goods in course of site preparation for construction of the New Central Correctional Home at Baruipur. It has been submitted by the Respondent that in the present case also, the scope of the work as per Work Orders include earth work in embankment using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc., spreading in uniform layers, breaking clods and dressing to the designed canal section etc. Thus, the present case is also a case of transfer of property in goods and therefore falls under Works Contract

5.9 The Respondent has prayed that the appeal filed by the department may be dismissed and Order-in-Original No. A.C./S.R./16/ST/KADI/2022-23, dated 29.06.2022 passed by the Assistant Commissioner, CGST, Kadi Division, Gandhinagar may be upheld.

5.10 The Respondent have also submitted that demand of Service Tax is not sustainable merely on the basis of some data / details provided by the CBDT. In this regard, reliance is placed on the decisions of the Hon'ble CESTAT in the case of *Kush Constructions Versus CGST NACIN, ZTI, Kanpur [2019 (24) G.S.T.L. 606 (Tri. - All.)]*.

5.11 The Respondent have further submitted that as there was no suppression of facts on the part of the Respondent, the extended period could not be invoked in the present



case. In any case, the Respondent were under *bona fide* belief that the activities being carried out by the Respondent were not liable to Service Tax as the same were exempted from payment of Service Tax. The belief of the Respondent gets further strength from the adjudication order passed by the Assistant Commissioner, CGST, Kadi-Division, Gandhinagar-Commissionerate. As the entire demand of Service Tax is covered under extended period of limitation, the demand of Service Tax is not sustainable on this ground alone. Therefore, the appeal filed by the department may be dismissed.

5.12 The Respondent has submitted that he is entitled to benefit of cum-tax price in this case.

6. Personal hearing in the matter was held on 17.04.2023. Shri Vimal M. Thakar, Proprietor, and Shri Alpesh Kumar S. Kabra, authorized representative on behalf of the respondent, appeared for hearing. They submitted a written submission dated 17.04.2023 during hearing and reiterated submission made therein.

7. I have gone through the facts of the case, grounds mentioned in the appeal filed by the department, submissions made by the Respondent in written reply as well as during Personal Hearing and the materials available on the record. The issue before me for decision is as to whether the impugned order dropping the demand of Service Tax amounting to Rs. 12,95,646/- alongwith interest and penalty, in the facts and circumstances of the case, is legal and proper or otherwise. The demand pertains to the period F.Y. 2015-16.

8. It is observed from the case records that the Respondent, as sub-contractor, had provided services to three contractors viz. (i) M/s. Hardware Tools & Machinery Projects Pvt. Ltd., (ii) M/s. Silver Sand Developers; and (iii) M/s. Kevadiya Infra Projects Pvt. Ltd., during the F.Y. 2015-16. It is not in dispute that the aforesaid main contractors were providing Works Contract Services, which were exempt under Sr. No. 12(d) of Notification No. 25/2012-ST, as held by the adjudicating authority. However, it is the case of the department that the Respondent is not entitled to the benefit of Sr. No. 29(h) of Notification No. 25/2012-S.T. inasmuch as the Respondent has provided pure labour services (without material), and not the Work Contract services.

9. On going through the Works Orders / Agreement cum Work Order of the Contractors and the Invoices issued by the Respondent submitted alongwith the submission, following observations are made.

The Work Order dated 09.4.2015 issued by M/s. Hardware Tools & Machinery Projects Pvt. Ltd. to the Respondent describes the work as follows -



<i>Description</i>	<i>Unit</i>	<i>Rate</i>	<i>Qty</i>	<i>Amount</i>
<i>Stripping the canal construction width and borrow areas in all sorts of soil, soft and hard murrum including depositing the stripped material as and where directed within a lead upto 200m</i>	<i>CMT</i>	<i>9</i>	<i>2700</i>	<i>24300</i>
<i>Earth work in embankment using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc. Excluding royalty charges, conveying, spreading in uniform layers, breaking clods and dressing to the designed canal section etc. with lead upto 1 km and all lift.</i>	<i>CMT</i>	<i>58</i>	<i>65100</i>	<i>3775800</i>

It has been observed that the second part of the aforesaid Work Order clearly mentions that the Respondent is required to carry out *"Earth Work in embankment using selected soil, soft & hard murrum"*. It has also been mentioned that such soil has to be excavated from approved borrow area / village tanks. It is, therefore, evident that the Respondent were required to provide soil (earth) also in embankment, apart from providing other services i.e. conveying, spreading soil in uniform layers, breaking clods and dressing to the designed canal section. Therefore, I find that work carried out by the Respondent as per the aforesaid Works Order was in the nature of "Works Contract" and not the pure labour service.

9.2 The Work Order dated 30.01.2015 issued by M/s Silver Sand Developers to the Respondent describes the work as follows –

"As per above subject, Earthwork in Embankment using selected soil, soft and hard murrum excavated from approved borrow area / village tanks etc. with all lead & all lifts is under Thakar Enterprise scope of work. The amount of work order is approximately 80 Lakhs. With time limit and all the responsibility of earthwork, the work is given to Thakar Enterprise. All future liability is under Thakar Enterprise Scope."

It has been observed that the Work Order clearly mentions that the Respondent is required to carry out *"Earthwork in Embankment using selected soil, soft and hard murrum"*. It has also been mentioned that such soil had to be excavated from approved borrow area / village tank etc. It is, therefore, evident that the Respondent was required to provide soil (earth) also in embankment apart from providing other services. Therefore, I find that work carried out by the Respondent as per the aforesaid Works Order was in the nature of "Works Contract" and not pure labour service.



9.3 The Agreement cum Work Order dated 15.01.2015 (in Gujarati language) mentions that Kevadiya Infra Projects Pvt. Ltd. has got the aforesaid work (Excavation work of Kadi Underground Drainage Scheme Phase III under SJMMSVY, GUDC) from the Gujarat Urban Development Ltd. Gandhinagar, in respect of which, work of Earthwork is given to the respondent, which is agreed to by both the parties subject to conditions mentioned therein. One of the conditions mentioned in the said Agreement cum Work Order is that Kevadiya Infra Projects Pvt. Ltd. would deduct TDS as per Works Contract Rules from the Bill presented by Thaker Enterprise (Respondent) and after depositing in Government Account as per Rules, its TDS Certificate would be given to Thaker Enterprise (Respondent).

It has been observed that M/s. Kevadiya Infra Projects Pvt. Ltd. had given work of "Earthwork" to the Respondent. Both the parties agreed that it was a "Works Contract" and therefore, M/s. Kevadiya Infra Projects Pvt. Ltd. would deduct TDS as per Works Contract Rules from the Bills presented by the Respondent. Therefore, I find that work carried out by the Respondent as per the aforesaid Agreement cum Works Order was in the nature of "Works Contract" and not the pure labour service.

9.4 One of the grounds mentioned in the appeal filed by the department is that the Respondent has shown labour charges, without material, in its Invoices. In this regard, I observe that the composite rate for providing soil (earth) and other services have been given in Work Orders issued to the Respondent, For example, in case of Work Order dated 09.04.2015 issued by M/s. Hardware Tools & Machinery Projects Pvt. Ltd., composite rate of Rs. 58 per CMT has been mentioned for the entire work of "Earth work in embankment using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc. excluding royalty charges, conveying, spreading in uniform layers, breaking clods and dressing to the designed canal section etc. with lead upto 1 km and all lift". In the invoice issued by the Respondent to M/s. Hardware Tools & Machinery Projects Pvt. Ltd., a composite rate of Rs. 58 per CMT has been charged, which apparently include charges for soil (earth) as well as service. Therefore, transaction cannot be termed as that of pure labour service without material, merely on the ground of non-mentioning of separate charges of material (soil in the present case) in the Invoices.

9.5 As regards the not mentioning of purchase of material in the Profit and Loss Account, the Respondent has submitted that the earthwork in embankment was carried out by using selected soil, soft & hard murrum excavated from approved borrow area / village tanks etc. and not by purchase from someone, therefore, the same has not been shown as purchase in their Profit and Loss Account. It is observed that the Respondent has carried out earthwork for canal and drainage system. The nature of this type of



work is peculiar wherein material used is soil (earth), which can be obtained from nearby approved area, and not necessarily by purchase from someone. Therefore, absence of the details of purchase of material in the Profit and Loss Account can not be the sole ground to deny the services provided by the respondent as Works Contract services.

9.6 It is relevant to refer to the definition of "Works Contract", as provided at clause 54 of Section 65B of the Finance Act, 1994. Same is re-produced below:-

(54) "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;

As already discussed, the Work Orders issued in this case clearly establishes that all the three contracts involve transfer of property in goods (soil – earth). It is also not in dispute that the contracts are for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property (canal and drainage system) or for carrying out any other similar activity or a part thereof in relation to such property. The only issue that remains to be examined is whether transfer of property in goods involved in the execution of these contracts was leviable to tax as sale of goods. As already noted above, one of the conditions mentioned in the Agreement cum Work Order between M/s. Kevadiya Infra Projects Pvt. Ltd. and the Respondent is that M/s Kevadiya Infra Projects Pvt. Ltd. would deduct TDS as per Works Contract Rules from the Bill presented by the Respondent and after depositing in Government Account as per Rules, its TDS Certificate would be given to the Respondent. The work order itself establishes the nature of services as Works Contract services.

9.7 As regards the decision of the *Appellate Authority for Advance Ruling, West Bengal* in case of *Ashis Ghosh [2020 (32) G.S.T.L. 225 (App. A.A.R. – GST – W.B.)]* referred to and relied upon by the Respondent, it is observed that the decision of the Appellate Authority for Advance Ruling may have persuasive value, though it cannot be relied as precedent. However, in the present matter, I don't find any reason to deny the services provided by the Respondent were to be in the nature of Works Contract services.

9.8 As the work carried out by the Respondent under the aforesaid three Work Orders is found to be falling under "Works Contract", I hold that the adjudicating authority has rightly held the Respondent to be entitled for benefit of exemption



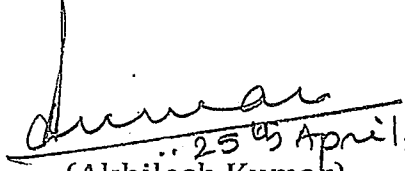
provided vide Sr. No. 29(h) of Notification No. 25/2012-S.T., dated 20.6.2012, as amended, and hence they are not liable to pay Service Tax as demanded vide show cause notice dated 30.9.2020.

9.9 As already held that the demand of Service Tax is not sustainable on merit against the Respondent, I do not find it necessary to go into the issues of limitation, cum-tax benefit etc. as submitted by the Respondent.

10. In view of the above, the impugned order is upheld and the appeal of the department is dismissed.

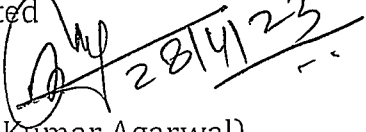
11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

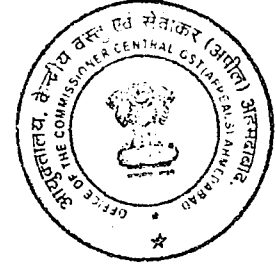
The appeal filed by the *appellant* stands disposed of in above terms.


25 April, 2023..
(Akhilesh Kumar)
Commissioner (Appeals)

Date: 25.04.2023

Attested


(Ajay Kumar Agarwal)
Assistant Commissioner [In-situ] (Appeals)
Central Tax, Ahmedabad.



BY RPD / SPEED POST

1. The Deputy Commissioner,
Central GST, Division-Kadi,
Commissionerate-Gandhinagar.

APPELLANT

2. Shri Vimal Mahendraprasad Thakar,
Proprietor of M/s Thakar Enterprise,
3/Nirmannagar Society,
Detroj Road, Opposite Petrol pump,
Kadi, Gujarat.

RESPONDENT

Copy to: -

1. The Principal Chief Commissioner, CGST & C.Ex., Ahmedabad Zone.
2. The Principal Commissioner, CGST & C.Ex., Commissionerate: Gandhinagar.
3. The Deputy/ Assistant Commissioner, CGST & C.Ex., Division-Kadi, Commissionerate: Gandhinagar.
4. The Superintendent (Systems), CGST, Appeals, Ahmedabad. (for uploading the OIA).

~~25.~~ Guard File.

6. P.A. File.

