आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
GST Bhavan, Ambawadi, Ahmedabad-380015
Phone: 079-26305065 - Fax: 079-26305136
E-Mail : commrappl1-cexamd@nic.in
Website : www.cgstappealahmedabad.gov.in

सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By SPEED POST

DIN:- 20240164SW0000333D61

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/3016/2023-APPEAL /845-49
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-182/2023-24 and 17.01.2024
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील्स) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	18.01.2024
(ङ)	Arising out of Order-In-Original No. AHM-CEX-003-ADC-RKJ-008-22-23 dated 20.03.2023 passed by the Additional Commissioner, CGST & Central Excise, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	Shri Atul Ravishankar Pandya, Prop. of M/s Jay Enterprises, Swagat Rain Forest-1, B-5, Opp. Pratik Mall, Kudasan, Gandhinagar, Gujarat-382009

कोई व्यक्ति इस अपील-आदेश से असंतोष 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-35 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 मे हो माल की प्रकिया 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 मामलें 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 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।

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 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.

(3) 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 :-

(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 2ndfloor, 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. 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 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 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 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 संषोधित की अनुसूची -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 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 in 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 अपीलो 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 राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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 present appeal has been filed by Shri Atul Ravishankar Pandya, Proprietor of M/s Jay Enterprises, Swagat Rain Forest-1, B-5, Opp. Pratik Mall, Kudasan, Gandhinagar, Gujarat-382009 [hereinafter referred to as "the appellant"] against Order in Original No. AHM-CEX-003-ADC-RKJ-008-22-23 dated 20.03.2023 [hereinafter referred to as "the impugned order"] passed by the Joint Commissioner, CGST & Central Excise, Gandhinagar Commissionerate [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant were registered under Service Tax having Registration No. AIWPP8592NSD001 and were providing Works Contract Service. As per information received from Income Tax Department, it was observed that during the period F.Y. 2015-16 & F.Y. 2016-17 the appellant had earned substantial service income but have not paid service tax thereon. Letters dated 09.04.2021 and 16.04.2021 were issued to the appellant calling for the details of services provided during the period. But, no reply was submitted by them. The jurisdictional officer therefore considering the services provided by the appellant during the relevant period as taxable under Section 65 B (44) of the Finance Act, 1994 determined the Service Tax liability for the F.Y. 2015-16 & F.Y. 2016-17 on the basis of value of 'Sales of Services' under Sales/Gross Receipts from Services (Value from ITR) and Form 26AS as details below:

Sr. No.	Period (F.Y.)	Differential Taxable Value as per Income Tax Data (in Rs.)	Rate of Service Tax incl. Cess	Service Tax payable but not paid (in Rs.)
1	2015-16	3,44,22,433/-	14.5%	49,91,252/-
2.	2016-17	3,19,38,578/-	15%	47,90,787/-
			Total	**97,82,039/-**

3. The appellant was issued Show Cause Notice No. ADC-PMR-002/21-22 dated 22.04.2021 (in short SCN) proposing to demand and recover Service Tax amounting to Rs.97,82,039/- for the period F.Y. 2015-16 & F.Y. 2016-17, under proviso to Section 73 (1) of Finance Act, 1994 along with interest under Section 75 of the Act. The SCN also proposed imposition of penalty under Section 77(2), Section 77(3) (c) and Section 78 of the Finance Act, 1994.

4. The SCN was adjudicated vide the impugned order wherein the Service Tax demand of Rs.96,13,737/- was confirmed for the period F.Y. 2015-16 & F.Y. 2016-17 alongwith interest. Penalty of Rs.10,000/- under Section 77(2); Penalty under Section 77 (1) (c) and Penalty of Rs.96,13,737/- was also imposed under Section 78 (1) of the Finance Act,1994.

5. Aggrieved by the impugned order, the appellant has preferred the present appeal on following grounds:

- The adjudicating authority has calculated the Service Tax payable on the basis of value of "sales of goods under Sales/Gross Receipts from business (Value from ITR)" or "Total amount paid/credited u/s 194C, 194I, 194H, 194J" as provided by the Income Tax Department for the F.Y. 2015-16 & 2016-17 , which cannot prove that the amount shown in Income Tax Return is taxable under Service Tax Law and hence, basis of data submitted to Income Tax department can be used for income

Tax Assessment and not for Service Tax Assessment. They relied upon the following judgements of the Hon'ble Courts and Tribunal in case of :

- J.I Jesudasan vs. CCE 2015 (38) S.T.R 1099 (Tri.Chennai);
- Shubham Electricals v. CCE 2015 (40) S.T.R. 1034 (Tri. - Del.)
- Deltax Enterprises v. CCE 2018 (10) G.S.T.L. 392 (Tri. - Del.)
- Faquir Chand Gulati vs. Uppal Agencies Pvt Ltd 2008 (12) S.T.R 401 (S.C)

➢ The appellant is engaged in trading of electrical items as well as job work income. The appellant has VAT registration and the supply of goods by the appellant does not fall under the definition of "service". Thus, the income earned by the appellant by way of sale of electric items shall be taxable under Gujarat Value Added Tax Act, 2003. The appellant was liable to take registration under VAT regime. The VAT registration number (TIN) of the appellant is 24060101405. VAT has been duly paid on the turnover earned through supply of goods. Copy of VAT returns & Financial Statements for the FY 2015-16 & 2016-17 has been submitted.

➢ It must be appreciated that the rate of VAT in case of Works Contract Service is 0.6%, whereas for sale of goods rate of VAT is 5%. Hence, the appellant has proved beyond doubt by submitting invoices wherein the rate of VAT is 5%. The claim of appellant is corroborated in VAT audit assessment as submitted and verified by state tax regulatory authorities. Hence, it seems that the Ld. Adjudicating authority does not want to rely on the VAT assessment order but would demand service tax merely on the basis Strange Invoice of the appellant and based on doubt of credibility of invoice without any corroborative evidence.

➢ It is submitted that selective reading of profit and loss account only for labour expenses, while ignoring material purchase amount in the same Profit and loss account is not allowed. In FY 2015-16, there is material purchase amount of Rs. 1,74,62,302.06 and in FY 2016-17, the material purchase amount is Rs. 2,25,70,270.91. When Adjudicating authority can read and refer labour expenses in profit and loss account, how come material purchase expenses are not referred for adopting abated value. This selective reference and reading of documents; ignoring VAT Assessment Orders and not referring to rate of VAT on works contract services seems to be non-descript and capricious.

➢ For the said supply of goods, TDS u/s 194C has been deducted by the recipient of goods. The officer is of contention that since TDS u/s 194C has been deducted, the said supply shall be classified as "works contract services" and not as supply of goods. Here, the appellant would like to submit that the complete nature of transaction cannot be determined by the type of TDS.

➢ Appellant is involved in trading of goods also. The same fact can be confirmed from the filed Income Tax return and Profit and Loss account of appellant. Copies of both are already submitted to the Ld. Officer. In case of sale of goods, appellant has already paid VAT. The figures related to sale of goods disclosed in Income Tax return and VAT return is tabulated as below:

Particulars	2015-16	2016-17
Sale of Goods as per ITR	2,93,38,961	3,28,92,501
Sale of Goods as per VAT Return	2,93,38,961	3,28,92,501
Difference	-	-

- Since the appellant has duly filed VAT returns as well as paid relevant tax on the income disclosed in Income Tax Returns, the demand imposed under Service Tax should be set aside on this ground alone.

- From the above table, it is crystal clear that appellant has already paid VAT on sale of goods so there is no question of payment of Service Tax arises.

- There is nothing in the law which forbids double taxation, but it should not be by way of mere interpretation of something whereby same income or turnover gets taxed twice. Unless otherwise specified in any law, every income shall be taxed according to its relevant law. In the given case as well, the tax can be levied only under the Value Added Tax law. The demand imposed under Service Tax law is non-tenable, illegal and unsustainable. As the income has already been taxed and relevant taxes have been paid by the appellant, the impugned order needs to be set aside on that ground alone.

- The bulk issuance of order on the basis of Form ITR filed by the appellant without consideration to the applicability of taxation law is violation of Article 265 of Constitution of India. Thus, the said order issued is unthinkable and hence, the order needs to be set aside.

- In present case, the main contractors to whom appellant had provided service were providing service to Government for Sarva Shiksha Abhiyan related works and their services were reported to us to be exempt under entry no 12 and 12A of Notification No. 25/2012-ST, dated 20-06-2012 as amended. The main contractor has availed the benefit of entry no. 12 (c) of Mega Exemption Notification - 25/2012 - ST dated 20.06.2012. The appellant has availed the benefit of entry no.29(h) of Mega Exemption Notification - 25/2012 - ST dated 20.06.2012. The said entry is reproduced below for your reference:

  "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;"

- However, vide Finance Act 2015 Government withdrew certain exemptions in relation to construction activity. The extract of the entry stated above [12(a), (c) & (f)] were omitted and henceforth becomes taxable w.e.f. 1st April, 2015. However, Central Government again in Finance Act, 2016 restored the exemption as new entry no 12A (a), (c) & (f) w.e.f. 01.03.2016 in limited manner (i.e. exemption shall be applicable on for such contracts that are entered into before 01.03.2015 i.e. date of publication of notification no. 06/2015-ST).

- Further, Circular no. F. No. 334/8/2016-TRU dated 29th February 2016 was also issued with this regard to clarify the availability of refund. Entry no. 12A(a), (b) and

(c) of Notification no. 25/2012-ST read with Section 102 of Finance Act, 2016, one can derive at following major five conditions that are required to be fulfilled for claiming the refund claim:

(i) Services must be provided to Government, local authority or a governmental authority;

(ii) Such services must be by way of construction, erection, commissioning, installation, completion, installation, completion, fitting out, repair, maintenance, renovation or alteration of a civil structure.

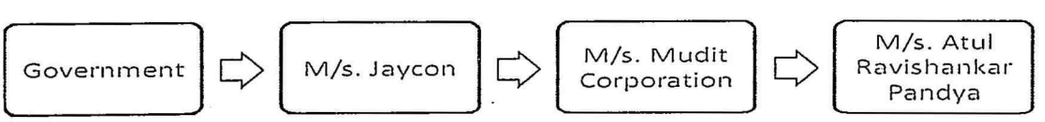
(iii) Such contract must have been entered before 01.03.2015.

(iv) Such refund claim must be filed within six months from the date on which finance bill, 2016 receives Presidential Assent.

(v) Assessee claiming refund should not have collected service tax from Government or local authority or governmental authority (unjust enrichment)

- For the period from 01.03.2015 to 29.02.2016, the exemption available for contract entered before 01.03.2015 for services under Entry 12 (a), (c), (f) was withdrawn. However, vide Section 102 of Finance Act, 2015 read with Circular no. F. No. 334/8/2016-TRU dated 29th February, 2016, refund mechanism for the said period was introduced. Due to this, tax was payable during such period but the same was available as refund.

- In the present case, appellant has entered into an agreement with M/s. Mudit Corporations (Sub-Contractor) for internal electrifications in Government primary school rooms in various districts of Gujarat state under Sarva Siksha Abhiyan (SSA) project of Government of Gujarat. M/s. Jaycon (Main Contractor) has sub-contracted such contract to M/s. Mudit Corporations on 19.01.2015. M/s. Jaycon has entered into an agreement on 29.12.2014. So, main contract has been entered before 01.03.2015. The diagrammatic representation of workflow is as below:



- Appellant has received income by providing work contract service to M/s. Mudit Corporations and such income is exempt as per Clause 29(h) of Notification No.25/2012-ST dated 20.06.2012.

- Appellant fulfills all the conditions for availing threshold exemption benefit vide Notification No. 33/2012-ST dated 20-06-2012, for the period referred in notice. The appellant eligible to claim exemption in F.Y. 2015-16 to F.Y. 2016-17 as follows:

Particulars	2015-16	2016-17
Total Income as per ITR	3,05,05,053	3,40,97,251
Less: Interest Income	26,263	21,716
Less: Income from sale of goods as per VAT returns	2,93,38,963	3,28,92,501
Less: Exempt Jobwork Income	8,99,023	2,52,960
Net Income for availing SSP Exemption	**2,40,804**	**9,30,074**

- As aggregate turnover of the appellant is Rs. 2,40,804/- during F.Y. 2015-16 and Rs. 9,30,074/- during F.Y. 2016-17, which is below threshold limit as discussed above, appellant is not required to pay Service Tax.

- As per Circular No 128/47/2019-GST dated 23.12.2019, it is mandatory to quote DIN number on any communications issued to registered taxpayer. The said communication can be made in any form that includes E-mail as well in connection with search, authorization, summons, arrest memos, inspection notices etc. By considering the said Circular, Notice received regarding short payment of Tax Liability to us doesn't contain DIN reference. Hence, the communication sent to us for providing the clarification on such difference is not as per the instruction issued by CBIC to departmental officers and hence it will be considered as null and void.

- The figures reflected in Income Tax Returns and Form 26AS are already available with the department at the time of filing during relevant year itself. Therefore, the said information has never been suppressed by the concerned taxpayer from the department. Further, it is submitted that the appellant has also not indulged in any fraud or collusion or willful misstatement as the given figures reported in ITR on the basis of which SCN has been issued and the said information is available for department's perusal right from the year in question.

- It is a settled principle of law that in cases where the original demand is not sustainable, interest & penalty cannot be levied. In view of the aforesaid submissions, it is clear that the demand itself is not sustainable and hence, the question of imposing interest and penalty does not arise. Hence, the interest and penalty imposed by the impugned Order is liable to be dropped.

6. Personal Hearing in the case was held on 14.12.2023. Shri Rashmin Vaja, Chartered Accountant appeared for personal hearing on behalf of the appellant. He stated that their clients sold electrical goods. Hence, Service Tax is not applicable. Further, he reiterated the contents of the written submission and requested to allow their appeal.

7. I have carefully gone through the facts of the case available on record, grounds of appeal in the appeal memorandum, oral submissions made during personal hearing, the impugned order passed by the adjudicating authority and other case records. The issue before me for decision in the present appeal is whether the demand of service tax amounting to Rs.96,13,737/- confirmed under proviso to Section 73 (1) of Finance Act, 1994 alongwith interest, and penalties vide the impugned order passed by the adjudicating authority in the facts and circumstances of the case is legal and proper or otherwise. The demand pertains to the period F.Y. 2015-16 & F.Y. 2016-17.

7.1 The appellant have basically claimed following:-

a) They have provided services to main contractor who in turn have rendered services to Government for Sarva Shiksha Abhiyan related works which is exempted vide Entry no 12 and 12A of Notification No. 25/2012-ST, dated 20-06-2012. They are eligible for the benefit of entry no. 29(h) of Mega Exemption Notification - 25/2012 - ST dated 20.06.2012.

b) Apart from job-work they have also done trading of electrical goods on which they have paid VAT so the question of paying service tax on such transaction does not arise.

c) They claim they are also eligible for the benefit of exemption vide Notification No. 33/2012-ST dated 20-06-2012.

7.2 On the first issue the adjudicating authority observed that the contract has been entered between the main contractor M/s. Bhumi Procon Pvt. Ltd., Vadodara and Gujarat Council of Elementary Education. This work was later sub-contracted to the appellant vide Work Order dated 14.05.2016. Since the contract entered is after 01.03.2015, it was held that the exemption is not available to the appellant. Further, in respect of contract entered by the appellant with M/s. Mudit Corporations (sub-contractor) for internal electrifications in Government primary school room in various districts of Gujarat States under Sarva Siksha Abhiyan (SSA) project of government of Gujarat. It was observed that the main contractor M/s. Jaycon has sub-contracted the contract to M/s. Mudit Corporations on 19.01.2015, which is prior to 01.03.2015. Hence, income received towards such contract is exempted in terms of Notification No.25/2012-ST dated 20.6.2012.

7.3 The appellant claim that the main contractors to whom they have provided services were providing the service to Government for Sarva Shiksha Abhiyan related works and their services are exempted vide Entry No. 12 & 12A of Notification No.25/2012-ST. To examine the exemption relevant text of the said notification is reproduced below:-

Notification No.25/2012-ST dated 20.06.2012

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or

(f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65B of the said Act;

7.4 In the above entry, **items (a), (c) and (f)** was omitted vide [**Notification No. 6/2015-S.T., dated 1-3-2015].** However, vide Section 102 of the Finance Act, 2016, special provision was inserted, wherein retrospective exemption was provided to certain cases relating to construction of Government buildings. Section 102 is reproduced below;

SECTION 102. Special provision for exemption in certain cases relating to construction of Government buildings. *— (1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction,*

erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of —

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;

(b) a structure meant predominantly for use as —

(i) an educational establishment;

(ii) a clinical establishment; or

(iii) an art or cultural establishment;

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act,

under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all the material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President.

7.5 Thereafter vide Notification No.09/2016-ST dated 01.3.2016 after entry 12, with effect from the 1st March, 2016, the following entry shall be inserted, namely –

"12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or

(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act;

under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date :

provided that nothing contained in this entry shall apply on or after the 1st April, 2020;";

7.6 I find that the appellant have not submitted the contract entered between M/s. Bhumi Procon Pvt. Ltd., Vadodara and Gujarat Council of Elementary Education (GCEE) to prove that the contract entered were prior to 1st March, 2015. The adjudicating authority denied exemption based on Work Order dated 14.05.2016 stating that the said contract was sub-contracted to the appellant after 1st March, 2015. The contract entered between M/s. Bhumi Procon Pvt. Ltd., Vadodara and GCEE should have been produced before the adjudicating authority.

8. Second claim made by the appellant is that they have done trading of electrical goods on which they have paid VAT hence service tax not required to be paid. The adjudicating authority however held that since the income is deducted by the creditor under Section 194C of the Income Tax Act, it is on the goods or material purchased from the deductor for manufacturing or supplying a product. It is not on sale of goods. Further, it was observed that the appellant has not submitted the contracts entered between the creditors mentioned therein hence the appellant is liable to pay VAT on goods supplied under any contract apart from the service tax in case services provided are not found to be exempted.

8.1 Clause (54) of Section 65B "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. So a contract where transfer /supply of material are involved in execution of contract and if such goods are leviable to sales tax/VAT then said contract shall be classifiable under works contract service.

8.2 I find that the appellant have filed VAT return and discharged VAT on sale of goods. They also submitted a C.A. Certificate issued by Nilesh J. Nanadankar & Co. wherein it is certified that the appellant is engaged in business of trading/Reseller of electrical goods and providing electrical installation services on job work basis. It is certified that during the F.Y. 2015-16 and F.Y. 2016-17 they have shown the sale of goods and has paid VAT. They certified that the figures shown in the Tax Audit Report, VAT Audit report in Form 217 and VAT Return matches with the ITR return.

8.3 On going through the CA certificate, I find that they have shown sale of goods as under;

Year	Amount of Sale of Goods	VAT paid
2015-16	2,93,38,961	1466947
2016-17	3,28,92,501	1644625

Since works contract involves transfer of goods, it is possible that the VAT was paid on such transfer. I find that the appellant has also incurred labour expenses which also establish the fact that the appellant was providing works contract service.

8.4 However, it is observed that the demand has been made on the entire amount of income received towards works contract without excluding the value of goods & VAT paid. I find that in terms of Rule 2A of SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006, service tax shall be determined only on the service portion of the works contract. Relevant Rule 2A is reproduced below;

> ***RULE [2A. Determination of value of service portion in the execution of a works contract.*** *— Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-*
>
> *(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods [or in goods and land or undivided share of land, as the case may be] transferred in the execution of the said works contract.*
>
> ***Explanation.*** *- For the purposes of this clause,-*
>
> *(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;*
>
> *(b) value of works contract service shall include, -*
> - *(i) labour charges for execution of the works;*
> - *(ii) amount paid to a sub-contractor for labour and services;*
> - *(iii) charges for planning, designing and architect's fees;*

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;
(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;
(vi) cost of establishment of the contractor relatable to supply of labour and services;
(vii) other similar expenses relatable to supply of labour and services; and
(viii) profit earned by the service provider relatable to supply of labour and services;

(c) where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause;

(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;
*[**Provided** that where the amount charged for works contract includes the value of goods as well as land or undivided share of land, the service tax shall be payable on thirty per cent. of the total amount charged for the works contract.]*
[(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -
(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or
(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,
service tax shall be payable on seventy per cent. of the total amount charged for the works contract.]

***Explanation 1.** - For the purposes of this rule,-*
(a) "original works" means-
(i) all new constructions;
(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
(iii)erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;
(b) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-
(i) the amount charged for such goods or services, if any; and
(ii) the value added tax or sales tax, if any, levied thereon :
***Provided** that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles*

8.5 Since works contract involves transfer or sale of goods, the value of the amount charged for such goods or services, if any; and the value added tax or sales tax, if any, levied thereon shall be deducted, which I find was not done in the instant case. So, considering the deductions allowed in the total amount received, the demand needs to be re-determined accordingly.

9. Further, the appellant have claimed that they are also eligible for the benefit of exemption, vide Notification No. 33/2012-ST dated 20-06-2012. As per the said notification, "aggregate value" means the sum total of value of taxable services charged in the first consecutive invoices issued during a financial year but does not include value charged in invoices issued towards such services which are exempt from whole of service tax leviable thereon under section 66B of the said Finance Act under any other notification. Since the appellant is not required to pay service tax on sale of goods involved in

execution of works contract, I find that only the taxable income shall constitute the aggregate income. Thus, the aggregate value may get reduced so would the taxable income. Hence, the SSI exemption claimed by the appellant needs to be examined accordingly.

10. Accordingly, I set-aside the impugned order and allow the appeal by way of remand.

11. अपील कर्ता 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.

17.01.24

ज्ञानचंद जैन
आयुक्त(अपील्स)

Dated: 17th January, 2024

सत्यापित/Attested :

रेखा नायर
अधीक्षक (अपील्स),
सी जी एस टी, अहमदाबाद

By REGD/SPEED POST A/D

To,
Shri Atul Ravishankar Pandya, - **Appellant**
Proprietor of M/s Jay Enterprises,
Swagat Rain Forest-1, B-5,
Opp. Pratik Mall, Kudasan,
Gandhinagar, Gujarat-382009.

The Additional Commissioner, - **Respondent**
CGST & Central Excise,
Gandhinagar Commissionerate

Copy to:

1. The Principal Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Gandhinagar
3. The Superintendent (Systems), CGST, Appeals, Ahmedabad, for publication of OIA on website.
4. Guard file.