आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By SPEED POST
DIN:- 20230764SW0000000AFB

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/2655/2022-APPEAL
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-056/2023-24 and 21.07.2023
(ग)	पारित किया गया / Passed By	श्री शिव प्रताप सिंह, आयुक्त (अपील) Shri Shiv Pratap Singh, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	24.07.2023
(ङ)	Arising out of Order-In-Original No. AC/S.R./15/ST/KADI/2022-23 dated 28.06.2022 passed by The Assistant Commissioner, CGST, Division-Kadi, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	Shri Kanubhai Baldevbhai Patel (PAN – AVWPP8318H), 01, Rangpurda, Meda Adara, Kadi, Gujarat-382715

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 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 :-

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 संशोधित 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

M/s Shri Kanubhai Baldevbhai Patel, 01, Rangpurda, Meda Adaraj, Rangpurda, Kadi, Distt. Mehsana- 382715 (hereinafter referred to as the *"appellant"*) have filed the present appeal against Order-In-Original No. AC/S.R./15/ST/KADI/2022-23, dated 28.06.2022 (hereinafter referred to as the *"impugned order"*), issued by Assistant Commissioner, CGST & C.Ex., Division-Kadi, Commissionerate-Gandhinagar (hereinafter referred to as the *"adjudicating authority"*) .

2. Briefly stated, the facts of the case are that the appellant were not registered with the Service Tax department. They were having PAN No. AVWPP8318H. As per the information received from the Income Tax department, the appellant have declared the income earned from sale services in the Income Tax Return / Form 26AS for the period F.Y. 2016-17, whereas as per records they have neither obtained any Service Tax Registration nor have paid any Service Tax during the relevant period. In order to ascertain the fact, letters dated 31.07.2020, 14.08.2020 and 14.09.2020 and e-mails dated 31.07.2020, 14.08.2020 and 14.09.2020 were issued to them by the department. The appellant vide letter dated 22.09.2020 submitted the Income Tax Returns for F.Y. 2013-14, F.Y. 2014-15, F.Y. 2015-16 and F.Y. 2016-17 and Balance Sheet and Profit & Loss Statement for F.Y. 2014-15 and F.Y. 2016-17. It was also observed that the nature of services provided by the appellant were covered under the definition of 'Service' as per the provisions of the Finance Act, 1994, and their services were not covered under the 'Negative List' or exempted.

3. In the absence of any other available data for cross-verification, the Service Tax liability of the appellant for the F.Y. 2014-15 to F.Y. 2016-17 was determined on the basis of value of 'Sales of Services under Sales/Gross Receipts from Services (Value from ITR)' as provided by the Income Tax department for the relevant period as per details below:

TABLE (Amount in "Rs.")

F.Y.	Category of Service	Description of service in documents	Value considered	Abatement Rate	Taxable Value	Service Tax rate	RCM	Service Tax payable
2014-15	Works Contract Service	Earthwork Contract Income	45,05,225/-	30%	31,53,658/-	12.36%	50%	1,94,896/-
2015-16	Supply of Tangible Goods	Machinery Rent Income	19,29,118/-	NA	19,29,118/-	14.5%	NA	2,79,722/-
2016-	Works	Earthwork	18,97,135	30%	13,27,995	15%	50%	99,600/-

17	Contract Service	Contract Income	/-		/-			
2016-17	Renting of immovable Property	Godown Rent	8,58,000/-	NA	8,58,000/-	15%	NA	1,28,700/-
2016-17	Works Contract Service	Repair & Maintenance	20,000/-	30%	14,000/-	15%	50%	1,050/-
								7,03,668/-

4. The appellant were issued a Show Cause Notice No. GEXCOM/ADJN/ST/300/2020-CGST-DIV-KADI-COMMRTE-GANDHINAGAR, dated 29.09.2020 ('SCN' for short) wherein it was proposed to: -

- Demand and recover Service Tax amounting to **Rs. 7,03,968/-** under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994 ;
- Impose penalty under Sections 70, 77 and 78 of the Finance Act, 1994.

5. The said Show Cause Notice was adjudicated vide the impugned order wherein:-

- Demand of Service Tax amount of **Rs. 7,03,968/-** was confirmed under the proviso to Section 73 (1) of the Finance Act, 1994 alongwith Interest under section 75 of the Finance Act, 1994;
- Penalty amounting to **Rs. 7,03,968/-** was imposed under Section 78 of the Finance Act, 1994 alongwith provision for reduced penalty in terms of clause (ii) ;
- Penalty amounting to **Rs. 10,000/-** under Section 77 of the Finance Act, 1994 was also imposed.
- Penalty of **Rs. 20,000/-** was imposed under Section 70 of the Finance Act, 1994 .

6. Being aggrieved with the impugned order, the appellant have filed this appeal on following grounds :-

- The demand is solely on the basis of the 'Income earned' under Section 44AD of Income Tax Act and accounted for in the profit and loss account and balance sheet of the appellant.

- Even a single line of appellant's reply dated 26.10.2020, was not considered in the discussion and finding of impugned order. Surprisingly, when on 22-09-2020 the appellant submitted Income Tax returns along with Profit and Loss Account

and Balance Sheet, within a week, notice to show cause was issued. Whereas, the impugned order passed after one year and eight months from the date of submission of reply, but adjudicating failed to consider any cause of appellant's reply dated 26-10-2020. It is a settled law that a quasi-judicial authority is obligated to provide cogent reasons while passing any order.

- The CBIC had issued guidelines vide Instruction F.No. 390/CESTAT/24/2016-JC, dated 13-4-2016. In para 5(d) of the said Instructions, the CBIC has categorically mentioned that the quasi-judicial orders have to be necessarily be the speaking orders recording every fact and reason leading to the final decision in the matter. Non-speaking orders or the orders passed without recording the submissions and reasons for passing the order is nonest in law.

- A mechanical order is unconstitutional which is not sustainable in law. Reasons are the soul of law. The requirement of furnishing reasons is a shackle on acting arbitrarily and whimsically. It is the only visible safeguard against possible injustice and arbitrariness. Reasons disclose how the mind is applied to the subject matter of a decision, whether it is considered in the setup of a purely administrative or quasi-judicial order.

- Reasons should reveal a rational nexus between the facts and the conclusions reached. Only in this way opinions *or* decisions recorded can be shown to be manifestly just and reasonable. The appellant request to consider that in the absence of reasons by an adjudicating authority in the order passed by her would suggest a non-application of mind by the adjudicating authority and the presumption may be drawn that the adjudicating authority did not have any reason to give, to demand service tax in the present case.

- The service tax liabilities on the basis of nature of business indicated in the profit and loss account or from yearly Income Tax Return under Income Tax Act, is not sufficient to ascertain the category of service under the Finance Act, 1994. The nature of business required to indicate in the Income Tax Return is less precise than it defined in the Finance Act, 1994, much importance cannot be given to the description of income indicated in the Profit and Loss Account and Balance Sheet.

- The "Earthwork Income" is shown in the 'Profit and Loss Accounts' and nowhere it is shown as "Earthwork Contracts Income", the word "WORKS Contract" is not mentioned in the 'Profit and Loss Accounts' submitted by the appellant to the department. Also, the description "Machinery Rent Income" may be considered as "Earthwork Income".

- A person will not change his business for each year, only the business description is through oversight indicated differently in the profit and loss account for each year. The appellant was solely doing business of supply of soil / sand and was delivering it at the door step of the customers, using own vehicles and machineries. In the Income Tax Act, such description does not have any serious effect and hence this mistake of different description is occurred. The exact nature of these services must be determined from the tangible evidences. The true nature of the service whether liable for Service tax was required to ascertain precisely.

- Special provision of presumptive basis is provided in the Income Tax Act, vide Section 44AD under the head "Profits and gains of business or profession": which cannot be equated with the services precisely defined under the Finance Act, 1994. Whereas, under the Finance Act, 1994 there is no such provisions to pay service tax on presumptive basis *nor* can declare higher income.

- Under Income Tax Act, an assessee, who opts for ITR-4, is exempted from maintenance of books of account. A taxpayer who is covered by section 44AD can declare higher income also. Also, the income Tax Act does not have any distinction between business or profession, whereas service tax under Finance Act, 1994, is applicable only on services, "other business activities" are not covered under the Finance Act,1994.

- *"Income earned"* does not attract payment of service tax, except it is specified under the Finance Act, 1994. The appellant had never executed any contract for any customer wherein transfer of property in goods is involved in the execution of contract.

- The words "Earth Work" and "Machinery Rent Income" requires to understand as per the concept of person who has filed the return under the Income Tax Act.

The appellant has neither executed any work force nor used any other material to execute any such works contract.

- From the ledgers maintained by one of the customer M/s. Mascot Infratech for the financial year 2014-15, 2015-16 and 2016-17 that the activities are in relation to supply of soil only, the customer have specifically indicated "CARRIAGE INWARD SOIL" which has no relation with works contract service as defined under the Finance Act, 1994. This earthwork income of 'soil carriage' earned by the appellant cannot be said to be for providing service under *WORKS CONTRACT SERVICE.*

- The notice is issued mere on assumption and presumption, just for raising demand of service tax. Earthwork income cannot be treated as earthwork contract to make it taxable service under works contract, without any support of tangible evidence.

- Each specific allegation should be duly and adequately supported with substantive evidence so as to impart factual and legal sustainability to the allegation. Mere reproduction of the information received from the Income Tax Department or *Profit* and Loss Account, is without qualification.

- If any amount taken on the basis of information received from any third party, then this amount should be treated as inclusive of service tax, not the net of service tax. Service Tax liability of Rs. 1,050/- under the category of "works contract" in the F.Y. 2016-17 for the expenses of repair and maintenance amounting to Rs. 20,000/-, is not in accordance with the provision under Notification No. 52/2012 - S.T., as the appellant not a business entity registered as body corporate who is liable to pay service tax under Reverse charge. This indicates that impugned notice is issued without comprehensively considering the provisions under the Finance Act, 1994.

- The Godown Rent Income of Rs. 8,50,000/- is undisputedly covered under the service tax net, however, considering only this income as taxable service, it is exempted being aggregate value not exceeding Ten Lakhs Rupees, from the whole of the service tax leviable thereon under Section 66B of the Finance Act,1994, as notified in the Notification No. 33/2012 - Service Tax, dated

20.062012 as amended, because the Earth work and Machinery Rent income are nothing but are carting and supply of soil /sand.

- In view of above, appellant were not liable to pay any service tax nor liable to register under Service tax. In the present case the crux of dispute is in respect of the identification of the taxable person and classification of taxable service. Income Tax and Service Tax are two different/ separate and independent Acts and their provisions operating in two different fields. Therefore, ONLY by relying the Income Tax Returns and Profit and Loss under the Service Tax Act, demand of service tax cannot be made. As the said statement under provisions of Section 44AD of Income Tax Act, 1961. Specifically, when it is submitted by the appellant that the appellant have neither executed any work force nor used any other material to execute any such works contract, it is baldly alleged that the appellant has rendered taxable services of works contract. However, the show cause notice dated 29.09.2020 does not analyze the activities allegedly carried out by the appellant and whether the same would fall within the definition of any taxable services. The show cause notice has failed to analyze the transactions properly and mechanically raised the demand of Service tax.

- They made request to consider that appellant have produced ledgers maintained by one of the customer *M/s.* Mascot Infratech for the F.Y. 2014-15, F.Y. 2015-16 and F.Y. 2016-17 that the activities are in relation to supply of soil only, customer have specifically indicated "CARRIAGE INWARD SOIL" which has no relation with works contract service as defined under the Finance Act, 1994. This earthwork income of 'soil carriage' earned by the appellant cannot be said to be for providing service under WORKS CONTRACT SERVICE. The documents produced were maintained by the customer (THIRD PARTY) to support appellant's claim that appellant have not provided any taxable services for which appellant may be held liable for service tax. The said documents clearly established that the nature of the service provided by the appellant are not the services as alleged in the show cause notice and as confirmed in the impugned order. And the appellant does not become a person liable for payment of service tax in this case. And the appellant is solely doing business of supply of soil / sand and was delivering it at the door step of the customers, using own vehicles and machineries.

- Therefore, it is the responsibility of the department to show that the appellant had rendered the taxable services to customers with positive evidences. The appellant request to consider that unless and until the clear analysis of the activity done by the assessee is carried out; demand of service tax cannot be confirmed.

- The appellant is not an entity registered as body corporate, and therefore not liable to pay service tax under Notification No. 30/2012-S.T., on Reverse charge basis on Rs. 20,000/-, the expenses of repair and maintenance under the category of "works contract". The appellant request to consider that Service tax liability of Rs. 1,050/- under the category of "works contract" in the F.Y. 2016-17 for the expenses of repair and maintenance amounting to Rs 20,000/-, is not in accordance with the provision under Notification No. 30/2012-S.T., as the appellant ARE not a business entity registered as body corporate who is liable to pay service tax under Reverse charge.

- The appellant request to consider that they are not liable to pay service tax on Godown rent income also, because the appellant was solely doing business of supply of soil / sand and was delivering it at the door step of the customers, using own vehicles and machineries.

- Considering that the appellant was solely doing business of supply of soil / sand which were not taxable services than, though the Godown rent income of Rs. 8,50,000/- is undisputedly covered under the service tax net, however, considering only this income as taxable service, it is exempted being aggregate value not exceeding ten lakh rupees, from the whole of the service tax leviable thereon under section 66B of the Finance Act,1994, as notified in the notification No. 33/2012-Service Tax, dated 20-06-2012, because the Earth work and Machinery Rent Income are nothing but are carting and supply of soil/ sand. The appellant request to consider that there was no justification for invoking the extended period of limitation. There is no specific allegation against the appellant of any deliberate suppression or misstatement with intent to evade taxes in the show cause notice issued by the adjudicating authority. The Hon'ble Supreme Court in case of *Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur-2,* held that every non-payment / non-levy of duty does not attract extended period and there must be deliberate default. Further, it was held that the

conclusion that mere non-payment of duties is not equivalent to collusion or willful misstatement or suppression of fact is untenable as the Act contemplates a positive action which betrays a negative intent of willful default. Further, *in Pushpam Pharmaceuticals Co. Vs. CCE3* it was held that misstatement or suppression of fact must be willful since the word "willful" precedes the words 'misstatement or suppression of fact' which means with an intent to evade duty.

- Therefore, the appellant request to consider that there is no specific allegation or prima facie finding of any willful misstatement or suppression on the part of the assessee. The appellant also requests to consider that the details have been culled out by the adjudicating authority from the available records and there are no new or fresh tangible materials available in the hands of the adjudicating authority to make out a case of willful misstatement or willful suppression.

- Therefore, the appellant request to consider that the extended period of limitation could not have been invoked. The appellant request to consider that appellant was filing ITR under section 44AD of presumptive taxation, small taxpayers with less than 2 Crores of turnover are not required to maintain books of accounts and their profits are presumed to be a percentage of their turnover declared on presumptive basis.

- Despite this option available to the appellant, appellant have prepared profit and loss account and balance sheet (Though not precise as far as description of services). Which itself demonstrate that there was no intention of the appellant to suppress any fact or there was no any intention to evade any tax. Therefore, penalty cannot be imposed under Section 78 of Finance Act, 1994 in absence of any fraud or collusion or wilful mis-statement or suppression of facts, with the intent to evade payment of service tax. The- appellant also requests to consider that appellant were not liable to pay service tax or required to take registration. And therefore, penalty cannot be imposed under Section 77 of Finance Act, 1994 The appellant request to consider that the appellant was not liable to pay penalty (late fee) of Rs 20,000/under Section 70 of Finance Act, 1994, for non-filing of ST-3 return for the period from F.Y. 2014-15 to F.Y. 2016-17.

- The appellant were neither registered under service tax nor liable to file ST-3. The ACES system does not have any provision to file return for the period before

the date of registration. Especially when the impugned notice to show cause itself proposed penalty under Section 77 of Finance Act, 1994, for not obtaining Service tax registration.

- Under Section 70 of Finance Act, 1994 person liable to pay the service tax, required to self-assess the tax due on the services provided and required to furnish ST-3 return, whereas the appellant was not liable to pay service tax was also not required to file ST-3 return. And therefore, cannot impose penalty (late fee) of Rs. 20,000/- under Section 70 of Finance Act, 1994, for non-filing of ST-3 return. Even in a case where a tax payer is liable to pay service tax for the period prior to the date of registration, there was no provision in the ACES system to file ST-3 returns for the period prior to the date of registration. In absence of any facility to file ST-3 returns in ACES system for the period prior to the date of service tax registration, no one can file such ST-3 returns; consequently late fee for such returns cannot be levied from the tax payer, for such impossible task. Therefore, the demand of late fee for the returns prior to the date of service tax registration is not legal and proper.

7. Personal hearing in the matter was held on 13.03.2023. Shri Bindesh I. Shah and Pinakin Patel, Advocates, appeared as authorized representative of the appellant. They re-iterated the submissions made in the appeal memorandum. However, upon change in the appellate authority, personal hearing was again held on 07.07.2023. Shri Bindesh I. Shah and Pinakin Patel, Advocates, appeared on behalf of the appellant for hearing. They submitted an additional written submission alongwith copies of supporting documents e.g. carting income register, sample invoices and a copy of OIO in similar matter. They also submitted that the appellant did not provide any service falling under 'Works Contract Service' or 'Renting of immovable property service'. They have only supplied soil (earth), sand etc, and the same was not liable for service tax.

8. I have gone through the facts of the case, submissions made in the Appeal Memorandum as well as submissions made at the time of personal hearing and the materials available on the record. The issue before me for decision is as to whether the impugned order confirming the demand of Service Tax amounting to Rs. 7,03,968/- along with interest and penalty, in the facts and circumstances of the case, is legal and

proper *or* otherwise. The demand pertains to the period to the F.Y. 2014-15, 2015-16 and 2016-17.

9. It is observed that total demand of Service Tax was raised in the SCN on the three different issues as detailed below :

(A.) Demand of Service Tax amounting to Rs. 2,79,722/- (on a taxable value of Rs. 19,29,118/-) was raised under 'supply of tangible goods service' for the period F.Y. 2015-16.

(B.) Demand of Service Tax amounting to Rs. 2,95,546/- (on a taxable value of Rs. 64,22,360/-) on service portion in 'execution of work contract service' during the period F.Y. 2014-15 and F.Y. 2016-17 and

(C.) Demand of Service Tax amounting to Rs. 1,28,700 /- (on a taxable value of Rs. 8,58,000/-) on 'renting of immovable property service' during the period F.Y. 2016-17.

10. It is further observed that the appellant were holding GST Registration No. AVWPP8318H with effect from 16.08.2018. They were engaged in the activity of carting/supply of sand /soil/ stone chips to various customers at their doorstep using their own vehicles. They were not liable to Service Tax and were never registered under Service Tax. The SCN was issued entirely on the basis of data received from Income Tax department without causing any verification. The impugned order was issued on the basis of the SCN, without considering the submissions made by the appellant before the adjudicating authority randomly presuming and classifying the services rendered by the appellant and confirming the demand indiscriminately.

10.1 I find it relevant here, to refer to the CBIC Instruction dated 26.10.2021, wherein at Para-3 it is instructed that:

Government of India
Ministry of Finance
Department of Revenue
(Central Board of Indirect Taxes & Customs)
CX &ST Wing Room No.263E,
North Block, New Delhi,

Dated- 21st October, 2021

To,
All the Pr. Chief Commissioners/Chief Commissioners of CGST & CX Zone, Pr. Director General DGGI

Subject:-Indiscreet Show-Cause Notices (SCNs) issued by Service Tax Authorities- reg.

Madam/ Sir,

...

3. It is once again reiterated that instructions of the Board to issue show cause notices based on the difference in ITR-TDS data and service tax returns only after proper verification of facts, may be followed diligently. Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate show cause notices. ***Needless to mention that in all such cases where the notices have already been issued, adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee***

...

Examining the facts of the case with the specific Instructions of the CBIC, as above, I find that the SCN as well as the impugned order has been passed indiscriminately and mechanically without application of mind, and is vague, issued in clear violation of the instructions of the CBIC discussed above.

11. It is also observed that, the adjudicating authority has confirmed part of demand of Service Tax amounting to Rs. 2,79,722/- (on a taxable value of Rs. 19,29,118/-) by classifying the activity of the appellant under 'supply of tangible goods service'. The period covered by the demand is F.Y. 2015-16. It is noteworthy to mention that with the introduction of 'Negative List Regime' under Service Tax with effect from 01.07.2012, the definition of 'supply of tangible goods service' has been subsumed within the definition of service'' as per Section 66E (f) of the Finance Act, 1994. Examining the nature of activity of the appellant during the relevant period, I find that they are not covered within the ambit of 'Service' in terms of Section 66E (f) of the Finance Act,1994.

11.1 It is further observed that the demand of Service Tax amounting to Rs. 2,95,546/- (on a taxable value of Rs. 64,22,360/-) was confirmed vide the impugned order by classifying the services under 'Service portion in execution of work contract service' during the period F.Y. 2014-15 and F.Y. 2016-17. Considering the nature of activities of the appellant during the period F.Y. 2014-15 and F.Y. 2016-17 it is observed that it is in the nature of 'Trading' or 'Sale' rather than 'Service'. The Invoices issued by the appellant do not show any ingredient of service or execution of service portion of works contract. Hence, the classification of the services under 'Service portion in execution of work contract service' is indiscriminate and improper.

11.2 It is also observed that the demand of Service Tax amounting to Rs. 1,28,700 /- (on a taxable value of Rs. 8,58,000/-) was confirmed vide the impugned order by classifying the services under 'renting of immovable property service' during the period F.Y. 2016-17. I find that the appellants are not registered under Service Tax during the period. Further, in terms of Para 6.1.1 of CBE & C's 'Taxation of Services: An Educational Guide' published on 20.06.2012, 'Renting of Property' in the following cases are specified in the negative list :

- *renting of vacant land, with or without a structure incidental to its use, relating to agriculture.*
- *renting of residential dwelling for use as residence*
- *renting out of any property by Reserve Bank of India*
- *renting out of any property by a Government or a local authority to a non-business entity.*

Renting of immovable properties covered by exemption are as under :

- *Threshold level exemption up to Rs. 10 lakh.*
- *Renting of precincts of a religious place meant for general public is exempt.*
- *Renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff of a room below rupees one thousand per day or equivalent.*
- *Renting to an exempt educational institution*

I also find that, the appellants have reflected an income of Rs. 8,58,000/- in their Income Tax Returns for the F.Y. 2016-17 and described the same as 'Income from Property'. On the basis of the same the SCN was issued presuming the said income as 'Rental Income' without any verification or inquiry regarding the type of rental income earned by the appellant. It is also observed that although all rental income are liable to Income Tax, however, all rental incomes are not liable to Service Tax as explained in the negative list and exemptions, listed above. Moreover, a threshold exemption limit of Rs. 10, 00,000/- is also available to the appellant for the period F.Y. 2016-17. Therefore, classifying the activity under 'renting of immovable property service' for confirming the demand vide the impugned order is not legally sustainable.

12. It is observed that, the appellant have submitted that they were engaged in the activity of supplying sand /soil/stone chips to various customers using their own transport vehicles. Documents submitted by the appellant confirm that they were raising bills for 'Carting' to their customers without any mention for transportation expense. They have claimed that their services are covered under the 'Negative List' in terms of Section 66D (p) of the Finance Act, 1994. Relevant portion of the said Section 66D (p) of the Finance Act, 1994 is reproduced below:

SECTION 66D. Negative list of services.—
The negative list shall comprise of the following services, namely :—

...

(p) services by way of transportation of goods—
(i) by road except the services of—
(A) a goods transportation agency;or
(B) a courier agency;

(ii) [* *]*

(iii) by inland waterways;

...

Upon examination of the facts and circumstances of the case alongwith the above legal provisions, I find force in the argument of the appellant that their activity stands squarely covered under the negative list of services in terms of Section 66D (p) of the Finance Act, 1994.

12.1 In view of the above and the discussions in the foregoing paragraphs, I am of the considered opinion that the activities of the appellant during the period F.Y. 2014-15, F.Y. 2015-16 and F.Y. 2016-17 are covered under the 'Nagative List' in terms of Section 66D (p) of the Finance Act, 1994. The SCN issued in the case is vague. The demand of Service Tax amounting to Rs. 7,03,968/- confirmed vide the impugned order is indiscriminately passed without any verification and in violation of specific guidelines of the department and therefore, is liable to be set aside.

13. Accordingly, the demand of Service Tax confirmed vide the impugned order is set aside. As the demand fails to sustain, the question of fine and penalty does not arise. The appeal filed by the appellant is allowed.

14. 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.

(Shiv Pratap Singh)
Commissioner (Appeals)
Date : 21.07.July, 2023

Attested

(Somnath Chaudhary)
Superintendent (Appeals)

BY RPAD / SPEED POST

To,
M/s Shri Kanubhai Baldevbhai Patel,
01, Rangpurda, Meda Adaraj,
Rangpurda, Kadi,
Distt. Mehsana- 382715, Gujarat.

Copy to: -

1. The Principal Chief Commissioner, CGST & C.Ex., Ahmedabad Zone.
2. The Principal Commissioner, CGST & C.Ex., Commissionerate: Gandhinagar.
3. The Assistant Commissioner, CGST & C.Ex., Division-Kadi, Commissionerate: Gandhinagar.
4. The Superintendent (System), CGST, Appeals, Ahmedabad. (for uploading the OIA).
5. Guard File.
6. P.A. File.