आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
. 07926305065- टेलेफैक्स07926305136

DIN: 20230264SW000000F533

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2220/2022-APPEAL /8656 – 60

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-140/2022-23**
दिनाँक Date : **01-02-2023** जारी करने की तारीख Date of Issue 03.02.2023

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

ग Arising out of Order-in-Original No. **09/ADC/GB/2022-23** दिनाँक: **18.05.2022**, issued by Joint/Additional Commissioner, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s. Veer Procon Ltd.,
   53, Sardar Patel Colony,
   Near Sardar Patel Bavla,
   Naranpura, Ahmedabad-380014

2. Respondent
   The Joint Commissioner,CGST, Ahmedabad North , Custom House, 1st Floor, Navrangpura, Ahmedabad - 380009

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने 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 प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम 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 सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

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

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के 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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर 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.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (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 सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(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.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Veer Procon Ltd., 53, Sardar Patel Colony, Near Sardar Patel Bavla, Naranpura, Ahmedabad – 380014 (hereinafter referred to as "the appellant") against Order-in-Original No. 09/ADC/GB/2022-23 dated 18.05.2022 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central GST & Central Excise, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant was holding Service Tax Registration No. AADCV2831JSD001. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the FY 2015-16 & FY 2016-17, it was noticed that there is difference of value of service amounting to Rs. 5,52,65,977/- during the FY 2015-16 between the gross value of service provided in the said data and the gross value of service shown in Service Tax return filed by the appellant. Accordingly, it appeared that the appellant had earned the said substantial income by way of providing taxable services but not paid the applicable service tax thereon.

2.1 Subsequently, the appellant was issued a Show Cause Notice No. STC/15-12/OA/2021 dated 23.04.2021 demanding Service Tax amounting to Rs. 80,13,567/- for the period FY 2015-16 & FY 2016-17, under provisions of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994 and imposition of penalties under Section 77(2) and Section 78 of the Finance Act, 1994.

2.2 The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority wherein the demand of Service Tax amounting to Rs. 80,13,567/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period from FY 2015-16. Further, Penalty of Rs. 80,13,567/- under Section 78 of the Finance Act, 1994 and Penalty of Rs. 10,000/- under Section 77(2) of the Finance Act, 1994 were also imposed on the appellant.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the following grounds:

- The appellant engaged in providing services by way of construction of road for use by general public. As the provision of services by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a road for use by general public are exempt under Sr. No. 13(a) of Notification No. 25/2012-ST dated 20-06-2012, the appellant was of bonafide belief that no service tax is payable on their services.

- The Deputy Commissioner, Preventive Wing of CGST & Central Excise, Ahmedabad North, had, vide letter dated 13.02.2018, inquired about Non-payment/short payment of Service tax for the FY 2014-15 to FY 2017-18 (upto June, 2017). The appellant, vide letter 26.03.2018, submitted all documents as stated therein to the Deputy Commissioner for the period from FY 2014-15 to June, 2017 in response to their letter dated 13.02.2018. In this reply, apart from submitting all documents as stated therein, it was categorically stated therein that entire work income of FY 2014-15 to FY 2017-18 (upto June, 2017) has been towards construction of road and that the same is not taxable. The appellant submitted copies of the letter dated 13.02.2018 and their reply dated 26.03.2018 along with appeal memorandum.

- A letter dated 07.10.2020 was issued by the range officer to seek explanation regarding non-payment/short payment of Service Tax for the financial year 2015-16. The appellant vide reply dated 15.10.2020 and 16.10.2020, contended that as they were providing services by way of construction, erection, commissioning, installation, completing, fitting out or alteration of a road for use by general public and as these services were exempt, no service tax is payable by them. The appellant had also submitted reconciliation of income reconciling the difference between assessable value under service tax and 26AS and submitted details of all their invoices issued during the FY 2015-16 and copy of sample invoices. The appellant submitted copies of the letter dated 07.10.2020 and their replies dated 15.10.2020 and 16.10.2020 along with appeal memorandum.

- In sheer disregard of the above replies submitted to the Department informing about the nature of service being that of construction of road for general public which is fully exempt from service tax, Department, mechanically issued the present Show Cause Notice No. STC/15-12/OA/2021 dated 23-04-2021. SCN is issued mechanically based on income tax return and details from Form 26AS without considering the explanations provided twice by the appellant.

- The appellant submitted that their entire contract receipts during FY 2015-16 is in respect of services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of road for use by general public which is exempt under Sr. No. 13(a) of Notification No. 25/2012-ST dated 20-06-2012. Apart from the service being more specifically exempt under Sr. No. 13(a) of the said notification, the same is also exempt under Sr. No. 29(h) of Notification No. 25/2012-ST as they have provided services as subcontractor by way of works contract to another contractor providing works contract services which are exempt. However, since, Sr. No. 13(a) of Notification No. 25/2012-ST clearly covers such service to be fully exempt from levy of whole of service tax, there is no liability for payment of any service tax on the part of the appellant.

- This appellant had provided following documents in support of their claim that the services provided by them exempt under Notification No. 25/2012-ST dated 20-06-2012.

(a) CA Certificate dated 20.05.2021 certifying that the entire contract receipt during the FY 2015-16 is in respect of services provided by way of construction, erection, commissioning, installation, completion, fitting out, or alteration of a road for use by general public.

(b) Reply dated 26.03.2018 to the Deputy Commissioner, Preventive Wing of Ahmedabad North, in response to its letter dated 13.02.2018 submitting all documents as stated therein for the period from 2014-15 to June, 2017. In that reply, apart from submitting all documents as stated therein, it is categorically stated that entire work income of FY 2014-15 to FY 2017-18 (Upto June, 2017) has been towards construction of road and the same is not taxable. No SCN was issued for the period FY 2014-15 which implies that, department was satisfied that the services were exempt under Notification No. 25/2012-ST dated 20.06.2012. It is shocking and surprising that no discussion or finding on fact of submission of their reply dated 26.03.2018 has been made in the SCN or in the impugned order making the impugned order non-speaking.

(c) Reply dated 15.10.2020 to the Superintendent of Ahmedabad North Commissionerate in response to letter dated 07.10.2020 from department. Wherein it is categorically stated that entire work income of FY 2015-16 has been towards construction of road and the same is not taxable.

(d) Letter dated 16.10.2020 filed with Office of the Superintendent on 19.10.2020 submitting documents and explanations as also contending that the entire work income of FY 2015-16 has been towards construction of road and the same is not taxable.

(e) Sample Bill for August, 2015 for earth work related to Four Laning of Bhilwara Rajsamand road for Bhavna Engineering Company. The bill has been issued against their services for construction of four laning of Bhilwara-Rajsamand National Highway-758.

(f) Sample Bill for period 26.12.2015 to 25.01.2016 of Sadbhav Engineering Ltd. for Road work on Bhilwara Rajsamand Tollway.

(g) Work Order dated 17.04.2015 issued by Sadbhav Engineering Ltd for works of Construction of Road.

(h) Reconciliation of figures of contract income as reflected in books of account, 26AS and income tax return.

- The impugned order disallows exemption to them contending that they have not produced any evidence to prove that the said amount credited in their account is against services provided by way of construction of road for use by general public. This contention of adjudicating authority is contrary to facts on record and is not true as they have provided CA Certificate dated 20.05.2021 certifying that the entire contract receipt during the FY 2015-16 is in respect of services provided by them by way of construction, erection, commissioning, installation, completion, fitting out, or alteration of a road for use by general public and said income is exempt from the levy of whole of service tax thereon and have also provided host of other documents and details as stated above.

- After the departmental officers had collected required information from them under inquiry letter dated 13.02.2018, they had never even disputed that any tax is payable by them in respect of road construction service which is exempt. Further, on department's inquiry vide letter dated 07.10.2020 also they had submitted details to show that their service of construction of road is exempt and no service tax is payable by them. Despite being two different offices satisfied about non-liability for payment of service tax, a third office of the Department, without taking any cognizance of the details already submitted to two different authorities and without giving any opportunity of explanation, issued SCN dated 23-04-2021 based on assumptions and presumptions contrary to facts on record.

- The SCN issued to them is on the basis of data received from CBDT without ascertaining the reasons for mismatch in taxable value as per ST-3 and Income Tax Return/26AS. They submitted that department cannot raise the demand on the basis of 26AS figures and balance sheet figures without examining the real nature of income and without establishing that the entire amount received by the appellant as reflected in said Form 26AS is consideration for any taxable services provided and without examining whether the said income was because of any exemption. It is not legal to presume that the entire amount was on account of consideration for providing taxable services without such examination. In this regard, they relied upon the following case laws:

  a. Kush Constructions Vs. CGST NACIN, ZTI, Kanpur [2019 (24) GSTL 606 (Tri.All.)]
  b. Sharma Fabricators & Erectors Pvt. Ltd. [2017 (5) GSTL 96 (Tri.-All.)

- The SCN is issued in defiance of CBEC direction to grant mandatory pre-show cause notice consultation making it patently illegal and invalid. The SCN on its page No. 2 states that "The said assessee was given opportunity to appear for pre-show cause

consultation. The pre-show cause consultation was fixed on 22.04.2021 but the assesse did not appear for the same". The appellant submitted that they were not given any such opportunity of pre-show cause consultation on 22-04-2021. Without providing pre-show cause consultation the issuance of SCN is bad in law. In this regard, they relied upon the judgement in case of Amadeus India Pvt. Ltd. Vs. Pr. Commr. of CE, ST & CT [2019 (25) GSTL 486 (Del.)]

- Even where service tax is payable, the value should be treated as inclusive of service tax as per Section 67(2) of the Finance Act, 1994, as no service tax is recovered over and above the amount from the service receivers by them. In this regard they relied upon the following case laws:

  i. Godfrey Phillips India Ltd. Vs. CCE [2018 (10) GSTL (Tri.-Mum.)]
  ii. CCE Vs. Advantage Media Consultant [2009 (14) STR J49 (SC)].
  iii. Balaji Manpower Services Vs. UOI [2019 (31) GSTL 418 (P&H)]

- Further, the works contract entered into by them for execution of original works, service tax payable is forty percent of the total amount charged for the works contract in terms of provisions of Rule 2A(ii)(A) of Service Tax (Determination of Value) Rules, 2006. However, the adjudicating authority has mechanically confirmed the service tax demand on total amount making the impugned order bad in law. Though in their case, no service tax is payable as entire value of service is fully exempt as their service is for construction of road for use by general public. They submitted that even where service tax is payable, the same should be payable only on 40% of total amount charged and the impugned order confirming the same on total amount is not legal or proper.

- As service tax itself is not payable, question of ordering recovery of interest under Section 75 of the Finance Act, 1994 is not arise.

- They further submitted that imposing penalty of Rs. 10,000/- under Section 77(2), and Rs. 80,13,567/- under Section 78 of the Finance Act, 1994 despite there being no violation of any of the provisions of the Finance Act, 1994 or the rules made thereunder on the part of the appellant, is bad in law. When no service tax is payable, no compliance under Finance Act, 1994 or the rules made thereunder are required on the part of the appellant.

- Confirming the demand of service tax by invoking extended period of limitation despite the fact that there is not an iota of evidence of suppression or intent to evade payment of tax on the part of the appellant is also bad in law. Further, extended period of limitation of even five years is over on 11.04.2021 as ST-3 return is filed on 11.04.2016 for half year ended 31.03.2016. As this SCN is served on 27.04.2021, i.e. after 11.04.2021, the

same is hopelessly barred even beyond the extended period of limitation. They relied on the following case laws in support of their above contention:

a) CCE, Mumbai-IV Vs. Damnet Chemicals P. Ltd. [2007 (216) ELT 3 (SC)].
b) CC Vs. Seth Enterprises [1990(49) ELT 619 (Tri.Del.)]
c) Tamilnadu Housing Board Vs. CCE - 1994 (74) ELT 9 (SC)
d) Collector Vs. Chemphar Drugs - 1989 (40) ELT 276 (SC)
e) Pahwa Chemicals P. Ltd. Vs. CCE, Delhi [2005 (189) ELT 257 (S.C.)]
f) Cosmic Dye Chemical Vs. CCE, Bombay [1995(75) ELT 721(SC)]
g) Hindustan Steel Vs. State of Orissa [1978 (2) ELT (J 159) (S.C.)]
h) Cement Marketing Co. [1980 (6) ELT 295 (SC)]

- On the basis of above grounds, the appellants requested that the impugned order confirming demand of service tax, interest thereon and imposing penalties be quashed and set aside.

4. Personal hearing in the case was held on 24.01.2023. Shri Nilesh V. Suchak, Chartered Accountant, Shri Nandesh Barai, Chartered Accountant, Shri Nimesh Shah, Chartered Accountant and Shri Pritam Patel, Director of the appellant, appeared for personal hearing. They reiterated submission made in appeal memorandum. They submitted a written submission during hearing. They further stated that the demand is barred by limitation even after taking into the consideration extended period of limitation.

4.1 In their additional written submission dated 24.01.2023 produced during the course of personal hearing, the appellant, inter alia, reiterated the submission made in appeal memorandum and also submitted following documents:

(a) Work Orders for Dhule-Palasner NH-3

(i) Work Order dated 15.01.2009 issued by NHAI for work awarded to Sadbhav Engineering Ltd.

(ii) Work Order dated 17.04.2015 issued by Sadbhav Engineering for work sub-contracted to Veer Procon Limited

(b) Work Orders for Bhilwara-Rajsamand NH 758

(i) Work Order dated 26.11.2012 issued by NHAI for work awarded to Sadbhav Engineering Ltd.

(ii) Work Order dated 24.06.2013 issued by Sadbhav Engineering to Veer Procon Limited

(c) Work Orders for Gomti-Udaipur NH-8

(i) Work Order dated 12.03.2012 issued by NHAI for work awarded to Sadbhav Engineering Ltd.

(ii) Work Order dated 01.05.2013 issued by Sadbhav Engineering for work sub-contracted to Veer Procon Limited

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand against the appellant along with interest and penalty, in the facts and circumstance of the case is legal and proper or otherwise. The demand pertains to the period FY 2015-16.

6. I find that in the SCN in question, the demand has been raised for the period FY 2015-16 based on the data of Form 26AS received from the CBDT. Except for the value of "Total amount paid / credited under Section 194C, 194I, 194-H, 194-J (as per Form 26AS)"provided by the Income Tax Department, no other cogent reason or justification is forthcoming from the SCN for raising the demand against the appellant. It is also not specified as to under which category of service the non-levy of service tax is alleged against the appellant. Merely because the appellant received the amount on which TDS collected by the service recipient, the same cannot form the basis for arriving at the conclusion that the respondent was liable to pay service tax, which was not paid by them. In this regard, I find that CBIC had, vide Instruction dated 26.10.2021, directed that:

> *"It was further reiterated that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns.*
>
> *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."*

6.1 In the present case, I find that earlier inquiry were initiated by the Deputy Commissioner of Preventive, CGST & Central Excise, Ahmedabad North vide letter dated 13.02.2018 whereby it was asked for details and documents of the service provided by the appellant during the period from FY 2014-15 to FY 2017-18 (upto Jun-17) and the appellant had provided various documents to them vide reply dated 26.03.2018. Again, the jurisdictional Range Superintendent vide letter dated 07.10.2020 sought details and documents of the service provided by the appellant for the period FY 2015-16, which were also provided by the appellant vide their reply dated 15.10.2020 and 16.10.2020. However, without any further inquiry or investigation and without giving any reference of the said correspondence and documents / details provided by the appellant or reason for not considering the said correspondence and documents / details, the present SCN has been issued only on the basis of details received from the Income Tax department, without even specifying the category of service in respect of which service tax is

sought to be levied and collected. This, in my considered view, is not a proper ground for raising of demand of service tax, when all the details and documents available with the department. Therefore, on this very ground, the demand raised vide the impugned SCN is liable to be dropped.

6.2 A similar view has been taken by the Hon'ble High Court of Madras in the case of R.Ramdas Vs. Joint Commissioner of Central Excise, Puducherry - 2021 (44) GSTL 258 (Mad.). The relevant parts of the said judgment are reproduced below :

> *"7. It is a settled proposition of law that a show cause notice, is the foundation on which the demand is passed and therefore, it should not only be specific and must give full details regarding the proposal to demand, but the demand itself must be in conformity with the proposals made in the show cause notice and should not traverse beyond such proposals.*
>
> *11. The very purpose of the show cause notice issued is to enable the recipient to raise objections, if any, to the proposals made and the concerned Authority are required to address such objections raised. This is the basis of the fundamental Principles of Natural Justice. In cases where the consequential demand traverses beyond the scope of the show cause notice, it would be deemed that no show cause notice has been given, for that particular demand for which a proposal has not been made.*
>
> *12. Thus, as rightly pointed out by the Learned Counsel for the petitioner, the impugned adjudication order cannot be sustained, since it traverses beyond the scope of the show cause notice and is also vague and without any details. Accordingly, such an adjudication order without a proposal and made in pursuant of a vague show cause notice cannot be sustained."*

7. I also find that the appellant have also contended that the demand is barred by limitation. In this regard, I find that the demand pertains to FY 2015-16 and even by invoking the extended period of limitation, the SCN could have been issued by 08.10.2020 for demanding service tax for the first half of 2015-16 as the ST-3 Returns for the period from April-2015 to September-2015 was filed by the appellant on 09.10.2015. I also find that the said date was extended upto 31.12.2020 vide Notification dated 30.09.2020 issued by the Central Board of Indirect Taxes & Customs vide [F. No. 450/61/2020- Cus.IV (Part-I)]. Therefore, the demand in respect of the period from April, 2015 to September, 2015 is time barred as the notice was issued on 27.04.2021, beyond the prescribed period of five years. I, therefore, agree with the contention of the appellant to that extent that even if the suppression is invoked, the demand is time barred in terms of the provisions of Section 73 of the Finance Act, 1994. In my considered view, the demand on this count is also not sustainable for the period from April, 2015 to September, 2015 as the same is barred by limitation.

7.1 I also find that the Show Cause Notice for demanding service tax could have been issued on or before 10.04.2021 for the period from October-2015 to March-2016 as the appellant filed their ST-3 Return on 11.04.2016. However, the SCN has been issued on 27.04.2021. Therefore, the demand in respect of the period from October-2015 to March-2016 is also time barred as the notice was issued on 27.04.2021, beyond the prescribed period of five years. I, therefore, agree with the contention of the appellant to that extent that even if the suppression is invoked, the demand is time barred in terms of the provisions of Section 73 of the Finance Act, 1994. In my considered view, the demand on this count is also not sustainable for the period from October-2015 to March-2016 as, the same is barred by limitation.

8. The adjudicating authority had confirmed the demand of Service Tax in the impugned order by disallowing exemption of Sr. No. 13(a) of the Notification No. 25/2012-ST dated 20.06.2012 to the appellant, inter alia, holding that the appellant have not produced any evidence to prove that the said amount credited in their account is against services provided by way of construction of road for use by general public. The relevant Para 19 & 20 of the impugned order are reproduced as under:

> *"19. I have carefully gone through the reply to show Cause Notice field by the assessee wherein they claimed that they are doing road construction works on sub contract basis for the main contractors M/s. Bhavna Engineering Company and M/s. Sadbhav Engineering Ltd and claimed exemption from payment of service tax under Notification No. 25/2012 dated 20.06.2012. The assessee has also provided copy of works order dated 17.04.2015 issued by M/s. Sadbhav Engineering Limited wherein it was mentioned as work order for execution of earthwork, feeding of aggregates and transportation works for the 4 laning MP/Maharashtra Border-Dhule Section of NH-3 from Km 168.500 to Km 265.000 in the state of Maharashtra under NHDP Phase-III. I have gone though the works order and attached schedule wherein the details of works such as scope of work, period for completion and other conditions along with schedule. On perusal of the Show Cause Notice, I find that the demand of service tax is derived on the basis of Gross receipts from services of Form 26AS. I have gone through the Form 26AS for the period 2015-16 in the total amount paid/credited from the account of M/s. Sadbhav Engineering limited is Rs.5,49,96,976/-. However they have not produced any evidence to prove that the said amount credited in their account is derived from the, above referred work order given to the assessee by M/s. Sadbhav Engineering Limited. Similarly the assessee also not produced the copy of work order to prove that the main Contractor M/s. Sadbhav Engineering has been allotted by the appropriate authority for construction of construction and maintenance of road for public. The work orders for construction of road for road transportation for general public is normally being allotted by a Government Agency i.e. National Highway Authority of India, Centra Public Works Department, State Public Works Department or any other Govt. Agency. However in the instant case the assessee claimed that M/s. Sadbhav Engineering have allotted the road construction to the assessee, but they could not produce any agreement/contract/work order that the construction of road for the use of general public is allotted by any*

Government agency. In the absence of such documents and evidence, it is not possible to arrive a conclusion that the said amount credited on the account of the assessee from the main contractor i.e. M/s. Sadhbhav Engineering company is in lieu of work carried for construction of any road used for pubic or not. In the absence of such documentary evidence, the claim of the assessee that these services are exempted from Service Tax vide Notification No. 25/2012 dated 20.06 2021 cannot be accepted. As they are not eligible for exemption from service tax, service tax on Rs.5,49,96,976/- is required to be confirmed and recovered from the assessee.

20. Similarly on perusal of Form 26AS for the Financial Year 2015-16 an amount of Rs.7,01,001/- paid/credited to the account of the assessee from the deduct or M/s. Bhavna Engineering Company Private Limited. This amount is also taken in the SCN for demand service tax. On perusal of the documents submitted by the assessee, I find that no documents such as copy of work order, invoices, bank statements, Ledger or copy of work or allotted to the said M/s. Bhavna Engineering Company P. Ltd. from any Agency for the construction of Road for public use. In the absence any such supporting documents, it cannot be ascertained whether the income derived from M/s. Bhavna Engineering Company Private Limited is in relation to construction or maintenance of any public road or not. In the absence of such documentary evidence, the claim of the assessee that these services are exempted from Service Tax vide Notification No. 25/2012 dated 20.06.2012 cannot be accepted and therefore the said income of Rs.7,01,001/- is also liable to be taxed."

9. For ease of reference, I reproduce the relevant provision of Sr. No. 13 of Notification No. 25/2012-ST dated 20.06.2012 as amended, which reads as under:

"Notification No. 25/2012-Service Tax dated 20th June, 2012

G.S.R. 467(E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification No. 12/2012- Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

1...

2... ... ...

13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of, -

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;"

9.1 In view of the above provision of Sr. No. 13(a) of the Notification No. 25/2012-ST dated 20.06.2012, it is amply clear that if the appellant provided services by way of construction of a road for use by general public, the services provided by the appellant is exempted one.

9.2 On verification of the various documents provided by the appellant, viz. the CA Certificate dated 20.05.2021 certifying that the entire contract receipt during the FY 2015-16 is in respect of services provided by way of construction, erection, commissioning, installation, completion, fitting out, or alteration of a road for use by general public; Sample Bill for August, 2015 for earth work related to Four Laning of Bhilwara Rajsamand National Highway-758 for Bhavna Engineering Company; Sample Bill for period 26.12.2015 to 25.01.2016 of Sadbhav Engineering Ltd. for Road work on Bhilwara Rajsamand Tollway; the Work Orders dated 15.01.2009, 26.11.2012 & 12.03.2012 issued by the NHAI to Sadbhav Engineering Ltd. and the Work Orders dated 17.04.2015, 24.06.2013 & 01.05.2013 issued by Sadbhav Engineering Ltd. to the appellant for sub-contract of work of Construction of Roads; I find that the appellant had provided services related to Bhilwara Rajsamand National Highway NH 758, Dhule-Palasner NH-3 and Gomti-Udaipur NH-8, which are roads for general public being a National Highway, and, therefore, the said services were exempted as per Sr. No. 13(a) of the Notification No. 25/2012-ST dated 20.06.2012. Under the circumstances, I find that the version of the appellant that they were engaged in the services by way of construction of roads and that consideration so received against providing such services were exempted vide Sr. No. 13(a) of the Notification No.25/2012-ST dated 20.06.2012, as amended, has to be considered in their favour in absence of any contrary evidences brought on record by the adjudicating authority. I find that it is a well settled legal position that the phrases and wordings used in the statutes have to be interpreted strictly and cannot be interpreted to suit one's convenience as it may defeat the objective/purpose of Legislature. As a principle of equity, no tax can be imposed by inference or analogy or assumptions or presumptions. In the case of **State of Rajasthan Vs Basant Agrotech (India) Ltd. [2014 (302) ELT 3 (SC)]**, the Hon'ble Supreme Court has held that if the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intention of the legislature and by considering what was the substance of the matter and in interpreting a taxing statute, equitable considerations are entirely out of place.

10. On verification of the Work Order submitted by the appellant, I find that the appellant have provided Works Contract Service, thus, the Service Tax was required to be paid by them on 70% or 40% of the gross value as per Rule 2A of Service Tax (Determination of Value) Rules, 2006. However, I find that while issuing the impugned order, the Service Tax has been confirmed on the entire amount of value of service without considering the abatement provided under Rule 2A of Service Tax (Determination of Value) Rules, 2006 for the said service category. Thus, I find that the impugned order has been issued to the appellant without appreciation of facts available on record and without correct classification and the quantification of Service Tax payable, which is not legally tenable.

11. Accordingly, I find that the impugned order is not sustainable on merits as well as on the ground of limitation. Therefore, I set aside the impugned order and allow the appeal filed by the appellant.

12. 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.

(Akhilesh Kumar)
Commissioner (Appeals)

Attested

(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad

Date : 01.02.2023

By RPAD / SPEED POST

To,

M/s. Veer Procon Ltd., — Appellant
53, Sardar Patel Colony,
Near Sardar Patel Bavla,
Naranpura, Ahmedabad – 380014

The Additional Commissioner, — Respondent
CGST& C. Excise,
Ahmedabad North

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Additional Commissioner, CGST& C. Excise, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North (for uploading the OIA)
5) Guard File
6) PA file