आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211064SW000000CE02

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1082, 1084,1087/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad 3629 To 3633

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-20 to 22/2021-22**
दिनाँक Date : **23.09.2021** जारी करने की तारीख Date of Issue : **01.10.2021**

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

ग Arising out of Order-in-Original Nos. **15/ADC/2020-21/MSC dated 14.09.2020**, passed by Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Sl. No. 01. - M/s. Wagad Infraprojects Pvt. Ltd., Block No. 765, Sarkhej to Sanand Road, In lane of Hotel Sarvottam, Nr. Bharat Farm House Gibpura, TA: Sanand, Ahmedabad.

Sl. No. 02. – Shri Ankush Jain, Director of M/s. Wagad Infraprojects Pvt. Ltd.,

Sl. No. 03. – Shri Brijendra Pravinsinh Vaghela, Accounts Manager of M/s. Wagad Infraprojects Pvt. Ltd.

Respondent- Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

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 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।

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

(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 अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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

(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 not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय 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.

(6) 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 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 appeals have been filed by M/s. Wagad Infraprojects Pvt Ltd, Block No. 765, Sarkhej to Sanand Road, In lane of Hotel Sarvottam, Nr. Bharat Farm House, Gibpura, Tal: Sanand, Ahmedabad, Shri Ankush Jain, Director of M/s. Wagad Infraprojects Pvt Ltd, and Shri Brijendra P. Vaghela, Accounts Manager of M/s. Wagad Infraprojects Pvt Ltd (hereinafter referred to as the appellants) against Order in Original No. 15/ADC/20-21/MSC dated 14-09-2020 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, CGST, Ahmedabad North [hereinafter referred to as "*adjudicating authority*"].

2. The facts of the case, in brief, is that the appellant firm, having Central Excise Registration No. AABCW1489KEM003, is engaged in the manufacturing of Ready Mix Concrete (hereinafter also referred to as RMC). They are having manufacturing plants at Gandhinagar, Sanand and Vadodara. They were also providing taxable services viz. Works Contract Service but were not registered with the Service Tax Department. Intelligence was gathered by the Directorate General of Goods and Service Tax Intelligence, Surat Zonal Unit (hereinafter also referred to as DGGI) that the appellant firm is engaged in the manufacture of RMC falling under CH 38245010 and is not registered with Central Excise and not paying Central Excise duty. Investigation was carried out against all three units of the appellant firm. The investigation against the appellant firm located at Sanand was carried out by DGGI, Vadodara and the firm paid differential Central Excise duty alongwith applicable interest and penalty. The evasion of Service Tax for the period from April, 2014 to June, 2017 was also investigated.

3. The appellant firm were receiving work orders for providing and laying of RMC involving both supply of RMC as well as service. They were receiving composite contracts for supplying and laying RMC. The service part includes laying of RMC using a concrete pump, finishing the concrete with machineries/tools, labour etc. and in the contracts it was clearly mentioned that the rates are under the conditions of Works Contract. The service provided by the appellant firm appeared to be classifiable under the taxable service viz. Works Contract Services. The appellant firm was showing the details of works contract sales separately in their ledger under the column Works Contracts where they have also paid works contract tax instead of VAT. The appellant suppresses the above facts regarding providing of Work Contract

services from the Service Tax department. They had neither obtained Service Tax registration from the department nor paid Service Tax. The total Service Tax so evaded by the appellant firm was computed at Rs.1,94,47,481/-.

4. The documents submitted by the appellant firm to DGGI in the course of the investigation indicated that Work Order issued to them is for supply of RMC under Work Contract and the responsibility of the appellant firm includes supply of RMC, transporting, laying using concrete pump, finishing the concrete with their machineries, supply of all material, labour, tools, plant etc. It is also clearly mentioned in the Terms & Conditions that the rates are under the conditions of Works Contact.

5. In his statement, the Authorised Signatory of the appellant firm, Shri Brijendra Pravinsinh Vaghela, confirmed that wherever VAT paid is shown as Nil in sales invoices, the supplies are under Works Contract and for such supplies the contract entered into with the buyers is for concrete providing and laying and finishing at site of the buyers. In his statement, the Director of the appellant firm, Shri Ankush Jain, stated that Works Contract Sales related to the contract entered into with the party which are covered under Works Contract i.e. in such type of contract along with supply some service portions is also involved and as it was not possible for them to bifurcate the supply and service portion they were paying Central Excise duty on full amount and they were not paying Service Tax under Works Contract. He further clarified that in cases of contracts covered under Works Contract they were paying Works Contract Tax and no VAT was payable on such contract; wherever VAT paid has been shown as Nil in their sales invoices, such suppliers are under Works Contract and for such supplies the contract entered into by them with the buyer was for providing of concrete and laying and finishing at the site of the buyer.

6. A notice bearing F.No. DGGI/SZU/36-32/2019-20 dated 22.07.2019 was issued to the appellant firm calling upon them to show cause as to why : i) The service provided by them viz. transportation, laying, finishing and mixing should not be classified as Works Contract Services under the category of Declared Services under Section 66(E)(h) of the Finance Act, 1994 and the value received on account of sale of RMC should not be treated as taxable value for computing Service Tax liable thereon. ii) Service Tax amounting to Rs.1,94,47,481/- should not be demanded and recovered from them by invoking the extended period as per proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. iii) Interest should not be demanded from them

under Section 75 of the Finance Act, 1994 and iv) Penalty under Section 77 and 78 of the Finance Act, 1994 should not be imposed upon them.

6.1 The Director and the Authorised Signatory of the Appellant firm were also issued notice bearing F.No. DGGI/SZU/36-32/2019-20 dated 22.07.2019 calling upon them to show cause as to why Penalty should not be imposed upon them under Section 78A of the Finance Act, 1994.

7. The said SCN was adjudicated by the adjudicating authority vide the impugned order wherein he has :

A) ordered classification of the service provided by the appellant firm viz. transporting, laying, finishing and mixing be classified as Works Contract Services under the category of Declared Services under Section 66(E)(h) of the Finance Act, 1994 and the value received on account of sale of RMC to be treated as taxable value for computing Service Tax;

B) Confirmed the demand of Service Tax amounting to Rs.1,94,47,481/- as per the proviso to sub-section (1) of Section 73 of the Finance Act, 1994;

C) Ordered charging of interest under Section 75 of the Finance Act, 1994;

D) Imposed penalty of Rs.10,000/- under Section 77 of the Finance Act, 1994;

E) Imposed penalty of Rs.1,94,47,481/- under Section 78 of the Finance Act, 1994;

F) Imposed penalty of Rs.1,00,000/- on Shri Ankush Jain, Director of the appellant firm Under Section 78 of the Finance Act, 1994;

G) imposed penalty of Rs.50,000/- on Shri Brijendra Pravinsinh Vaghela, Accounts Manager and Authorised Signatory of the Appellant firm under Section 78 of the Finance Act, 1994.

8. Aggrieved with the impugned order, the appellant firm has filed the instant appeal on the following grounds:

i) That the adjudicating authority has failed to appreciate that the entire basis for treating the transaction as Works Contract is the purchase orders vide Purchase Order dated 13.09.2016 from M/s.Virasat Buildcon and Purchase

Order dated 30.11.2015 of M/s.A.D.Corporation. These contracts apart from supply of RMC stipulate other additional requirements of transporting, laying, using concrete pump and finishing concrete with machineries. When the RMC is to be placed at the Rooftop or first floor then only the appellant is required to discharge the delivery by using a pump. The pumped out RMC is also required to be equally distributed on the given floor as it cannot be discharged for technical reasons on a single spot in the form of a heap. The appellant have not used any plant or machinery or tools to carry out any process of construction etc. other than the aforesaid process of laying of RMC by concrete pump.

ii) They have not deployed any manpower like mason, concrete punner, plasterer or similar such tradesman/artisans or skilled workers except six pure labourers who handled the aforesaid work of laying RMC by pumping.

iii) The Purchase Order shows a Works Contract for concrete providing and laying because under the Sales Tax/VAT laws the terms 'Works Contract' is very loosely defined. As per the Sales Tax Act, Works Contract is defined as : " Work Contract" means a contract for carrying out any work which includes assembling, construction, building, altering, **manufacturing, processing,** fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property".

iv) In the Gujarat VAT Act, 2003 there is no definition of Works Contract but it is covered under Composition Tax." The lump sum tax reduced under Section 14A for Works Contract is notified vide Notification No. (GHN-88) dated 17.08.2006.

v) The definition of Works Contract in the VAT law is very wide which includes among others even manufacturing and processing work. On the other hand, the definition of Works Contract in the Service Tax law is poles apart and does not include or apply to a case of manufacturing or processing. As per the Service Tax law, the dominant activity has to be a service simplicitor. Consequently, the mere fact that an activity is classified as Works Contract under the VAT law cannot *per se* be a conclusive factor to treat the contract as Works Contract Service.

vi) The impugned process of laying out the RMC by pumping and placing it at the given floor area is only an integral part of delivery that is required solely due to the peculiar nature of the product and its shelf life. The dominant activity in the whole transaction is that of manufacture and sale of RMC on

FOR destination basis. Therefore, such a predominant activity of manufacture cannot cease to be so, just because the manufacturer performs some extra work for due discharge of the goods in the extant peculiar situation.

vii) There are direct judgements on the issue rendered by the Hon'ble Tribunal and upheld by the Hon'ble Supreme Court :

a) 2012 (25) STR 357 (T) in the case of GMK Concrete Mixing Pvt Ltd Vs. CST

b) 2016 (44) STR 274 (Tri.-Del) in the case of M/s.Ultratech Concrete Vs. CST :

c) 2016 (42) STR 866 (T) in the case of M/s.Vikram Ready Mix Concrete (P) Ltd Vs. CST and 2017 (8) TMI 1308 – CESTAT, Chennai in the case of CST Vs. RMC Readymix (I) Pvt Ltd

d) 2018 (11) TMI 1470 – CESTAT, Chennai in the case of CCE Vs. Larsen & Toubro Ltd

e) 2011 (8) TMI 1037 – Karnataka HC in the case of ACC Ltd Vs. State of Karnataka.

viii) The activity of manufacture is covered by the negative list of services vide clause (f) of Section 66D of the Finance Act, 1994. According to the charging Section 66D, levy of service tax is mandated on all services, other than services specified in the negative list.

ix) The Revenue proposes to treat the entire transaction as falling under Works Contract Service, such an attempt would go diametrically repugnant with the provisions of Section 2 (f) and Section 3 of the Central Excise Act, 1944 read with CET Heading 38.24 which together mandate levy of excise duty on RMC, being an excisable goods.

x) When the appellant have already paid full Central Excise duty on the full value of RMC including the pumping and laying charges, the demand of service tax on the very same value and very same activity will amount to double taxation.

xi) The impugned activity of manufacture and supply of RMC by pumping and laying cannot be categorized and taxed to Service Tax under Works Contract for the following reasons :

1) The definition of Works Contract Service as provided in Section 65 (105) (zzzza) very categorically specifies 5 types of services which can be classified as Works Contract Services. The appellant is not constructing i.e. not creating or raising or building any civil structure or a building or a part thereof..

2) The aforesaid definition clearly indicates that a Works Contract Service should basically be a service contract simplicitor and must fall under the 5 taxable services specified in clause (zzzza). The impugned services of pouring, pumping and laying of concrete do not fall in any of the 5 taxable services.

3) Neither the Show cause Notice nor the impugned order indicates the specific sub-clause of 65 (105) (zzzza) under which the disputed activity would fall, according to the Revenue.

4) Mere payment of Sales Tax/VAT under Works Contract cannot bring the activity under the Works Contract Service, since for the purpose of Service Tax the definition given in the Finance Act, 1994 alone would be applicable.

5) The impugned activity as a whole involves as a predominant object, manufacture of RMC with condition of door delivery by pumping. The alleged service portion forms far less than 5% of the contract value.

6) Valuation of Works Contract is provided in Rule 2A of the Service Tax (Determination of Value) Rules, 2006. Valuation has been adopted by the department under sub-clause (A) of clause (ii) of Rule 2A. According to this provision, in the case of works contract entered into for execution of "original works", service tax shall be payable on 40% of the total amount charged for the works contract.

7) However, there is no case of any construction in the present case because by mere supply of RMC at the place of construction, the appellant cannot be said to have erected or built a construction. In other words, there is no original work and even if mere pumping and laying of RMC is considered as construction, then also the exclusive value of RMC cannot be considered as attributable to the whole original construction.

xii) The adjudicating authority has failed to appreciated that according to Section 67 read with Rule 2A (i) of the Service Tax (Determination of Value) Rules, 2006 the value of the service portion in execution of Works

Contract shall be the value of the service portion less the property in goods transferred. The value of RMC is already available on record and they are charging the additional delivery cost of Rs 200 to Rs.300 per M^3. Therefore, even assuming that the impugned activity of the works contract service, the service tax recoverable is wrongly calculated which should be re-determined by taking value of the service portion only.

xiii) The adjudicating authority has failed to appreciate that the appellants are only supplying Ready Mix Concrete at their customers construction site in their vehicles. Even if there are some ancillary and incidental activities of pouring, pumping of concrete from transit mixtures and laying of concrete, such activities cannot be treated as service as the primary and dominant object of the contract with the buyers was to manufacture and supply RMC on FOR delivery basis. There was no taxable service involved in the supply of RMC.

xiv) The quantity and value of RMC cleared during the relevant period without pumping & laying is approximately 40 to 50% of the total turnover whereas the remaining 50 to 60% is for the quantity of RMC cleared with the extended delivery steps as aforesaid.

xv) The purchase order dated 13.9.2016 of M/s.Virasat Buildcon is wrongly taken as the order dated 14.09.2016 mentioned in Invoice No. RPS/EX/0705 dated 27.09.2016. The said invoice is against Purchase Order dated 14.09.2016 and not against Purchase Order dated 13.09.2016 which is scanned and printed on page 3 of para 4.2.2 of the SCN. Therefore, the contention and allegation based on such comparision is inapt and factually distorted. They submit copy of purchase order dated 13.09.2016 which is RMC with pumping while the purchase order dated 14.09.2016 is for RMC without pumping.

xvi) The adjudicating authority has failed to appreciate that the Show Cause Notice covering the period from April, 2014 to June, 2017 is time barred.

xvii) The entire issue is of interpretational nature and as per the prevailing practice in the RMC industry, the appellant had cleared RMC on payment of excise duty on full value including the extended delivery cost. Their bonafide belief is also well supported by the judgements including that of the Hon'ble Tribunal, High Courts and Supreme Court. Therefore, just because the appellant considered the activity as manufacture and exigible to Central Excise duty whereas the department considered it a works contract

service does not ipso facto lead to a conclusion of malafide on the part of the appellant justifying invocation of longer period of limitation. For the same reason also, penalty is not imposable as none of the ingredients of the penal provisions invoked in the impugned order stands satisfied in the facts and circumstances of the case.

9. Aggrieved with the impugned order, the Director and the Accounts Manager of the appellant firm have filed the instant appeal on the following grounds:

I) They refer and rely upon all the grounds contained in the Appeal Memorandum filed by the main appellant.

II) The impugned order has been passed in violation of the principles of Natural Justice.

III) The adjudicating authority has erred by imposing penalty inasmuch as there is no material or evidence or proof in the Show Cause Notice or in the impugned order to indicate any specific role played by, or to establish any guild on their part.

IV) The adjudicating authority has failed to appreciated that the '*mens rea*' is a prerequisite under the relevant provisions. There is no allegation or findings in the impugned order about the presence of any '*mens rea*', consequently it is liable to be quashed.

V) They are merely the employee/Director and are carrying out the orders given by the employer/Board of Directors, therefore, they cannot be considered as a person in charge/responsible for conduct of the employer company's business. Consequently, the appellants cannot be held liable to penalty under Section 78A.

VI) They rely upon various judgements of the Hon'ble Tribunal that penalty cannot be imposable.

10. Personal Hearing in the case was held on 18.06.2021 through virtual mode. Shri Willingdon Christian, Advocate, appeared on behalf of all three appellants for the hearing. He reiterated the submissions made in their appeal memorandum and in the synopsis of case submitted by him. He relied upon various case laws on subject which was submitted along with synopsis.

11. I have gone through the facts of the case, the grounds of appeal made by the appellants in Appeal Memorandum and their written submissions. It is the department's case that the appellant firm is supplying RMC under work orders for providing and laying of RMC involving both supply of RMC as well as service. They were receiving composite contracts for supplying and laying RMC. The service part includes laying of RMC using a concrete pump, finishing the concrete with machineries/tools, labour etc. and in the contracts it was clearly mentioned that the rates are under the conditions of Works Contract. Therefore, the department contended that the service provided by the appellant firm is classifiable under the taxable service viz. Works Contract Services.

12. Before examining the merits of the case, I find it necessary to deal with the appellant's contention that about 40 to 50% of the total turnover of RMC is cleared without pumping and laying. What this implies is that these clearances of RMC are purely sales and cannot be a subject matter of dispute. I have perused the copies of some of the invoices submitted by the appellant and find that the appellant have sold RMC to some of their customers with Pumping clearly mentioned in the invoices. I also find that they have sold RMC to other customers with Non-Pumping clearly mentioned in the invoices. However, this aspect has apparently been overlooked and the demand against appellant has been determined by extrapolating some instances of RMC sold with pumping and laying to their entire turnover. I further find that this aspect has also not been considered by the adjudicating authority while passing the impugned order, which is vital for quantification of demand made in SCN.

13. I find that the dispute in the instant case pertains to the period from April, 2014 to June, 2017. From 01.07.2012 the definition of Works Contract is as per Section 65B(54) of the Finance Act, 1994, which reads as :

> "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". [Emphasis supplied]

13.1 From a reading of the definition of Works Contract as per Section 65B(54) of the Finance Act, 1994 it emerges that there are two primary ingredients which are required to be satisfied so as to fall within the scope of Works Contract :

1) The contract should involve transfer of property in goods, involved in the execution of such contract, which is leviable to tax as sale of goods; and

2) Such contract is for the purpose of carrying out construction, erection, ...

Applying the above to the case on hand, I find that the appellant are manufacturing RMC and selling it to their buyers and are paying Composition Tax under the Gujarat Vat Act, 2003. Therefore, they are satisfying the first ingredient of the definition of Works Contract under Section 65B(54).

13.2 I have perused the work orders which form part of the show cause notice issued to the appellant and I find that the work order referred to in para 4.2.2 is an order for RMC under the condition of Works Contract. Similarly, the work order referred to in para 4.2.3 of the show cause notice is also an order for RMC under condition of Works Contract. From these orders, it is clear that the **orders are for supply of RMC**. These orders are for supply of RMC under Works Contract and I find the scope of the work mentioned in the terms and conditions of these work orders. As per terms and condition 9 and 10 of the order referred to in para 4.2.2, the appellant is liable for providing and placing of concrete from their plant to the buyer's site and Material, Labour, Tools, are to be provided by the appellant. As per terms and condition 8 and 9 of the order, the appellant is liable for providing and placing of concrete from their plant to the buyer's site and laying and finishing. The Material, Labour, Tools, are to be provided by the appellant. Simply stated, the appellant is selling the RMC and he is also required to carry out the laying and finishing of the concrete at the site designated by the buyer. Therefore, I find that the scope of the work covered by these work orders do not fall under any of the activity i.e. carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property referred to in the definition of Work Contract as per Section 65B (54) of the Finance Act, 1994.

13.3 There is also merit in the contention of the appellant that RMC has a very short shelf life and that the same cannot be discharged at a single spot in the form of a heap. Considering the nature of the product, I am of the view that the activity of pumping, laying and finishing of the RMC at the buyer's site can at best be associated with the sale and delivery of the RMC to the buyer.

13.4 I also find support for the above in the decision of the Hon'ble High Court of Karnataka in the case of ACC Ltd Vs. State of Karnataka reported at 2012 (52) VST 129 (Kar.) The said decision was in the context of the VAT Act of the state of Karnataka, however, the ratio is applicable to the facts of the present case. At para 12 of the said judgement the Hon'ble High Court had observed that :

> " As is clear from the materials on record, the assessee transports the RMC from the manufacturing place to the customer's site. Therefore, in the case of RMC, transportation charges invariable forms part of the sale consideration. After it reaches the site of the customer, the RMC is to be delivered to the customer. The choice of taking the delivery is given to the customer. He has the option of getting the entire RMC dumped at the site from the lorry or he has also been provided the option to get the RMC dumped to a particular place such as roof top or any floor. **Therefore, the RMC is delivered by pumping the RMC from the lorry to the specified place by the customer. All expenses incurred till the delivery constitutes sale price.** In order to deliver the RMC at the specified place, if the assessee uses pump, then the charges collected by the assessee from the customer as pumping charges for mart of the sale price. If the RMC is not delivered through pumping, then the charges is not collected from the customer and it will not form part of the sale price. **Therefore, the sale transaction of the RMC gets completed only when it is delivered at the point where it is finally put to use.** All expenses incurred till such stage, if such delivery includes service of pumping then the pumping charges are also included in the pre-sale expenses and hence, form part of the taxable turnover.". [Emphasis supplied]

13.5 In view of the above judgement of the Hon'ble High Court, the charges collected by the appellant from their buyers, where the order for RMC is with the condition of pumping, laying and finishing, would have to necessarily be associated with the sale of the RMC. The delivery of RMC at the buyer's designated site by pumping and laying cannot be considered to be a taxable service.

14. I further find that the judgements relied upon by the appellant squarely cover the issue involved in the present appeals. In the case of M/s.GMK Concrete Mixing Pvt Ltd Vs. Commissioner of Service Tax, Delhi reported at 2012 (250) STR 357 (Tri.-Del) the Hon'ble Tribunal had vide Final Order dtd.4.11.2011 held that:

> *" Record does not reveal involvement of any taxable service aspect in the entire supply of RMC. Rather the contract appears to be a sales contract instead of a service contract. In absence of cogent evidence to the effect of providing taxable service, primary and dominant object of contract throws light that contract between parties was to supply ready mix concrete (RMC) but not to provide any taxable service. Finance Act, 1994 not being a law relating to commodity taxation but services are declared to be taxable under this law. "*

14.1 This decision of the Hon'ble Tribunal was appealed by the department before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide Order dated. 06.01.2015 in Civil Appeal Dairy No.37837 of 2014 dismissed the appeal holding that:

> *" Having gone through the records of the case, we are of considered opinion that the appeal, being devoid of any merit, is liable to be dismissed and, is dismissed accordingly".*

15. The decision in the case of M/s.Vikram Ready Mix Concrete (P) Ltd Vs. Commissioner of Service Tax, Delhi reported at 2016 (42) STR 866 (Tri.Del) is also squarely applicable to the facts of the present appeal. In the said case the Hon'ble Tribunal observed that *" Both sides agreed that the short issue involved in the present appeal is as to whether the supply of ready mix concrete and carrying out the ancillary and incidental activities of pouring, pumping and laying of concrete would*

call for service liability of not". The Hon'ble Tribunal by following the decision in the case of M/s.GMK Concrete Mixing Pvt Ltd Vs. Commissioner of Service Tax, Delhi reported at 2012 (250) STR 357 (Tri.-Del) allowed the appeal with consequential relief to the appellant. This decision too was appealed by the department before the Hon'ble Supreme Court by way of Civil Appeal No.8544 of 2015. The Hon'ble Supreme Court vide order dated 09.10.2015 dismissed the appeal filed by the department.

16. In view of the above judgements of the Hon'ble Tribunal the issue involved in the present appeal i.e. the activities of pumping, pouring, laying and finishing in respect of the RMC sold and delivered at the site stand settled in favour of the appellant. It is very pertinent to refer to the observation of the Hon'ble Tribunal in the GMK Concrete judgement :

> *"Record does not reveal involvement of any taxable service aspect in the entire supply of RMC. Rather the contract appears to be a sales contract instead of a service contract".* [Emphasis supplied]

16.1 The Hon'ble Tribunal had in very clear terms held that there was no Taxable Service involved. The department had appealed these orders of the Hon'ble Tribunal before the Hon'ble Supreme Court without any success as the Hon'ble Supreme Court had upheld the judgements of the Hon'ble Tribunal. The judicial pronouncements are against the department and do not support the contentions of the department. Further, these decisions of the higher appellate authority as well as of the Hon'ble Supreme Court are binding upon me in terms of the principles of judicial discipline. Applying the ratio of the judgements referred to hereinabove, I am of the considered view that there is no merit in the contention of the department in the present case. Therefore, I find that the impugned Order passed by the adjudicating authority confirming the demand of Service Tax under Works Contract Services is not legally sustainable. Since the demand has been set aside, the question of interest on demand and imposition of penalty does not arise

17. In view of facts discussed above, I set aside the impugned order and allow the appeal filed by all three appellants.

18. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals filed by all three the appellants stand disposed off in above terms.

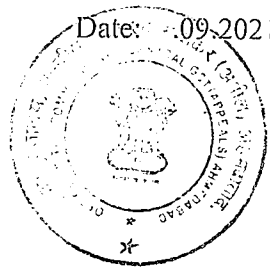
(Akhilesh Kumar) 23rd September, 2021.

Commissioner (Appeals)

Attested:

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

Date: 09.2021.



BY RPAD / SPEED POST

To

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The Additional Commissioner, — Respondent
Ahmedabad North.

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