आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/5273/2023 / 3389 - 93
(ख)	अपील आदेश संख्याऔर दिनांक / Order-In –Appeal and date	AHM-EXCUS-002-APP-307/23-24 dated 27.03.2024
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	02.04.2024
(ङ)	Arising out of Order-In-Original No. 174/ADC/MR/2022-23 dated 31.03.2023 passed by The Additional Commissioner, CGST, Ahmedabad North	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	Lubi Industries LLP Near Kalyan Mills Naroda Road Ahmedabad-380025

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

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

भारत सरकार का पुनरीक्षण आवेदन:-

Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में 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

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."

केन्द्रीय वस्तु एवं सेवाकर (अपील) अहमदाबाद
OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

ORDER IN APPEAL

M/s. Lubi Industries LLP, Near Kalyan Mills, Naroda Road, Ahmedabad-380025 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 174/ADC/MR/2022-23 dated 31.03.2023 (in short '*impugned order*') passed by the Additional Commissioner, Central GST, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*'). The appellant was holding Service Tax Registration No. AAEFL7190CSD001 and were availing cenvat credit of duty paid on input services under the CCR, 2004.

2. During the course of audit, carried out by the Central Tax officers for the period from 2014-15 to 2017-18 (upto June), on scrutiny of the financial records, it was noticed that the said appellant had incurred expenses towards Building Addition work done at their various units located in the name of M/s. Lubi Industries LLP. They had paid service tax on Work Contract Service (Original Work) under RCM as per Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012, as recipient of service.

2.1 On detailed scrutiny of the documents provided by the appellant and on reconciliation of the expenses incurred against works contract service (original work) as shown in their financial records vis-a-vis the value shown in ST-3 returns, a short payment of service tax to the tune of Rs.5,80,883/- was noticed. Further, it was also noticed that for the same period, the appellant had also incurred expenses towards Electrical Installation, Repair & Maintenance (R&M) of Building, R&M Electrical work and R&M others, carried out at their various units under works contract service (other than original work), but failed to pay service tax amount of Rs.78,46,650/-.

2.2 Audit observed that amount charged for supply of material for construction of new buildings was for execution of original work and the amount charged for services like providing electrical installation work, repair & maintenance of electrical work, repair & maintenance of building and other miscellaneous repair & maintenance work, done at various units of the appellant fall under works contract service for execution of work other than original work, which would attract the provisions of Section 68(2) and Section 67 of the Finance Act (F.A) 1994 read with Rule 2A(ii)(A) of the Service tax (Determination of Value) Rules, 2006. The appellant being a Limited Company and service recipient were liable to pay 50% service tax on 40% of the amount charged for works contract (original work) and 50% service tax on 70% of the amount charges in respect of works contract (other than original work), under Reverse Charge Mechanism (RCM).

2.3 Based on audit observations, a Show Cause Notice (SCN for brevity) No: VI/1(b)CTA/Tech-38/SCN/Lubi Ind/2019-20 dated 14.10.2019, was issued to the appellant invoking extended period and proposing to consider 40% of the total amount of Rs.1,11,33,651/- paid to various service providers during the period April, 2014 to June, 2017, as taxable value under Works Contract (original work) and 70 % of the total amount of Rs.15,86,71,749/- paid to various service providers towards the Electrical Installation, R M of Building, R M Electrical work and R&M others, carried out at their various units as taxable value under Works contract (other than original work), u/s 67 of the Finance Act (F.A) 1994 read with Rule 2A(ii)(A) of the Service tax (Determination of Value) Rules, 2006, proposing recovery of unpaid service tax amounting to Rs.5,80,883/- against works contract service for original work and Rs.78,46,650/- against works contract service for other than original work, totalling to Rs.84,27,533/- under proviso to Section 73(1) of the Finance Act, 1994 read with Section 68(2) of the F.A., 1994 & Notification No. 30/2012 dated 20.06.2021 as amended, under RCM; interest under Section 75 of the Act ibid on the total amount and imposition of penalty under Section 78(1) for suppressing the value of taxable service with intent to evade payment of service tax was also proposed.

2.4 The said SCN was adjudicated by the adjudicating authority vide OIO No. 14/ADC/2020-2021/MLM dated 04.09.2020, wherein the service tax demand of Rs.5,80,883/- against works contract service for original work and service tax of Rs.78,46,650/- against works contract service other than original work (totalling to Rs.84,27533/-) was ordered to be recovered alongwith interest. Equivalent penalty of Rs.84,27,533/- u/s 78(1) was also imposed on the appellant.

2.5 Aggrieved by the said OIO, the appellant preferred the appeal before Commissioner(A). The Commissioner (A) vide OIA No.AHM-EXCUS-002-APP-25-/2021-22 dated 11.10.2021 set aside the aforesaid order and allowed the appeal filed by the appellant by way of remand to the original adjudicating authority for fresh decision in the case.

3. In the remand proceeding, the adjudicating authority vide the impugned order confirmed the (i) service tax demand of Rs.5,21,898/- against Works Contract Service (Original work) and (ii) Service tax demand of Rs.17,55,254/- against Works Contract Service (other than Original Work) under Reverse Charge mechanism. Thus, service tax amounting to Rs.22,77,152/- in total was held liable to be recovered from the appellant under the provisions of Section 73(1) of the Finance Act, 1994 along interest under the provisions of Section 75 of the Act, ibid. Penalty of Rs.22,77,152/- under Section 78 was also imposed. Further, the service tax of Rs.58,985/- against Works Contract Service (Original Work) and the service tax of Rs.60,91,396/- against Works Contract Service (other than Original Work) was dropped.

4. Aggrieved with the impugned order passed by the adjudicating authority, the appellant preferred the present appeal on the grounds elaborated below:-

- The Additional Commissioner has committed twin jurisdictional errors in confirming service tax liability of Rs. 22,77,152/- as he has not established nor found that the services in question were in the nature of a contract wherein transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods, and thus the essential condition of any service for qualifying as "works contract" is not satisfied in this case. Secondly, the bills referred to for passing the impugned order nowhere show that there was any transfer of property in any goods in providing the services and any goods involved in so providing the services were leviable to tax as sale of goods; and thus there is a gross violation of the principles of natural justice as no basis or evidence is disclosed by the Adjudicating authority while passing the impugned order that the services provided to the appellant were in the nature of works contract service. The decision-making process stands completely vitiated, and therefore the impugned order is liable to be quashed and set aside at once in the interest of justice.

- The case was remitted back for considering this vital issue involved in the present case, and therefore the Additional Commissioner was obliged to consider whether there was any transfer of property in goods involved in the execution of the contracts/services in question and such transfer of property in goods was leviable to tax as sale of goods; because the services could be considered to be "works contract" only if the above conditions laid down by the Parliament under Section 65B(54) of the Finance Act were satisfied, which was not examined by the Adjudicating authority. Therefore, the impugned order that services of these agencies were in the nature of work contract service is wholly illegal and without jurisdiction.

- The Additional Commissioner has referred to a few invoices of M/s. Satishkumar, M/s. Jhanvi and M/s. Khetwshwar in paras 33.2 of the impugned order, but none of the invoices show specifically referred to nor any other invoices on record shows that these agencies executed a contract for original work wherein transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods. In case of works contract, the service provider specifically refers in his bill to the goods involved in the execution of such contract, and the tax like VAT or Sales Tax leviable on such goods involved in execution of the contract by him is also shown in the bill. However, no such indication appears on any of the invoices of the service providers in question, as is clear from a mere perusal of the invoices reproduced in para 33.2 of the impugned order. The invoices of M/s. Satishkumar reproduced in para 33.2 nowhere shows which were the goods involved in the execution of the contract by him, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. The invoice of M/s. Jhanvi reproduced in para 33.2 of the impugned order shows the quantity of the brick masonary, PCC for masonary, Rubble soling for paver etc., and the rate for such work; and the other details in this bill are the total amount for the services, discount for arriving at the net amount, and the service tax payable by the service provider. These invoice of M/s. Jhanvi also nowhere shows which were the goods involved in the execution of the contract by them, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. The other invoices of M/s. Kheteshwar and M/s. Vijaykumar T. Yadav reproduced in para 33.2 of the impugned order show the work description, the rate for such works and the total amount charged by them; but these invoices nowhere show which were the goods involved in the execution of the contract by him, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. Thus, none of the invoices relied upon by the adjudicating authority shows that they were for the services in the nature of a contract wherein transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods. There is no reference in any of these invoices to transfer of property in goods involved in providing such services nor to the tax leviable on any such goods as sale of goods while providing the services. Thus, the service tax demand of Rs.5,21,898/- for the services of M/s. Satishkumar, M/s. Jhanvi, M/s.

Khetewshwar, M/s. Vijaykumar etc. "for original work" is therefore liable to be quashed and set aside.

- The order regarding confirmation of service tax liability of Rs.17,55,254/-is also ex-fade illegal and without jurisdiction, because the mandatory conditions of "works contract" are not satisfied in respect of the services provided by M/s. Jhanvi Engineers & Construction for whom service tax demand to the extent of Rs.17,55,254/- is fastened on the appellant under reverse charge mechanism. The Additional Commissioner has referred to some of the bills issued by M/s. Jhanvi in para 34.4 of the impugned order, but a perusal of these bills reveals that there is no reference to any goods involved in execution of the contract of providing services by M/s. Jhanvi. It is nowhere mentioned or recorded in any of the bills of M/s. Jhanvi that they executed a contract wherein transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods. The bills of M/s. Jhanvi nowhere shows which were the goods involved in the execution of the contract by them, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. The invoice of M/s. Jhanvi reproduced in the impugned order shows only the quantity of the excavation in electric panel room, shuttering in electric panel room, etc; China mozac on terrace, water proofing on terrace, dismantling of old floor with broker, removing of debris etc; dismantling the wall in canteen, dismantling of lintel and platform in canteen etc. and the rate for such work; and the other details in this bill are the total amount for the services, and the total amount of the service tax payable by the service provider. This invoice of M/s. Jhanvi also nowhere shows which were the goods involved in the execution of the contract by them, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. Thus, the conclusion of the Additional Commissioner that the services provided by M/s. Jhanvi other were works contract service other than original work, is illegal and ex-fade incorrect because there is no transfer of property in any goods involved in these services, and there was no levy of tax as sale of goods in respect of transfer of property in any goods involved in execution of the concerned works by M/s. Jhanvi. Thus, the confirmation of service tax demand of Rs.17,55,254/- on the basis that the concerned service provider has rendered works contract service for other than original work is wholly illegal and without jurisdiction.

- The Additional Commissioner has misdirected himself while considering the core issue involved in this case about the nature and category of services provided by the agencies like M/s. Jhanvi, M/s. Satishkumar, M/s. Kheteshwar etc.; inasmuch as the fact that the services provided by them were not in the nature "works contract" is not considered even though this was the main issue, and the Commissioner (Appeals) has remitted the case back precisely for considering this issue only. It was incumbent upon the Additional Commissioner to have considered and examined the documents about the services to determine whether the essential conditions of "works contract" were satisfied or not; but the Additional Commissioner has miserably failed in discharging this obligation as the Adjudicating authority. In any case, the services provided by the above referred agencies, irrespective of the fact whether the services were for original work or other than original work, were not "works contract" because the works executed by these agencies were not contracts wherein transfer of property in goods involved in the execution of such contracts was leviable to tax as sale of goods. There is no documentary evidence nor is there any supporting evidence from the service providers for concluding that the services were in the nature of contracts wherein transfer of property in goods involved in the execution of such contracts was leviable to tax as sale of goods; and therefore, confirmation of the entire amount of Rs.22,77,152/- is illegal and unauthorized.

➢ The calculation of value of the service by applying Rule 2A (ii) (A) of the Service Tax Valuation Rules and recovery of service tax partly from the service receiver under reverse charge mechanism of Notification No.30/2012-ST were issues relevant only if the services rendered by agencies like M/s. Satishkumar, M/s. Jhanvi, M/s. Kheteshwar etc. were in the nature of "works contract service"; and therefore the core issue involved in the present case was whether the services provided by such agencies were works contract service or not. As the bills of the service providers show that no transfer of property in any goods involved in execution of the contract, and no tax on such goods, if any, arranged for execution of the works by the service providers was leviable in the hands of the service providers as sale of goods. In none of the bills of any of the service providers, the element of Sales Tax or VAT (being a tax as sale of goods) has been shown or charged; and it is an undisputable position of fact in this case that none of the service providers has borne any tax as sale of goods in respect of any of the goods whose property was transferred while providing the services. The appellant has emphasized right from submitting reply to the audit report till now that the service providers had not transferred to the appellant the property in any goods involved in providing the services and that the service providers had not paid any tax as sale of goods on any of the materials used in providing the services.

➢ Demanding service tax from the appellant under the extended period of limitation is not justifiable. The demand of Rs.22,77,152/- is confirmed for the period from April, 2014 to June, 2017, but the show cause notice was issued on 14.10.2019 as a result of audit verification by the Revenue Audit officers. The appellant has maintained all statutory records and registers whereas all the details of the business transactions involved in the present case stand fully and completely recorded in the audited books of accounts also, thereby signifying that there was no suppression of facts by the appellant. The service tax payable under reverse charge, if any, was fully admissible as Cenvat credit to the appellant themselves and such Cenvat credit could be utilized by the appellant for discharging liabilities like excise duty; signifying that the situation in the present case was revenue neutral. The fact that the Audit officers suggested a tax liability of Rs.84,27,533/- for the transactions in question and now this liability stands reduced to Rs.22,77,152/- also signifies that bonafide confusion and difference in opinion and understanding were possible in the present case. The demand of Rs.22,77,152/- confirmed under the extended period of limitation is therefore impermissible and without justification.

- The Additional Commissioner has not attributed any malafide or willful suppression or deliberate mis-statement to the appellant in the present case; and no specific evidence or instance is also referred to by the Additional Commissioner for concluding that there was any actual suppression of facts or willful mis-statement or concealment on the appellant's part. Mere non-disclosure or non-compliance is not similar to suppression of facts or willful mis-statement or contravention of law with intent to evade payment of tax; and therefore, the Additional Commissioner had no jurisdiction to uphold invocation extended period of limitation in this case, since there was no actual or deliberate suppression of facts or malafide on the appellant's part.

- It is an admitted fact that all the payments in question were shown in the appellant's books of accounts and records and it was from these statutory records and the audited books of accounts that the audit authorities raised dispute about payment of service tax. It is held by the Appellate Tribunal in the cases like Hindalco Industries reported in 2003 (161) ELT 346, Kirloskar Oil Engines Ltd. V/s CCE, Nasik reported in 2004 (178) ELI 998 and Martin & Hariss Laboratories Ltd. V/s Commissioner reported in 2005 (185) ELT 421 that balance-sheet being a public document, any demand raised on the basis of information appearing in the balance-sheet after invoking extended period of limitation was illegal because the allegation of suppression of facts cannot be made when some information was appearing in a public document like the balance-sheet of the assessee. The entire basis of invoking extended period of limitation is thus, totally incorrect and hence, the action of the Additional Commissioner in confirming the demand by invoking extended period of limitation on this basis deserves to be set aside.

- The present one is a case of revenue neutrality because the appellant itself would be entitled to take Cenvat credit of the amount in question. In the Larger Bench decision of the Appellate Tribunal in case of Jay Yushin Ltd. - 2000 (119) ELT 718, it is held that when actual duties paid were available as credit to the assessee's own unit, then there cannot be any intention to evade duty. Even the Hon'ble Supreme Court has held in cases like Narmada Chematur Pharmaceuticals Ltd. - 2005 (179) ELT 276 (SC) and Coca Cola India Pvt. Ltd. 2007 (213) ELT 490 (SC) that when the transaction was even otherwise revenue neutral, that is to say, if duty was paid and the same was available as credit to the same assessee, then no proceedings were permissible against the assessee. The Additional Commissioner has misdirected himself in not appreciating that the revenue neutrality was a very valid and relevant submission. The impugned order confirming the demand of duties in this case of Revenue neutrality is wholly illegal and requires to be set aside. During the period from FY 2014-15 to June, 2017, the appellant has paid majority of amount from PLA. The Hon'ble CESTAT, Ahmedabad, in the case of M/s. John Energy-Order No. A/12620/2018 dated 26.11.2018 has followed the ratio in the case of M/s. Jay Yuhshin Limited- 2000 (119) ELT 718 whereby the larger bench has held that when cenvat credit is available to the assesses himself, then a revenue neutral situation comes into picture and in such circumstances demand under extended period of limitation could not be confirmed.

- Penalty under Section 78 cannot be imposed as there was a clear doubt about the liability on part of the appellant herein. Section 78 of the Finance Act provides for a penalty equal to the amount of service tax determined under the Act in cases of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with an intent to evade payment of service tax. In the present case, there has been no such intention to evade payment of service tax on the appellant's part and therefore, Section 78 was not attracted at all. The matter of penalty is governed by the principles as laid down by the Hon' ble Supreme Court in the land mark case of Messrs Hindustan Steel Limited reported in 1978 ELT (J159) wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the assessee was guilty to conduct contumacious or dishonest and the error committed by the assessee was not bonafide but was with a knowledge that the assessee was required to act otherwise, penalty might be imposed.

- Payment of interest under Section 75 of the Finance Act is also without any authority in law inasmuch as the provision of Section 75 is not attracted in the instant case. Section 75 provides for interest in addition to tax where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment of service tax. In the instant case, there is no short levy or short payment or non-levy or non- payment of any service tax. The action of the Additional Commissioner to order payment of interest under Section 75 of the Act is also bad and illegal and hence, liable to be set aside.

5. Personal hearing in the appeal matter was granted on 19.03.2024. Shri Sudhanshu Bissa, Advocate appeared for personal hearing on behalf of the appellant. He reiterated the contents of the written submission and requested to allow the appeal. Further he informed that the services received by their clients is not works contract service, hence the client is not liable to pay service tax under reverse charge mechanism.

6. 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 of **Rs.5,21,898/-** under works contract service (original work) and **Rs.17,55,254/-** under works contract service (other than original works) 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 **F.Y 2014-15 & 2016-17 (upto June, 2017).**

6.1 In respect of the demand of Rs.5,21,898/-, the adjudicating authority observed that the services provided by M/s Satishkumar, M/s Jhanvi Engg & Construction and M/s Khetheswar Traders were in the nature of Works Contract Service in the nature of 'original work' as was provided to the appellant for construction of new buildings at their various units located in the name of M/s Lubi Industries LLP. He also observed that M/s Vijay Kumar T. Yadav have provided the services of transportation of soil hence was not covered under Works Contract Service. Therefore, the value of service provided by M/s Vijay Kumar

T. Yadav was deducted from the original tax liability and confirmed the service tax to the extent of Rs.5,21,898/- after granting 60% abatement.

6.2 The appellant however claim that the invoices issued by M/s. Satishkumar, M/s. Jhanvi, M/s. Khetwshwar does not show that these agencies have executed a contract for original work wherein transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods. M/s. Jhanvi provided quantity of the brick masonry, PCC for masonry, Rubble soling for paver etc., and the rate for such work; and the other details in this bill are the total amount for the services, discount for arriving at the net amount, and the service tax payable by the service provider. These invoice of M/s. Jhanvi also nowhere shows which were the goods involved in the execution of the contract by them, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. The other invoices of M/s. Kheteshwar and M/s. Vijaykumar T. Yadav show the work description, the rate for such works and the total amount charged by them; but these invoices nowhere show which were the goods involved in the execution of the contract by him, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. Thus, none of the invoices relied upon by the adjudicating authority shows that they were for the services in the nature of a contract wherein transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods. There is no reference in any of these invoices to transfer of property in goods involved in providing such services nor to the tax leviable on any such goods as sale of goods while providing the services. Thus, the service tax demand of Rs.5,21,898/- for the services of M/s. Satishkumar, M/s. Jhanvi, M/s. Khetewshwar, M/s. Vijaykumar etc. "for original work" is therefore liable to be set aside.

6.3 I have gone through the impugned order it is observed that the services provided by M/s Vijay Kumar T. Yadav was not considered as a works contract hence value of such service was deducted from the original tax liability. Subsequently, the service tax has been demanded only on the invoices issued by M/s. Satishkumar, M/s. Jhanvi, M/s. Khetwshwar which are re-produced at para-33.2 of the impugned order. The said service providers have rendered following services;

a) M/s. Satishkumar has provided Birla Putty, with labour and material.
b) M/s. Jhanvi Engineering & Construction provided excavation services for bricks masonry paver fitting, PCC for masonry paver fitting, plaster, new bathroom, excavation of sock well, earth filling, RCC beam slab, brick masonry etc.
c) M/s. Khetwshwar provided services of making panel with labour & materials.

6.4 The terms 'works contract' is defined in clause (54) of Section 65B of the F.A., 1994 as;

*(54) **"works contract"** means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;*

The basic requirements for defining a contract to be a works contract are:

(i) There is a transfer of property in goods involved in the execution of such contract, and

(ii) Such transfer of property in goods is leviable to tax as sale of goods (such as sales tax, VAT or WCT, etc.).

The words "leviable to tax as sale of goods', does not necessary mean that VAT has been actually paid on the transfer of property involved in such contract. It is enough if transfer of property is leviable to tax as sale of goods for determining whether such contract is a works contract or not. Such transfer delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. A deemed sale is also covered under works contract. For the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled:

a. There must be a works contract,
b. The goods should have been involved in the execution of a works contract and
c. The property in those goods must be transferred to a third party either as goods or in some other form.

So, it is important to note that the value added tax is not required to be paid for treating such transaction as works contract. If the transaction is leviable to tax as sale of goods, it would suffice, even under such local state tax law, the said transaction is exempted from payment of VAT. Levy is important and not the actual payment of value added tax. In the instant case, though no VAT was paid but the fact that there were goods involved in execution of works contract and the property in those goods were subsequently transferred to the service recipient is enough to consider the service as Works Contract service.

6.5 Now the question arises whether the works contract service rendered was in the nature of original work or otherwise. The term 'original work' is defined in Explanation-1 of Rule 2A(ii) of Service Tax (Determination of Value) Rules, 2006, as;

*(a) **"original works"** means-*

(i) all new constructions;
(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

6.6 It is observed that the activities of colour work, masonry work, construction of new bathroom, paver fitting, excavation of sock well, earth filling, RCC beam slab, brick masonry, panel making etc were carried out for new construction. The colour work is generally provided with supply of material and labour. At times it is possible that the contract would be for labour or for the work. At time material is provided by the service recipient. But in the instant case, I find that the appellant was charged for work, labour and goods. Further, the appellant has also failed to produce any documents to prove that the material was not supplied by the service provider. Similarly, I find that all other construction, erection, commission, fabrication done by M/s. Jhanvi & M/s. Khetwshwar was with supply of material which is clearly reflected in the respective invoices. Thus, I find that the above services rendered were in the nature of 'original works' and therefore covered within the scope of the definition of Works Contract. Accordingly, I find that the service tax demand of Rs.5,21,898/- confirmed under Works Contract Service (original work) is legally sustainable.

7. In respect of the demand of Rs.17,55,254/-, it is observed that originally the service tax demand was for Rs.78,46,650/- which was raised on the grounds that the appellant had incurred expenses towards Electrical Installation, Repair & Maintenance (R&M) of Building, R&M Electrical work and R&M others, carried out at their various units were taxable under Works contract (other than original work) on which they failed to pay taxes.

7.1 The appellant however contested the demand of Rs.78,46,650/- in appeal before the Commissioner(A) on the grounds that the said demand was arrived by taking the figures & amounts shown in the financial records under head 'R&M' which were not for works contract service. Expenses incurred by agencies like M/s. Vikram A. Prajapati, M/s. Bharati Electricals, M/s. Famous Industries, M/s. Manu R. Sharma etc cannot be considered as they are labour contractors, iron & steel fabricators. From the bills of these agencies, it is clear that all the expenses incurred under R&M were not for work contract as transfer of goods is not involved, hence demand of Rs.78,46,650/- is also not sustainable. They also produced copy of certificate issued by Chartered Accountant Jhaveri Shah & Co. dated 13.07.2019 wherein it is certified that the payments made/ expenses incurred by the appellant for the F.Y. 2014-15, 2015-16, 2016-17 were towards works contracts pertaining to work related to addition to building, bifurcated into material, services etc; that for each item in respect of which payment/expenses made have been verified and strongly contended that the value of the taxable service arrived on the basis of the figures and value of the assets & properties shown in the financial records cannot be correct comparison since all the expenses incurred are not under work contract service hence demand arrived is incorrect and unsustainable. The Commissioner(A) considering merit in the above argument as correct, remanded the matter for fresh adjudication after considering the aforesaid certificate and invoices.

7.2 In the remand proceedings the adjudicating authority had relied on the Chartered Accountant's above certificate, wherein, the bifurcation of the difference of gross value into materials, labour, electricity connection, maintenance of office/shop, P Mody & Co. and Jhanvi engineers. The details of the same were submitted in Annexure- 1 to 16. On going through the details, the adjudicating authority finds that most of the expenses are with regard to purchase of materials, labour, electricity connection, maintenance of office etc hence are not liable to service tax under reverse charge mechanism. However, in respect of the expenses incurred by the appellant for the services provided by M/s. Jhanvi Engineers & Construction, the Chartered Accountant had certified that the total expenses of Rs.3,57,13,336/- has been incurred by the appellant in respect of the services provided by M/s Jhanvi Engineers & Construction under Works Contract Service (Other than Original Work) during the period from 2014-15 to 2017-18 (Upto June-17). Further, on perusal of the bills issued by M/s Jhanvi Engineers & Construction, the adjudicating authority held that the services provided by M/s Jhanvi Engineers & Construction were in the nature of Works Contract Service (other than original works). He further finds that M/s

Jhanvi Engineers & Construction is a Proprietorship firm and hence the said appellant is liable to discharge service tax on the services received under Reverse Charge Mechanism.

7.2 The appellant however has claimed that the bills of M/s. Jhanvi nowhere show which were the goods involved in the execution of the contract by them, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. The invoice of M/s. Jhanvi reproduced in the impugned order shows only the quantity of the excavation in electric panel room, shuttering in electric panel room, etc; China mozac on terrace, water proofing on terrace, dismantling of old floor with broker, removing of debris etc; dismantling the wall in canteen, dismantling of lintel and platform in canteen etc. and the rate for such work; and the other details in this bill are the total amount for the services, and the total amount of the service tax payable by the service provider. The invoice of M/s. Jhanvi also nowhere shows which were the goods involved in the execution of the contract by them, and what was the tax leviable on deemed sale of such goods involved in the execution of the contract. Thus, the conclusion of the adjudicating authority that the services provided by M/s. Jhanvi were works contract service other than original work, is illegal and ex-fade incorrect because there is no transfer of property in any goods involved in these services, and there was no levy of tax as sale of goods in respect of transfer of property in any goods involved in execution of the concerned works by M/s. Jhanvi.

7.3 I have gone through the invoices issued by M/s. Jhanvi Engineers & Construction and find that other than excavation in electric panel room, shuttering in electric panel room, etc; China mozac on terrace, water proofing on terrace, dismantling of old floor with broker, removing of debris etc; dismantling the wall in canteen, dismantling of lintel and platform in canteen etc it also includes frame fitting, brick masonry, single mala plaster work, toilet tiles fitting, RCC work, IPS Water proofing, platform fitting, Kota stone fitting, Tiles fitting, steel binding, china mozac on terrace, plumbing works, granite water counter, excavation for RCC foundation, garden wall painting, electrical fittings etc. All these activities carried out were as maintenance, repair or completion and finishing services, which I find is a work contract service as there were goods involved in execution of works contract and the property in those goods were subsequently transferred to the service recipient/appellant.

7.4 In terms of Rule 2A(II)(B) of the Service Tax (Determination of Value) Rules, 2006, works contract entered into for maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property, service tax shall be payable on seventy per cent. of the total amount charged for the works contract. Relevant text is of Rule 2A introduced vide Notification no.24/2012-ST dated 06.06.2012, is re-produced below;

*"2A. **Determination of value of service portion in the execution of a works contract-***

Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

XXX

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property, service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

7.5 However, the above sub-clause (B) & (C) were amended vide Notification No.11/2014-ST dated 11.07.2014 effective from 01.10.2014 is re-produced below;

2. In the Service Tax (Determination of Value) Rules, 2006, in rule 2A, in clause (ii), for sub-clauses (B) and (C), the following sub-clause shall be substituted, namely:--

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

The adjudicating authority after considering the services rendered by M/s. Jhanvi Engineers & Construction held that the above service was in the nature of Works Contract (other than original work) and determined the tax on 70% of the gross amount and arrived at the value of Rs.2,49,99,334/-. In view of above Rule 2A, I find that the appellant shall be required to pay service tax on 70% of the gross value as the services received were in the nature of repair, completion or finishing service of immovable property hence correctly classifiable as Works Contract listed at clause (B) of the said rules.

7.6 Further, I find that under RCM in terms of Notification No.30/2012-ST dated 20.06.2012, in respect of Works Contract service the tax payable on service portion in execution of works contract, 50% of tax shall be payable by the service recipient if the same is provided by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory. The appellant is a business entity registered as body corporate hence 50% liability to pay service tax shall be on them. Hence, I find the adjudicating authority has correctly determined the tax liability of Rs.5,21,898/- and Rs.17,55,254/- on the appellant. I, therefore, uphold the total service tax demand of **Rs.22,77,152/-.**

8. When the demand sustains there is no escape from the interest liability and the same is also recoverable.

9. Regarding the imposition of penalty under Section 78, the appellant has claimed that non-payment of tax was under a bonafide belief that the said services are not classifiable under Works Contract Service hence not taxable. I find that there was nothing on record produced or referred to by the appellant substantiating the element of bonafide in the correct applicability of Service Tax. There was no evidence on record which suggest that the department was made ever known about the difficulties in understanding the levy and payment of service Tax regarding the Impugned services. Further, it was the self-assessment procedure by virtue of which the appellant was required to assess the taxability of impugned services vis-a-vis the legal provisions. Hence, it was imperative on the part of the appellant to ensure correct interpretation and application of legal provisions in the case. The evasion of Service Tax by the appellant detected by the department does not automatically construe to be arising out of bonafide element. All this clearly points out the intention of the appellant not to discharge their service tax liability. Hence, the appellant had contravened the said provisions with the intention not to pay Service Tax at the appropriate time. I, therefore, find that the imposition of penalty under Section 78 is also justifiable as it provides penalty for suppressing the value of taxable services. Hon'ble Supreme Court in case of *Union of India* v/s *Dharamendra Textile Processors* reported in [2008 (231) E.L.T. 3 (S.C.)], considered such provision and came to the conclusion that the section provides for a mandatory penalty and leaves no scope of discretion for imposing lesser penalty. Therefore, the appellant is also liable for equivalent penalty of Rs. 22,77,152/- imposed under Section 78.

10. In view of the above discussion and findings, the impugned order is upheld.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.

(ज्ञानचंद जैन)
आयुक्त(अपील्स)

Date: 27.3.2024

Attested

अधीक्षक (अपील्स)
केंद्रीय जी. एस. टी, अहमदाबाद

F. No. GAPPL/COM/STP/5273/2023

By RPAD/SPEED POST

To,
M/s. Lubi Industries LLP, - **Appellant**
Near Kalyan Mills, Naroda Road,
Ahmedabad-380025

The Additional Commissioner - **Respondent**
CGST & Central Excise,
Ahmedabad North

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (System), CGST, Appeals, Ahmedabad. (For uploading the OIA)
4. Guard File.