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

DIN: 20230964SW000000F7A4

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/ 1503/2023-APPEAL /5217 - 22

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-89 /2023-24**
दिनाँक Date : 28-**08-2023** जारी करने की तारीख Date of Issue 04.09.2023

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Shiv Pratap Singh**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **80/JC/LD/2022-23** दिनाँक:**26.12.2022** , issued by The Joint Commissioner, CGST & Central Excise, Ahmedabad North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant
Vikas Nitinkumar Shah HUF,W19, Nilkanthvarni, Ghanshyam Nagar,Subhash Bridge Naka,Ahmedabad - 380013

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

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

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

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

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

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

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

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

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

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

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो 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।

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

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

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

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

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

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

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

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

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

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

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

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

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

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

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

ORDER IN APPEAL

M/s. Vikas Nitinkumar Shah (HUF), W-19, Nilkanthvarni, Ghanshyam Nagar, Subhash Bridge Naka, Ahmedabad-380013 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 80/JC/LD/2022-23 dated 26.12.2022, (in short '*impugned order*') passed by the Joint Commissioner, Central GST, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*'). The appellant were engaged in providing taxable service without taking registered.

2. The facts of the case, in brief, are that on the basis of the data received from the Central Board of Direct Taxes (CBDT) for the F.Y. 2016-17, it was noticed that the appellant in the ITR/Form-26 AS has reflected taxable income on which no service tax was discharged. Letters were, therefore, issued to the appellant to explain the reasons for non-payment of tax and to provide certified documentary evidences for said period. The appellant neither provided any documents nor submitted any reply justifying the non-payment of service tax on such receipts. The detail of the taxable income is as under;

Table-A

F.Y.	*Value as per ITR/Form 26AS*	*Service tax rate*	*Service Tax liability*
2016-17	7,24,83,683/-	15%	1,08,72,552/-

2.1 A Show Cause Notice (SCN) No. STC/15-234/OA/2021 dated 23.04.2021 was therefore, issued to the appellant proposing recovery of service tax amount of Rs.1,08,72,552/- along with interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalties under Section 77(1)(a) & 77(1)(c), 77(2) and Section 78 of the Finance Act, 1994 were also proposed.

2.2 The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs. 1,08,72,552/- was confirmed alongwith interest. Penalty of Rs. 10,000/- each under Section 77(1)(a), 77(1)(c) & 77(2) and penalty of Rs. 1,08,72,552/- was also imposed under Section 78 of the F.A., 1994.

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

- The Appellant submits that the adjudicating authority failed to appreciate that appellant has submitted following documentary evidence/relied upon judgments to prove that activity carried out by the appellant amounts to 'manufacture' under section 2 (f) of the Central Excise Act, 1944 and that they are not liable to service tax. Ready Mix Concrete (RMC) manufactured at the site on job work basis will not even fall under Works Contract service in terms of Finance Act, 1994 and cannot be subjected to service Tax under Works Contract service.

- The Appellant is engaged in manufacturing activity of Ready Mix Concrete (RMC) which cannot be covered under Works Contract. Even if there is contract of Works .Contract it is basically for the purpose of VAT Act, service tax cannot be applied in the present transaction of manufacture and sale of goods in terms of Section 2(f) of Central Excise Act, 1944. In support of their contentions, they relied on following decisions to prove that activity carried amounts to 'manufacture' under Section 2 (f) of the Central Excise Act, 1944 and hence they are not liable to service tax.

  - Wagad Infra projects Pvt Ltd SERVICE TAX Appeal No.11157 of2018-DB
  - GMK Concrete Mixing Pvt. Limited vs. Commissioner of Service Tax - 2012 (25) STR 357 (Tri. Del.)
  - Commissioner vs. GMK Concrete Mixing Pvt. Limited - 2015 (3 8) STR JI 13 (SC)
  - Vikram Ready Mix Concrete (P) Limited vs. Commissioner of S.T.,Delhi- 2016 (42) STRJ282 (Supreme Court)
  - ACC Limited vs. State ofKamataka -- [2012] 52 VST 129 (Kar.) -

- Ready Mix Concrete (RMC) manufactured at the site on job work basis will not even fall under Works Contract service in terms of Finance Act, 1994 and cannot be subjected to service Tax under Works Contract service. Manufacture of Ready Mix Concrete (RMC) falls under CETH No. 38245010 of the C. Ex. Tariff Act 1985 during the F.Y 2015-16 (February 2016 to March 2016) and 2016-17 and F.Y 2017-18 (up to June 2017). The appellant was registered with Central Excise department having C. Ex. Registration No. AAJHV4901LEM001 dt. 08/02/2016 during the F.Y.2015-16 (during the period February 2016 to March 2016) and also filed Quarterly ER-3 return for the period January 2016 to March 2016. Appellant has paid C. Ex. Duty @2% as provided by Notification No. 01/2011 C.E. Sr. No. 46 on such manufactured of Ready-Mix Concrete (RMC).

- In terms of Notification No.12/2012-Central Excise, dated the 17th March, 2012 amended vide Notification No. 12/2016-Central Excise dt. 01/03/2016, whereby Ready Mix Concrete (38245010) manufactured at site of construction for use in construction work at site is being fully exempted from Excise duty vide Notification No. 12/2012 dt. 01/3/2012 as amended by Notification No. 12/2016 dt. 1/03/2016 Sr. No. 144. Hence Ready Mix Concrete (S.H.No.38245010) manufactured at site of construction for use in construction work at site was attracted NIL duty w.e.f. 01/03/2016. Ready Mix Concrete (S.H.No.38245010) is excisable goods and are subjected to Excise duty and appellant has paid C. Ex. Duty @2% as provided by Notification No 001/2011 C.E. Sr. No. 46 during the period F.Y. 2015-16 during the period February 2016 to March 2016.

- Negative List at Section 66D at clause (f) covers 'any process amounting to manufacture or production of goods.' As per Section 65B (40) "process amounting to manufacture or production of goods" means a process on which duties of excise are leviable u/s 3 of the Central Excise Act, 1944 (1 of 1944.) or the Medicinal and Toilet Preparations (Excise Duties) Act,1955" (16 of 1955) or any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties

excise are leviable under any State Act for the time being in force. Therefore, the above phrase 'processes amounting to manufacture or Production of goods' has been defined in Section 65B of the Act as a Process on which duties of excise are leviable under Section 3 of the Central Excise Act, 1944 (1 of 1944). The job work done by the appellant is covered within clause (f) of section 66D of the finance Act, 1944 and Exempted from service tax under Negative List:-

- Section 2(f) of Central Excise defines "**manufacture**" includes any process,- i. incidental or ancillary to the completion of a manufactured product; ii. which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or iii. which, in relation to the goods specified in Third Schedule involves packing or re-packing of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer, and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labor in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

- Thus the job work done by the appellant complies with the provisions of section 2(f) of the Central Excise Act, 1944 and are covered within the meaning of Manufacture. Which is also exempted under clause (f) of Section 66D (Negative List) of the Finance Act, 1994.

- The definition of Works Contract under Service Tax in Section 65 (54) and also refer to Section 65(105) (zzzza) which provides definition of taxable service. From the definition of works contract under service tax, manufacturing and sale of excisable goods is not covered under Works Contract. The appellant submitted that in various cases, assessee has treated the transaction to manufacture of Ready Mix Concreate (RMC) with pumping and laying as Works Contract even the verdict of the Hon'ble Tribunal is upheld by the Hon'ble Supreme Court in favour of the assessee in the case of GMK Concrete Mixing Pvt. Limited vs. CST. - [2012 (25) STR 357 (Tri.)] 2015 (38) STR J113 (SC); Ultratech Concrete vs. CST. - 2016 (44) STR274 (Tri. Del.). They also relied upon on the following judgments:-

  - 2016 (42) STR 866 (Tri.) - Vikram Ready Mix Concrete (P) Limited vs. CST-2016 (42) STRJ282.

  - 2018 (11) TMI 1470 - CESTAT Chennai - CCE vs. Larsen & Toubro Limited

- The government extended the exemption to RMC by amending the entry no.144 of S1. No.12/2012-CE dated 17.03.2012 vide Notification 12/2016-CE dated 01.03.2016 w.e.f 01.03.2016. As a result, appellant had surrendered and deposited original copy of Registration certificate No. AAJFV4901LEM001 Dt.08/02/2016 in terms of the provision of Rule 9 of the CER 2002 w.e.f. 01/04/2016. Copy submitted for reference.

- They claim they are not liable to pay any penalty/ interest as amount of duty demand and confirmed is not required to be paid on the grounds mentioned herein above.

4. Personal hearing in the matter was held on 11.08.2023. Shri Harshadbhai G. Patel, Advocate appeared on behalf of the appellant. He handed over the additional written submission with supporting case laws. He reiterated the submissions made in the Appeal Memorandum. He submitted that the appellant was manufacturing Ready Mix Concrete (RMC) as per orders from the clients. The same amounts to manufacturing which was excisable in the previous years but due to issuance of exempted notification, it became exempted and they had surrendered their excise registration. The notice has been issued on the basis of ITR data without verifying the nature of service. The adjudicating authority rejected their claim only because they had not submitted the works contract. The appellant has now submitted the same alongwith invoices during the relevant period and those of the previous period, where excise duty was applicable. They have also submitted a copy of register and VAT returns. The appellant was involved in the activity of manufacturing and sales of goods and did not provide any service, hence are not liable for service tax. He further drew attention to the copy of the work order, wherein it is clearly mentioned that they are liable to VAT, but the service tax exempted. Therefore, even if it is considered to be service, but being provided for Sardar Sarovar Narmada Nigam Limited, water projects, the same still remains exempted under the Mega Notification No.25/2012-ST. The impugned order is therefore liable to be set-aside.

5. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made by the appellant in the appeal memorandum, additional written submission and those made during personal hearing. The issue to be decided in the present case is as to whether the service tax demand of Rs.1,08,72,552/- alongwith interest and penalties, confirmed in the impugned order passed by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise.

The demand pertains to the period F.Y. 2016-2017.

6. It is observed that the entire demand in the SCN has been raised based on the income data shared by the CBDT and on the differential income on which no service tax was paid by the appellant. The appellant in their defense reply to the SCN filed before the adjudicating authority stated that they are engaged in the manufacture of RMC falling under CETH-38245010 of the CETA, 1985. They manufactured RMC on contract basis during the F.Y. 2015-16, 2016-17 and 2017-18 (upto June, 2017) and while supplying the said product they also undertook the activity of laying RMC using concrete pumping at the site of the principal Buyer of RMC. They had earned income from manufacturing of RMC on contract or job work basis which they have declared in Profit & Loss Account and Form 26AS. They claim that they are holding Central Excise Registration No.AAJHV4901LEM001 dated 08.02.2016 and have also filed the quarterly ER-3 return for the period January, 2016 to March, 2016; that they had paid duty @2% as per Sr.No. 46 of the Notification No. 01/2011-CE, however, vide Notification No.12/2016-CE dated 01.03.2016 the RMC manufactured at site was exempted from excise du

hence they surrendered their registration in terms of Rule - 9 of the CER, 2002. They claim that since the above activity amounts to manufacture, the same is covered under clause (f) of the Negative list introduced vide Section 66D.

6.1 The adjudicating authority observed that as per Form 26AS for the F.Y. 2016-17, the amount credited and the name of the TDS deductor is as under:-

Details of Form -26AS		
Section under which TDS deducted	*Name of TDS deductor*	*Amount paid/credited*
194C	Bygging India Ltd.	7,00,375/-
194C	ITD Cementation India Ltd.	7,17,83,308/-
	Total	**7,24,83,683/-**

6.2 The adjudicating authority however held that the appellant failed to produce the copy of contract entered between the above clients, invoices, ledgers etc therefore the benefit claimed by the appellant cannot be extended to them. He therefore confirmed the entire demand. The appellant now before the appellate authority has submitted the Work Order between the appellant (Proprietor of the Sharad Infra Projects) and ITD Cementation India Ltd., Sales Register, Bill of exchange issued to M/s. Bygging India Ltd, Commercial Retail Invoices etc.

6.3 On scrutiny of the above documents submitted by the appellant, it is observed that the appellant has entered a contract with M/s. ITD Cementation India Ltd. As per Work Order No. WRK 40155 dated 22.11.2016, the scope of work order was to supply RMC IS 456 2000 providing and laying RMC Gr M10 to M50 at Devbhumin Dwarka project including ingredients like coarse and fine aggregates, sand admixtures except cement & water as per approved mix design. It also mentions that the value of the contract/contract price is inclusive of VAT @0.5% and service tax is exempted for the project and TDS 2% is applicable. Similarly they produced various Commercial Retail Invoices raised to M/s. Bygging India Ltd which is in connection with supply of Ready Mix Concrete (RMC) to M/s. Bygging India Ltd under Work Order dated 15.10.2016 at RSPL Chemical Complex, Dwarka. Similar commercial invoices raised to M/s. ITD Cementation India Ltd were also submitted which I find were either for supply of RMC or for laying and providing RMC at their site. They also submitted Form 217 (Audit Report under Section 63 of Gujarat Value Added Tax Act, 2003) reflecting the payment of VAT and Central Excise Registration Surrendered and the letter informing that the registration is surrendered as RMC manufactured by them at site are fully exempted vide Notification No. 12/2016 dated 01.03.2016 (Sr. 144). On scrutiny of aforesaid documents, I find that the appellant was manufacturing RMC and supplying the RMC and at time also undertook the activity of laying the RMC at the site of the buyer of RMC.

6.4 As per Section 2(f) of CEA 1944, *"any process incidental or ancillary to the completion of a manufactured product"* would amount to manufacture. I find that the entire activity of manufacturing of RMC is manufacturing in terms of Central Excise Act, 1944. The appellant used their own raw material and manufactured final product RMC

which is a excisable goods classifiable under CETH 3824.20, which is not under dispute in terms of C.B.E. & C. Circular No. 601/38/2001/CX, dated 20-11-2001 and Hon'ble Supreme Court judgment in the case of *Larsen & Toubro* v. *CCE* - 2015 (324) E.L.T. 646 (S.C.). Accordingly, the appellant have taken the registration and have been paying Central Excise duty on RMC and have also filed Quarterly ER-3 return for the period January 2016 to March 2016. They had been paid duty @2% as per Sr. No. 46 of the Notification No.01/2011-CE, however, vide Notification No.12/2016-CE dated 01.03.2016, the RMC manufactured at site was exempted from excise duty hence they surrendered their registration. Merely because the appellant has surrendered the Central Excise registration does not make them liable to pay Service Tax under Finance Act.

6.5 I find that the term '**service**' is defined under clause (44) of section 65B, which excludes the transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the constitution (which deals with tax on sale & purchase of goods). Relevant extract is re-produced:-

> *(44) "**service**" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
>
> *(a) an activity which constitutes merely,—*
>
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
>
> *(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or*
>
> *(iii) a transaction in money or actionable claim;*
>
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
>
> *(c) fees taken in any Court or tribunal established under any law for the time being in force.*

Thus sale & purchase of goods are not covered under the above definition of service.

6.6 Further, I find that in terms of Section 66D- Negative List under clause (f) "***services by way of carrying out any process amounting to manufacture or production of goods excluding alcohol liquor for human consumption***" are excluded from the levy of service tax. The phrase '*processes amounting to manufacture or production of goods*' has been defined in **Clause (40)** of Section 65B of the Act as a process on which duties of excise are leviable under Section 3 of the Central Excise Act, 1944 (1 of 1944) or any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any State Act for the time being in force. Thus, the process which amounts to manufacture was not considered as a taxable service as was included in the negative list. However, Clause (f) & Clause (40) were omitted vide Finance Act, 2017 with effect from 31.03.2017. But considering the period of dispute in the present appeal (F.Y. 2016-17), I find that the activity of manufacturing, supplying and laying Ready Mix Concrete at client's site is a manufacturing activity hence covered under negative list. Since the activity is not a taxable service, service tax thereof cannot be levied on the same. Thus, I find that the service tax demand on said activity is not sustainable on merits.

6.7 It is observed that Hon'ble CESTAT, WEST ZONAL BENCH, AHMEDABAD in the case of M/s. WAGAD INFRAPROJECTS PVT. LTD - 2022 (59) G.S.T.L. 95 (Tri. - Ahmd.) has held that;

> *"12. From the above definition, it is clear that manufacturing activity of RMC cannot be covered under Works Contract by any stretch of imagination. Therefore, even though there is contract of Works Contract basically for the purpose of VAT Act, cannot be applied in the present transaction of manufacture and sale of goods in terms of Section 2(f) of Central Excise Act, 1944. The department has very much accepted the activity of the appellant as manufacturing and collected the excise duty on the entire value of RMC which includes the pumping and laying of RMC at site. Therefore, the department cannot take two stands, in one hand manufacturer for demanding excise duty and on the same activity, on the other hand demanding service tax under Works Contract.*
>
> *13 to 18 XXXX*
>
> ***19. As per our above discussion and findings, we are of the clear view that activity of the appellant is entirely of excisable activity. Therefore, the same will not fall under Works Contract service in terms of Finance Act, 1994. Accordingly, the demand of service tax raised under Works Contract service is clearly not sustainable.*** *Therefore, the impugned order is set aside, appeal is allowed with consequential relief, if any, in accordance with law."*

6.8 It is observed that the department either in the SCN or in the impugned order has not classified the above activity of the appellant. In fact, the demand has been raised merely on the basis of the income reflected in Form 26AS. The appellant has been manufacturing and supplying RMC. As per the nature of product, it is necessary to supply RMC in a specialized container and after reaching at the customer's site RMC is delivered by carrying out the process of pouring, pumping and laying of concrete at the customer's place. The RMC cannot be unloaded at a particular place and thereafter shifted the same to the particular place at site. In the Works Order submitted, the Transportation Terms clearly mentions that the appellant shall transport the Concrete Mix from the place of mixing to the place of work with their transit mixture. Due to peculiar nature of RMC, it is unavoidable to deliver at particular place where the RMC is required to be laid-down. I find that the value of the contract clearly includes all the activities particularly when the value of such activities is integral part of the assessable value, which is determined in terms of Section 4 of Central Excise Act, 1944. The activities cannot be vivisected for the purpose of charging service tax on the same activity which is part and parcel of manufacturing activity. In view of this settled position, I find that merely because the appellant has earned income on which TDS was deduction as per the contract, cannot be a ground to demand service tax especially when the contract clearly states that the above contract is exempted from service tax but VAT as well as TDS shall be deducted as per applicable rate. The appellant had not been paying central excise

duty due to the fact that they were availing exemption in terms of Notification No.12/2016-CE dated 01.03.2016.

7. Hon'ble Apex Court dismissed the departmental appeal filed in the case of GMK Concrete Mixing Pvt. Ltd -*[Commissioner* v. *GMK Concrete Mixing Pvt. Ltd. - 2015 (38) S.T.R. J113 (S.C.)]* and held that no taxable service involved in supply of RMC. Relevant para of the judgment is re-produced below:-

> *"4. 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. No costs.*
> *Ordered accordingly."*
>
> ***The Appellate Tribunal in its impugned order had held that appellant was engaged in preparation of Ready Mix Concrete (RMC). While carrying out such dominant objects other ancillary and incidental activities were also carried out. Contract between the 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, the adjudication made under mistake of fact and law fails. "***

8. In light of above the above judgments and settled law, I set-aside the impugned order confirming the service tax demand of Rs.1,08,72,552/- alongwith interest and penalties and allow the appeal filed by the appellant.

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

(शिव प्रताप सिंह)
आयुक्त (अपील्स)

Date: .8.2023

Attested
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Vikas Nitinkumar Shah (HUF), - **Appellant**
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Ahmedabad-380013

The Joint Commissioner,
CGST, Ahmedabad North
Ahmedabad

Respondent

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner, CGST, Division-VII, Ahmedabad North.
4. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
5. Guard File.