



सत्यमेव जयते

आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलिफैक्स 07926305136



DIN : 20221164SW0000555D52

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/2213/2021 / 4996 - 5000
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-069/2022-23
दिनांक Date : 31-10-2022 जारी करने की तारीख Date of Issue 22.11.2022
- आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. 23/CGST/Ahmd-South/JC/RK/2021 दिनांक: 27.05.2021 passed by Joint
Commissioner, CGST, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. M/s Thummar Engineers
3, Padmavati Flats,
Bhulabhai Park Society,
Gitamandir Road, Ahmedabad - 380022

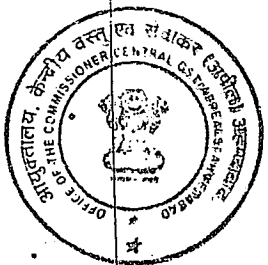
कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

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 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 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 मामलों 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 दिनांक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इका 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम होतो रुपये 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 सेवा कर 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. Registrar 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 आदेश 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 है।

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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु.6.50 पैसे कान्यायालय 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (52) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट), के प्रतिअपीलो 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)-

- (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.

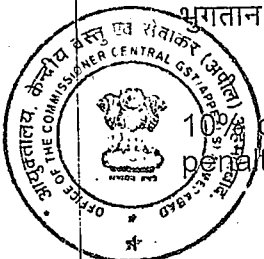
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (cxxxix) amount determined under Section 11 D;
- (cxli). amount of erroneous Cenvat Credit taken;
- (cxlii) 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 मांग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

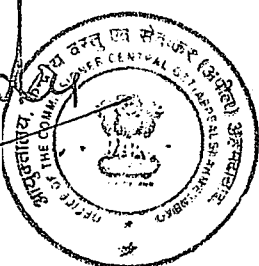
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

The present appeal has been filed by M/s. Thummar Engineers, 3, Padmavati Flats, Bhulabhai Park Society, Gitamandir Road, Ahmedabad – 380 022 (hereinafter referred to as the appellant) against Order in Original No. 23/CGST/Ahmd-South/JC/RK/2021 dated 27.05.2021 [hereinafter referred to as “*impugned order*”] passed by the Joint Commissioner, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as “*adjudicating authority*”].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. ACCPT8126AST001 and engaged in providing services like Erection, Commissioning and Installation and Maintenance and Repair. During the course of audit of the financial records of the appellant for the period F.Y. 2011-12 to F.Y. 2014-15 conducted by the officers of the erstwhile Central Excise and Service Tax Audit Commissionerate, Ahmedabad-II, it was observed that the appellant was providing labour services under the category of Erection, Commissioning and Installation service to various contractors such as Larsen & Toubro Limited, L&T Geo Structure, Ashoka Buildcon Ltd. etc. a sub-contractor. It was noticed that the appellant had not paid service tax amounting to Rs.1,21,02,492/- on the said services provided by them to the main contractors in some cases. The appellant did not agree with the audit objection and contended that they constructed road, bridges for use by general public, which is exempted by Serial No. 13 (a) of Notification No.25/2012-ST dated 20.06.2012 and even if it is considered as work contract, they being sub-contractor are exempted. Regarding the activity related to Metro and Airport, the appellant contended that the same are exempted vide Serial No. 14 (a) of Notification No.25/2012-ST dated 20.06.2012. However, the contention of the appellant was not found to be acceptable by the audit and it appeared that the appellant were not eligible to exemption in terms of Serial No.13(a) and 14 (a) of Notification No.25/2012-ST dated 20.06.2012.



3. The appellant was, therefore, issued a Show Cause Notice bearing No. CEA-II/ST/15-24/C-VI/AP-29/FAR-78/R.P.-06/2016-17 dated 01.12.2016 wherein it was proposed to :

- a) Demand and recover service tax amounting to Rs.1,21,02,492/- under the proviso to Section 73 (1) read with Section 68 of the Finance Act, 1994.
- b) Recover Interest under Section 75 of the Finance Act, 1994.
- c) Impose penalty under Sections 76, 77(2) and 78 of the Finance Act, 1994.

4. The SCN was adjudicated vide OIO No.31/CX-1/Ahmd/JC/MK/2017 dated 29.10.2017 wherein the demand for service tax was confirmed along with interest. Penalties were also imposed under Section 76, 77(2) and 78 of the Finance Act, 1994. Being aggrieved, the appellant filed appeal before the Commissioner (Appeals), Ahmedabad, who vide OIA No. AHM-EXCUS-001-APP-001-2018-19 dated 12.06.2018 remanded the matter back to the adjudicating authority to examine the claim of the appellant in detail.

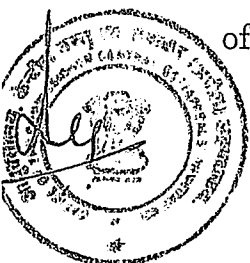
5. In the denovo proceedings, the case was adjudicated vide the impugned order wherein the demand of service tax was confirmed along with interest. Penalties were also imposed under Section 77(2) and 78 (1) of the Finance Act, 1994.

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

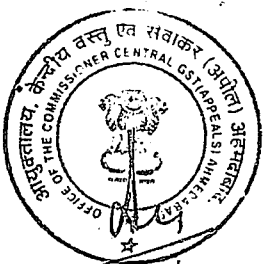
- i. The adjudicating authority has not appreciated the facts and circumstances of the case. They had availed exemption on the basis of work awarded to them by the Contractors involved in fabrication/civil construction of structures such as Walkaways, Lifts, Canopy, Railing, Roofing etc. in the course of construction of Airports, Metros, Bridges and Road.
- ii. Prior to 01.07.2012, the definition of industrial construction given in Section 65 (25b) of the Finance Act, 1994 specifically excluded the service of construction provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. The service of construction of civil structure or part thereof provided by them was not liable to service tax.



- iii. Notification No.17/2005-ST dated 07.06.2005 granted exemption to site formation and clearance, excavation and earthmoving and demolition and such similar activities referred to in sub-clause (zzza) of clause (105) of Section 65 of the Finance Act, 1994, provided to any person by any other person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports from the whole of service tax. Further, Notification No.42/2010-ST dated 28.06.2010 also granted exemption to the service of commercial or industrial construction when wholly provided within an airport.
- iv. From 01.07.2012, Serial No.14(a) of Notification No.25/2012-ST dated 20.06.2012 provided exemption by way of construction pertaining to airport, railways or metro, while Serial No.13 (a) provided exemption to construction of road and bridges. Consequently, the service of fabrication/construction provided by them to the aforesaid contractors was exempt from service tax.
- v. They were also informed by the contractor that since the work was of fabrication /construction for airport, metro, bridge and road, the same was not liable to service tax. Accordingly, they had not paid service tax and have not recovered the same from their contractors. The other sub-contractors of the said contractors have also not been paying service tax in respect of similar work. Therefore, the exemption is not deniable.
- vi. They had relied upon Board's Circular No.138/7/2011-ST dated 06.05.2011 in which it was clarified that although a contractor may be rendering Works Contract service, the service provided by the sub-contractor is to be classified under the applicable head and not under Work Contract service.
- vii. The notice has not specified the particular clause of Section 65 of the Finance Act, 1994 under which the service rendered by them would fall. The notice has proceeded on the basis that they were rendering service of Erection, Commissioning and Installation without examining whether the service rendered by them would fall under Section 65(39a) of the Finance Act, 1994.
- viii. They rely upon the judgment in the case of Mackintosh Burn Ltd. Vs. CST – 2016 (42) STR 161. They also rely upon the judgment in the case of Pioneer Fabrication P. Ltd. Vs. CCE – 2016 (42) STR 563.



- 7
- ix. The service rendered by them to the Contractors are by way of construction etc. and the same are in respect of airport, metro, roads and bridges and are, therefore, clearly exempt under Serial No.14(a) and 13(a) of Notification No.25/2012-ST dated 20.06.2012.
- x. The contention that the contractors have not sub-contracted the Works Contract Service to them and that the service rendered by them are only input service to the contractors is entirely irrelevant to the question of their eligibility to exemption under the said Notification. There is nothing in the Notification which restricts the scope of exemption only to Works Contract Service. Further, there is also nothing in Serial No. 13(a) and 14(a) of the said Notification to exclude their applicability when such service is provided by a sub-contractor.
- xi. The notice is issued on 01.12.2016 demanding service tax for the period F.Y.2011-12 to F.Y.2014-15 which is beyond the normal period of limitation. The larger period of limitation is not applicable since there is no fraud or collusion or wilful mis-statement or suppression of facts or contravention with intent to evade tax.
- xii. It is evident from the work orders that the work executed was in respect of Road, Airports, Railways, Terminals. Despite this undisputed facts, the adjudicating authority has given findings that the said work pertains to only regular labour work and does not involve transfer of goods or property.
- xiii. The Board has vide Circular No.147/16/2011-Service Tax dated 21.10.2011 clarified that in respect of projects involving construction of Road, Airport, Port, Railway etc. service provided by the sub-contractor will get the benefit of exemption.
- xiv. It is their bona fide belief based on the clarification issued by the Board that they are eligible for exemption and as such no duty was assessed and shown in their returns. The penalty of Rs.10,000/- imposed is liable to be set aside.
- xv. The very fact that they had maintained complete records in respect of the service rendered by them rules out any fraud, collusion or wilful mis-statement or suppression of facts of contravention with intent to evade tax. In the present case there is no positive and deliberate act of concealment of facts nor any clandestine activity. Therefore, the larger period of limitation cannot apply. They rely upon the decision in the case



of CCE Vs. Chemphar Drugs and Liniment – 1989 (40) ELT 276 (SC) and Pushpam Pharmaceuticals Limited Vs. CCE – 1995 (78) ELT 401 (SC).

- xvi. Since the demand of service tax is liable to fail both on merits and limitation, the question of interest or imposition of penalties does not arise.
- xvii. Assuming but not admitting, if service tax is confirmed, cum duty price may kindly be given.

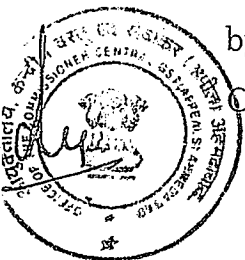
7. The appellant filed additional written submissions on 29.08.2022 wherein it was, inter alia, contended that :

- Copies of certain contracts, endorsed in their favour are enclosed, pertaining to road, metro rail project, airport, DMRC elevated via duct, part designing and construction of DMRC. These are Govt. project and exemption is granted to this project. The service tax in the contract is shown as Nil. Therefore, they had not discharged service tax as the same is not applicable.
- They rely upon OIA No.AHM/EXCUS/001/APP/125/2019-20 dated 23.06.2020 passed by the Commissioner (Appeals), Ahmedabad in the case of Karnavati Engineers.
- Reliance is also placed upon the judgment in the case of Hindustan Construction – 2021 (44) GSTL 369; GMR Projects (P) Ltd. – 2021 (44) GSTL 95 and GMR Projects – 2021 (44) GSTL 110.
- Penalty is not imposable as it is a question of interpretation of Notification and there is no intention to evade payment of service tax.

8. Personal Hearing in the case was held on 29.08.2022. Shri Naimesh K. Oza, Advocate, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum and in the additional written submissions.

9. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the additional written submissions and the material available on records. The issues before me for decision are :

- A. Whether for the period prior to 01.07.2012, the labour service provided by the appellant is classifiable under the category of Erection, Commissioning and Installation, as held in the impugned order, or



whether the same are Fabrication/Civil Construction of structures as claimed by the appellant?

B. Whether for the period post 01.07.2012, the labour service provided by the appellant are taxable services as defined under Section 65B(44) and 65B(51) of the Finance Act, 1994 and chargeable to service tax, as held in the impugned order, or whether the same are exempted in terms of Serial No. 13 (a) and 14(a) of Notification No.25/2012-ST dated 20.06.2012, as claimed by the appellant?

10. Prior to 01.07.2012, the service tax was levied on various services which were classified in terms of Section 65 of the Finance Act, 1994. The taxability of a service as well as the eligibility of a service to exemption was determined based on the classification of the service. However, it is observed that the SCN issued to the appellant does not contain any proposal regarding classification of the services provided by the appellant for the period prior to 01.07.2012.

11. Be it as it may be, it is seen that the impugned order has been passed in the denovo proceedings ordered by the Commissioner (Appeals), Ahmedabad vide OIA No. AHM-EXCUS-001-APP-001-2018-19 dated 27.04.2018, the operative part of which is reproduced below :

“11. It would be in the interest of justice if the matter is remanded back to the adjudicating authority to examine the claims of the appellant in detail. The appellant is directed to provide all the documents within two months from the receipt of this order, without fail. The adjudicating authority is further directed to first classify the service for the period prior to 1.7.2012, before deciding the taxability and in respect of the period from 1.7.2012, examine the claim of the appellant that the is eligible for the benefit of notification no.25/2012-ST. While deciding the matter, the adjudicating authority is also directed to give a detailed finding in respect of the claims made by the appellant. Needless to state that the adjudicating authority will follow the principles of natural justice while deciding the matter.”

11.1 The adjudicating authority has, in terms of the above directions determined, vide the impugned order, that the services provided by the appellant are classifiable under Erection, Commissioning or Installation services prior to 01.07.2012. For the period post 01.07.2012, the adjudicating authority has held that the appellant are not eligible to exemption on the grounds that the appellant could not prove that the service provided by them to the main contractors fell under the category of works contract service for original work as exempted under Serial No. 13 (a), 14(a) and 29(h) of



Notification No.25/2012-ST dated 20.06.2012. Accordingly, he has denied the benefit of exemption under the said Notification.

12. Having gone through the case records, I find that it is an undisputed fact that the services provided by the appellant are towards construction of Roads, Bridges, Metro, Railways, Airport etc. The adjudicating authority has at Para 25.2 of the impugned order held that the services provided by the appellant are defined under Section 65(39a) of the Finance Act, 1994 and classifiable under Section 65 (105) (zzd) of the Finance Act, 1994. The provisions of Section 65(39a) of the Act is reproduced below :

“ erection, commissioning or installation” mean any service provided by a commissioning and installation agency, in relation to,-

- (i) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise; or
- (ii) installation of-
 - (a) electrical and electronic devices including wirings or fittings therefore; or
 - (b) plumbing, drain laying or other installations for transport of fluids; or
 - (c) heating ventilation or air-conditioning including related pipe work, ductwork and sheet metal work; or
 - (d) thermal insulation, sound insulation, fire proofing or water proofing, or
 - (e) lift and escalator, fire escape staircases or travelators; or
 - (f) such similar services;”

12.1 The adjudicating authority has at Para 25.3 of the impugned order held that the services under Section 65 (105) (zzd) of the Finance Act, 1994 are not exempted by any Notification. The appellant have, however, claimed that the service provided by them was Commercial or Industrial Construction service as defined in Section 65(25b) of the Finance Act, 1994, which specifically excluded service of construction provided in respect of roads, airports, railways, bridges, tunnels etc. It is observed that the adjudicating authority has referred to and reproduced the relevant portion of four Work Orders, at Para 24 of the impugned order, under which the services were provided by the appellant to the main contractors. I find that two work orders pertain to the period prior to 01.07.2012. In respect of Work Order No. LE090546/E39 dated 12.06.2010, it is stated that the scope of work is mentioned as labour charges for shifting, assembling and erection of segment mould and that scope also includes shifting of segment mould, assembling of the mould shutter and erection of the same as well as necessary cutting and welding wherever



required. The other items covered under the scope of work pertain to loading and unloading of material.

12.2 I find it pertinent to refer to Circular No. 80/10/2004-ST dated 17.09.2004 issued by the CBIC, the relevant portion of which is reproduced below :

“14. Extension of service tax on installation and commissioning, to erection services :

Service tax was levied on commissioning and installation of plant, machinery and equipment w.e.f. 1-7-2003. The general practice is that ‘erection, commissioning and installation’ are contracted as a composite package. There have been a number of doubts and queries regarding the distinction between erection and commissioning/installation. Erection would refer to the civil works to installation/commissioning of a plant or machinery. In this year’s budget, the scope of service tax under installation and commissioning is being extended to include erection also. Erection involves civil works, which would otherwise fall under the category of construction services. However, in case of a composite contract for erection, commissioning and installation, the erection charges would be taxed as part of this category of service.”

12.3 Further, the Board had also clarified vide Circular No. 123/5/2010-TRU dated 24.05.2010 that :

“(ii) Under ‘Erection, commissioning or installation services’, the activities relevant to the instant issue are (a) the erection, commissioning and installation of plant, machinery, equipment or structures; and (b) the installation of electrical and electronic devices, including wiring or fitting there for. Thus, if an activity does not result in emergence of an erected, installed and commissioned plant, machinery, equipment or structure or does not result in installation of an electrical or electronic device (i.e. a machine or equipment that uses electricity to perform some other function) the same is outside the purview of this taxable service.”

12.4 From the clarifications issued by the Board vide the above mentioned Circulars, it is evident that only in the case of a composite contract for erection, commissioning or installation, the service of erection would be charged to service tax under this category. It was also clarified that erection involves civil works which would otherwise fall under the category of construction services. Further, if the activity does not result in emergence of erected, installed and commissioned plant, machinery, equipment or structure, the same would be outside the purview of erection, commissioning or installation services. In the instant case, I find that the service provided by the appellant is not under a composite contract of erection, commissioning and installation. The appellant have been given the work orders only for erection and are not entrusted with the commissioning and installation. Therefore, in terms of the clarification



issued by the Board, the service provided by them would be outside the purview of erection, commissioning or installation services and would fall under the category of construction services.

12.5 The appellants have relied upon the judgment in the case of Mackintosh Burn Ltd. Vs. Commissioner of Cus., C.Ex., & S.T, Shillong – 2016 (42) STR 161 (Tri.-Kolkata), the relevant portion of the said judgment is reproduced below :

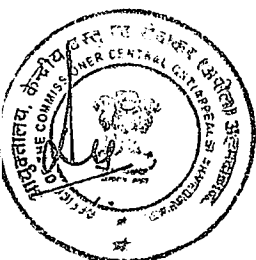
“39. In the aforesaid Circular, it is made amply clear that even though ‘erection’ is a civil work, but in a composite contract for ‘Erection, Commissioning or Installation Service’, an erection charge would be taxed as part of the commissioning or installation Service. Thus, the legislators are fully aware of the situation that the activity of ‘erection’, though fall under the category of ‘Construction Service’, but in a composite contract, the charge collected on this account would also be taxed under the category of ‘Erection, Commissioning or Installation Service’. To add further, it could safely be inferred that it was not the intention of the legislature to tax the activity/service of ‘erection’ separately in relation to the objects of levy viz. plant, machinery or equipment, but it is a necessity to be taxed being carried out along with commissioning or installation service, and when the charges thereof are composite. Therefore, it would be incorrect to interpret that after addition of the expression, “structure-pre-fabricated or otherwise” to the existing list of objects of levy of plant, machinery or equipment, it brought significant change in the said entry so as to result an interpretation that activity of erection of structure standing alone, would be leviable to service tax. On the contrary, the purpose for which the word ‘erection’ was inserted continued to be the same as was applicable to plant, machinery or equipment even after addition of the expression ‘structure-pre-fabricated or otherwise’.

50. Since, in our opinion the activity/service of erection of border fencing-structure standing alone would not be subjected to service tax under clause (39a) of Sec. 65, but ought to be along with the activity of commissioning or installation, in a composite contract, and no such finding is recorded in the impugned order that other activities of commissioning or installations are involved in the present appeals, therefore, the other alternative arguments including the issue of limitation, raised by the appellants become academic, hence, not delved into.

51. In view of above discussion, the impugned Orders are set aside and the respective appeals filed by the appellants are hereby allowed.”

12.6 The appellants have also relied upon the judgment in the case of Pioneer Fabrications Pvt. Ltd. Vs. Commissioner of Central Excise, Meerut – 2016 (42) STR 563 (Tri.-All), the relevant part of which is reproduced below :

“5. Regarding the nature of service rendered by the appellant it is clear from the work order as well as the observations of the lower authorities that these are composite work involving supply of materials and provision of service. These are rightly to be categorized under works contract and the Hon’ble Supreme Court in the case of *CCE, Kerala v. Larsen & Toubro Ltd.* (supra) held that prior to 1-6-2007 there is no charging section for levying service tax on works contract. We find on this ground alone, the appellant will succeed.



6. We also find that the classification followed by the lower authorities is not sustainable. From the nature of work and the material involved it is clear that supplying and fixing Metal Crash Barriers along the highways cannot be considered as erection and commissioning of any plant and machinery or similar equipments."

12.7 In view of the above judgments of the Hon'ble Tribunal and also considering the clarification issued by the Board, I am of the considered view that the services provided by the appellant are not classifiable under erection, commissioning or installation services and are appropriately classifiable under the category of Commercial or Industrial Construction services as defined under Section 65(25b) of the Finance Act, 1994, which is reproduced below :

"commercial or industrial construction" means-

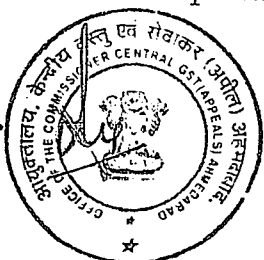
- (a) construction of a new building or a civil structure or a part thereof; or
- (b) construction of a pipeline or conduit; or
- (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or
- (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit,

which is-

- (i) used, or to be used, primarily for; or
- (ii) occupied, or to be occupied, primarily with; or
- (iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;"

12.8 As is seen from the definition mentioned above, the services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams are excluded from the purview of Commercial or Industrial Construction services and, therefore, are not chargeable to service tax. In the present appeal, it is not a matter of dispute that the service provided by the appellant is in respect of Airport, Metro, Roads, Bridges etc. Therefore, I find that there is merit in the contention of the appellant that they are not liable to pay service tax by virtue of the exclusion provided in Section 65(25b) of the Finance Act, 1994. Accordingly, I am of the considered view that the appellant are not liable to pay service tax in respect of the services provided by them for the period prior to 01.07.2012. Hence, the demand of service tax for the period prior to



01.07.2012 is neither tenable nor sustainable legally, and is liable to be set aside.

13. For the period post 01.07.2012, I find that the adjudicating authority has held at Para 26.6 of the impugned order that the appellant is supplying only labour work for erection, commissioning and installation to the main contractor where there is no supply or transfer of goods/property. The adjudicating authority thereafter held that the appellant could not prove that the service provided by them to the main contractors fell under the category of works contract service for original work as exempted under Serial No. 13 (a), 14(a) and 29(h) of Notification No.25/2012-ST dated 20.06.2012. As the adjudicating authority has himself held that the services provided by the appellant was erection, commissioning and installation service, he ought to have examined the eligibility of the appellant to exemption in terms of Serial No.13 (a) and 14(a) of the said Notification. On going through the material on record, I find that the appellant have at no stage claimed that the services provided by them were Works Contract Service nor did they claim the benefit of Sr.No.29 (h) of the said Notification. Therefore, the findings of the adjudicating authority regarding the eligibility of exemption under the said Serial No.29(h) is not relevant to the issue on hand.

13.1 I find that the appellant have claimed the benefit of exemption in terms of Serial No.13(a) and 14(a) of the said Notification, which are reproduced below :

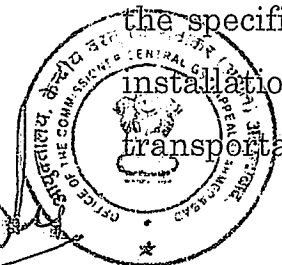
“13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of,-

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public.”

14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-

(a) an airport, port or railways, including monorail or metro;”

13.2 It is clear that Serial No.13 (a) and 14 (a) of the said Notification exempts the specified services, which includes construction, erection, commissioning, installation etc. pertaining to road, bridge, tunnel, terminal for road transportation, airport, port or railways including a metro. Even if the finding



of the adjudicating authority that the services provided by the appellant were classifiable under erection, commissioning and installation service is accepted, then also the appellant are eligible for exemption under Serial No.13 (a) and 14 (a) of the said Notification. However, without giving any findings regarding the eligibility of exemption to the services provided by the appellant in terms of Serial No. 13(a) and 14(a) of the said Notification, the adjudicating authority has denied the benefit of exemption based on his findings that the service provided by the appellant was not Works Contract Services.

13.3 As stated earlier, it is not disputed by the department that the services provided by the appellant are pertaining to roads, bridges, airport, metro etc. Further, it has already been held in the preceding paragraphs that the services provided by the appellant are Construction services and the same are within the scope of Serial No. 13(a) and 14 (a) of the said Notification. Therefore, the services provided by the appellant are exempt from payment of service tax in terms of Serial No.13(a) and 14(a) of the said Notification. Consequently, the impugned order confirming demand of service tax for the period post 01.07.2012 also is not legally sustainable.

14. Considering the facts of the case, the Circulars issued by the Board as well as the judgments of the Hon'ble Tribunal supra, I am of the considered view that the impugned order confirming demand of service tax on the appellant is not legally sustainable. Accordingly, the impugned order is set aside and the appeal filed by the appellant is allowed with all consequential relief.

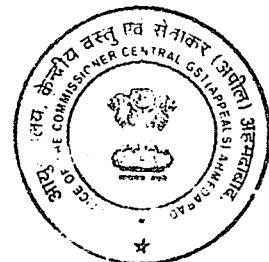
15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed of in above terms.

Attested:

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

Akhilesh Kumar
(Akhilesh Kumar) 31st October, 2022
Commissioner (Appeals)
.Date: 31.10.2022.



BY RPAD / SPEED POST

To

M/s. Thummar Engineers,
3, Padmavati Flats,
Bhulabhai Park Society,
Gitamandir Road,
Ahmedabad – 380 022

Appellant

The Joint Commissioner,
Commissionerate : Ahmedabad South.

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South.
(for uploading the OIA)
4. Guard File.
5. P.A. File.

