



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: 20230864SW0000777DFD

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1264/2023 / 5089-93
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-83/2023-24
दिनांक Date : 31-07-2023 जारी करने की तारीख Date of Issue 28.08.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Shiv Pratap Singh, Commissioner (Appeals)
- ग Arising out of OIO No. 09/CGST/Ahmd-South/JC/NB/2022-23 दिनांक: 12.09.2022 passed by
Joint Commissioner, CGST, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Shree Infracon Pvt. Ltd.
602, Parshwanath E Square,
Corporate Road, Near AUDA Garden,
Prahladnagar, Ahmedabad-380015.

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 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.

- (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.

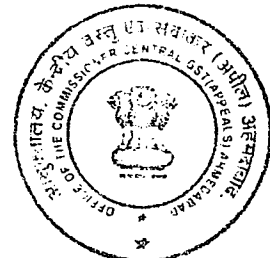
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

- (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 अनुसूची-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.

10 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)-

- a. (Section) खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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.

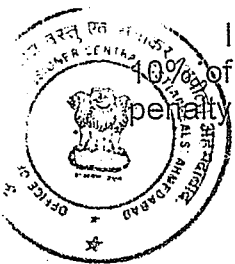
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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



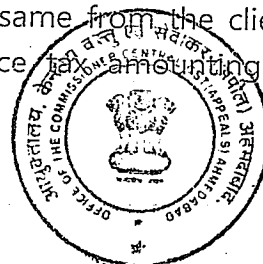
ORDER IN APPEAL

M/s. Shree Infracon Pvt. Ltd., 602, Parshwanath E Square, Corporate Road, Near AUDA Garden, Prahladnagar, Ahmedabad- 380015 (hereinafter referred to as 'the appellant') have filed the present appeal against the Order-in-Original No. 09/CGST/Ahmd-South/JC/NB/2022-23 dated 12.09.2022, (in short 'impugned order') passed by the Joint Commissioner, Central GST, Ahmedabad South Commissionerate (hereinafter referred to as 'the adjudicating authority'). The appellant were having Service Tax Registered No. AAKCS3508 CSD001 which was obtained on 18.06.2010 under Construction of Residential Complex, Works Contract Service and Transport of Goods by Road services.

2. During the course of EA-2000 audit, on verification of records of the appellant for the period 2010-11 and 2011-12, discrepancies were noticed based on which various revenue paras were raised vide FAR No. 237/13-14 dated 07.01.2014, issued to the appellant. Some of the revenue paras were disputed by the appellant, which are detailed below:

Revenue Para-5: It was noticed that the appellant during the F.Y. 2010-11, had provided services of 'Site Formation and Clearance, Excavation and Earthmoving and demolition' to M/s. MHS Infracon Pvt. Ltd. under Work Order No. WO/MHS/GIDC Dahej /2010-11/001 dated 16.12.2010, on which they had not paid service tax. The appellant have claimed that "Clearing and Grubbing Earth Work" was provided in GIDC SEZ project area at Dahej, Gujarat hence not taxable. As no documents were submitted in support of the above claim, the auditors observed that the appellant were required to pay Service tax amount of **Rs.8,75,918/-** on the taxable value of Rs.85,04,061/- received, as per Section 68 of the Finance act, 1994 read with Rule 6(1) of the Service Tax Rules, 1994.

Revenue Para-6: It was further noticed that the appellant during 2008-09 to 2011-12 had entered into an Agreement No.534/7/2008 dated 01.07.2008 with M/s Backbone Enterprise Ltd, Rajkot, wherein the appellant was appointed as a sub-contractor to provide the work of "Tender for the work of construction of D Types residential tower in Vastrapur Govt Colony, Ahmedabad." In Para 7 (D) of the said agreement, it is mentioned that the service tax, as applicable, shall be borne and paid by the appellant. However, the appellant as sub-contractor has not paid the service tax for the said service provided to M/s Backbone Enterprise Ltd (the main contractor). On the other hand, it has also been noticed that M/s Backbone Enterprise Ltd (Principal Contractor) had been paying service tax regularly for the Works Contract Service provided. M/s Backbone Enterprise Ltd charged service tax from their ultimate clients. It therefore appeared that claiming exemption from service tax on the services rendered by appellant as sub-contractor in terms of Board's Circular No.138/07/2011-ST dated 6.5.2011 issued from F. No. 137/57/2011-ST shall be exempted when the main contractor is providing exempted service. In the instant case, the main contractor i.e. M/s Backbone Enterprise Ltd has not provided any exempted service & discharged the service tax liability for the said project and collected the same from the client. Therefore, the appellant was also required to pay service tax amounting to



Rs.19,39,391/- on the taxable services valued at Rs.4,70,72,588/- rendered by them to M/s Backbone Enterprise Ltd.

Revenue Para-7: It was observed that during the period 2008-09 to 2011-12, the appellant had carried out various activities like Construction, Repair and Maintenance service under Works Contract Service, on which they have failed to discharge service tax. On being pointed out the appellant had argued that they had carried out the said construction activity in respect of Government work and as per the provisions of Circular No. 80/10/04-ST dated 17.09.2004, the activities of construction carried out in respect of the above are not taxable. But the appellant could not produce any documents to establish that the institutions to which the services rendered were non-commercial in nature or were actually rendering charitable work and are not established for the purpose of profit. Therefore, the benefit of the said circular could not be granted to the appellant. The service tax liability of **Rs. 78,33,625/-** was therefore required to be recovered from the appellant.

2.1 Accordingly, a Show Cause Notice (SCN) No. STC/04-74/O&A/2013-14 dated 17.04.2014 was issued to the appellant by the Commissioner, Service Tax Ahmedabad, proposing recovery of total service tax amount of **Rs.1,06,58,934/-** (Rs. 8,75,918/- + Rs.19,39,391/- + Rs.78,33,625/-) not paid on the value of income received during the disputed period along with interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalties under Section 76, penalties under Section 77(1), Section 77(2) and under 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.3,96,779/-** under '*Site Formation and Clearance, Excavation and Earthmoving and demolition*' was confirmed and demand of **Rs.60,98,559/-** was dropped. Demand of **Rs.39,09,442/-** under the category of Works Contract Service was confirmed and dropped the demand of **Rs.2,44,115/-**. Interest on total service tax liability of **Rs.43,06,221/-** was also ordered to be recovered. However, penalty under Section 76 was not imposed. Penalty of Rs.10,000/- each under Section 77(1) & Section 77(2) and penalty of Rs.43,06,221/- 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 have preferred the present appeal on the confirmed amount, alongwith application-seeking condonation of delay in filing the appeal, on the grounds elaborated below:-

- The appellant has carried out various activities such as "Clearing and Grubbing, Earthwork and Excavation work. For such activities, the demand is raised by the department under the category of "Site Formation and Clearance, Excavation and Earthmoving and Demolition". The definition of "Site Formation and Clearance, Excavation and Earthmoving and Demolition" which is as reproduced below:

Site formation and clearance, excavation and earthmoving and demolition includes,-

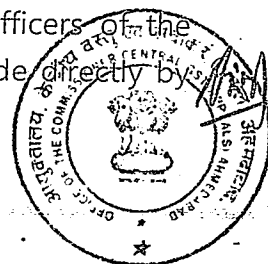


- i. *Drilling, boring and core extraction services, for construction, geophysical, geological or similar purposes; or*
- ii. *Soil stabilization; or*
- iii. *Horizontal drilling for the passage of cables or drain pipes; or*
- iv. *Land reclamation work; or*
- v. *Contaminated top soil stripping work; or*
- vi. *Demolition and wrecking of building, structure or road,*

but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies. "

Thus, as per the definition, if site formation activity is undertaken in relation to agriculture, irrigation and water bodies, then service tax cannot be levied. The appellant in terms of Work Order no. No. AB/TC/2666/0f 2011 dated 13.06.2011 had entered an agreement with the Executive Engineer, Ahmedabad Irrigation Division, and has carried out the Earth filling near the water body situated in Chandola. Water bodies constructed by the Government generally have an inspection office to oversee the Lake. Similarly, in the instant case, certain irrigation work has been done near the inspection office of the Chandola Lake. Thus, the said activities are in relation to water source or water bodies and hence such amount would not be levied to Service Tax as per the exclusion clause of the definition. Copy of the said Work order is submitted.

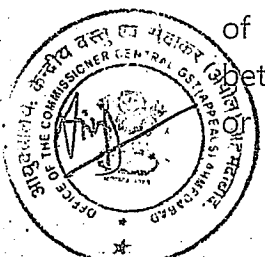
- The appellant has constructed "D" Type Residential tower in Vastrapur Govt Colony, Ahmedabad. For these Construction services provided to M/s Backbone Enterprise Ltd during the period 2008-09 to 2011-12, the demand is raised by the department under the category of "Works Contract Service". In the instant case, the appellant has constructed residential quarters for the staff of Government and hence, as per the exclusion clause of "personal use", service tax cannot be levied on such construction activity. For any residential complex, service tax is chargeable under clause (c) of definition of Works Contract which clearly specifies "construction of residential complex". Definition of "residential complex" is defined in Section 65 (105) (91a) and as per the clause (iii) of the said definition, if a residential unit is intended for 'personal use', then it should be excluded from the purview of service tax. Further, the term "personal use" is defined in explanation to the definition of 'residential complex' as permitting the complex for use as residence by another person on rent or without consideration. The service of constructing the Residential Complex is provided to Government and the contract provided by Government to M/s Backbone Enterprise Ltd. is merely sub-contracted to the appellant. And thus, the Service Tax should not be demanded on such income. Copy of the said Work order is submitted.
- Similarly, the appellant have constructed Residential Staff Quarters for M/s. Gujarat State Police Housing Corporation Ltd. (GSPHCL) at Chikali location. The Residential Staff Quarters are used for residential use of the officers of the respective Government department. Thus, the construction is made directly by



engaging another person and the construction of such complex is intended for personal use as residence by such person as per the explanation - (a) of the definition viz. 'personal use'. Thus, the construction of residential staff quarters for GPHC Chikali Surat is very well covered by the exclusion of definition of "residential complex" and hence service tax will not be applicable at all. Copy of the said Work order is submitted. Mere delegation of department for undertaking work in relation to construction of Residential Quarters by forming a Government Undertaking does not separate such entities. The ownership of the houses constructed vested with the Government of Gujarat & GSPHCL is nothing but an extended arm of the Government. They relied on following judgments;

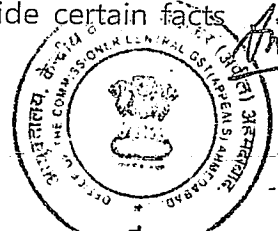
- o S. Kadrivel vs Commissioner of C. Ex. & S. T. Tiruchirapalli, CESTAT-Chennai [2018 (6) TIMI 926 - CESTAT CHENNAI]
- o M/s. Sima Engineering Constructions, S. Rajangam, T.M. Saravanan, M/s. Marimuthu Gounder & Sons V/s. CCE, Trichy.
- o M/s. Khurana Engineering Ltd Vs. Commr of C. Ex. , Ahmedabad- 201.1 (21) S. T.R. 115 (Tri. Ahmd.)
- o M/S. P & C Constructions (P) Ltd. [2018 (9) TMI 1660 - CESTAT Chennai
- o M/s. N.P Patel & Co Versus C.S.T. -Service Tax - Ahmedabad [2022 (11) TMI 1043 - CESTAT AHMEDABAD

- The appellant has provided services to M/s Gujarat State Police Housing Corporation Ltd. (GSPHCL) at Kapodara and Athwalines location in relation to construction of Police Station. The services provided to GSPHCL, are for providing services in relation to construction of Police Station. Thus, the aid works are for non-commercial activities. The services of construction of Police Station Q provided to GSPHCL supports the management of Police Department are to be considered as non-commercial.
- In respect of the work order no. GETCO/CE(PROJ)/SE(C)/LOI/ NDD/ 220KV/ Rajpar/9577 dated 21.12.06, the appellant has undertaken work in relation to construction of Compound Wall of power sub-station for GETCO. The Gujarat Energy Transmission Corporation Limited (GETCO) is an electrical power transmission company in the State of Gujarat, India. The company is a subsidiary of Gujarat Urja Vikas Nigam (GUVN). GUVN is wholly owned by the Government of Gujarat. GETCO is engaged in transmission of electricity to general public. This is a non-commercial activity and thus, it shall not be leviable to Service Tax.
- In respect of the Work Order no. No. EM/GJ/INFRA/28009/Earth Work dated 12.06.2009 of Emergency Management and Research Institute, Ahmedabad, the appellant has provided services of earthwork of office premises. The said services are classified as "works contract services". The CBIC concept note related to works contract services, states that disputes have been arisen in some parts of the country regarding applicability of Service Tax on certain activities such as shifting of overhead cables to underground on account of renovation/ widening of roads; laying of electrical cables under or alongside roads/ railway tracks; between grids/ sub-stations/ transformers the distribution points of residential commercial complexes and such activities as electrification of railways,



installation of street-lights, traffic lights, flood-lights. This clarification considers the taxability of different activities taking into account the scope of all services (such as site formation/ excavation /earth moving service, commercial or industrial construction services; erection, commissioning or installation services; or works-contract service) that are presently taxable as well as those which are covered under the Finance Act, 1994. The EMRI is a not for profit professional organization operating in the Public-Private Partnership (PPP) mode. EMRI Green Health Services has in place, meticulously chalked-out processes that ensure speedy, effective emergency services designed to save lives. Few of the emergency helplines managed by EMRI are 108 (Ambulance), 100 (Police), 181 (Women Helpline and Rescue Vans) etc. It is evident that they work for non-commercial purposes and thus, the building for which earthing work is supplied by the appellant shall be used for non-commercial purpose and thus, it shall not be leviable to Service Tax. Copy of the said Work order is submitted. They relied on following judgments:-

- o M/s. Avas Vikas Ltd. V/s CCE, Jaipur-I -2022 (12) TMI 138 – CESTAT New Delhi
 - o Ratan Das Gupta & Co. V/s CCE Jaipur [2017 (3) TMI 1662 – CESTAT, Delhi
- As per Section 67(2) of the Finance Act, 1994 where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to gross amount charged. Reliance placed on the following:
- o Commr. of Cen. Excise & Cus., Patna Versus M/S Advantage Media Consultant & Anr. 2008 (10) TMI 570-- SC
 - o Commissioner of Service Tax, Mumbai-I Versus Allied Aviation Ltd. 2017 (4) TMI 438- CESTAT Mumbai
 - o Commissioner of Central Excise, Delhi v. Maruti Udyog Ltd. {2012 {141} ELT 3 {SC}}
- According to Section 80, no penalty under Section 76, 77 or 78 can be imposed if the appellant proves that there was a reasonable cause for default or failure under these sections. Section 80 provides notwithstanding anything contained in Sections 76, 77, 78 or 79; no penalty shall be imposable on appellant for any failure referred to in the said provisions if appellant proves that there was reasonable cause for said failure. [CCE, Meerut-II v. On Dot Couriers & Cargo Ltd. {2006} 6 STJ 337 (CESTAT, New Delhi)]
- Penalty under section 78 can be levied only if there is a fraud; collusion; willful mis-statement; suppression of facts or contravention of any provisions with intend to evade payment of service tax and it can be imposed by invoking larger period or extended period for issue of show-cause notice. Only in unusual circumstances, demands for extended period are to be invoked, with a very serious allegation of suppression of facts and intention to evade payment of service tax. Such serious allegations of suppression can be invoked only if the noticee has deliberately done an action with an intention to hide certain facts



from the department and department has confirmed it beyond doubt with aid of corroborative evidence that there was a deliberate act on part of noticee to evade tax. No penalty shall be imposable on noticee for any failure referred to in the said provisions if noticee proves that there was reasonable cause for said failure. [CCE, Meerut-11 v. On Dot Couriers & Cargo Ltd. {2006} 6 STJ 337 (CESTAT, New Delhi)].

3.1 On going through the appeal memorandum, it is noticed that the impugned order was issued on 17.08.2022 and was claimed to be received by the appellant on 13.09.2022. However, the present appeal in terms of Section 85 of the Finance Act, 1994, was filed on 20.01.2023 i.e. after a delay of 19 days from the last date of filing appeal. The appellant, therefore, filed a Miscellaneous Application seeking condonation of delay. The appellant have stated that the organization was facing liquidity crunch and could not make the pre-deposit in time. Hence, there was delay in filing the appeal. They, therefore, requested to condone the delay of 19 days, as the same is within the condonable period.

4. Personal hearing in the matter was held on 30.06.2023. Ms. Forum Dhruv, Chartered Accountant, appeared on behalf of the appellant. She handed over a summary of the case alongwith copies of judgments as mentioned therein. She reiterated the submissions made in the appeal and those in the summary of the case. She submitted that the appellant had not received the impugned order by Post and had collected it from the office of the lower authority in person on 3rd November, 2022. Thereafter, there is a delay of about 19 days over and above the stipulated period of 60 days. The delay is on account of liquidity crunch and arranging finances for making the pre-deposit. The same being within the condonable period may be condoned. She submitted that in similar case the Commissioner (Appeal) vide O-I-A dated 29.03.2022 had upheld the order in favour of the appellant on the same issue. Based on the submissions made by them and the legal precedents, she requested to set-aside the impugned order.

5. Before taking up the issue on merits, I will first decide the Miscellaneous Application filed seeking condonation of delay. As per Section 85 of the Finance Act, 1994, an appeal should be filed within a period of 2 months from the date of receipt of the decision or order passed by the adjudicating authority. Under the proviso appended to Sub-section (3A) of Section 85 of the Act, the Commissioner (Appeals) is empowered to condone the delay or to allow the filing of an appeal within a further period of one month thereafter if, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of two months. Considering the cause of delay as genuine, I condone the delay of 19 days and take up the appeal for decision on merits.

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as the summary of the case submitted during hearing. The issues to be decided in the present case are as to whether;

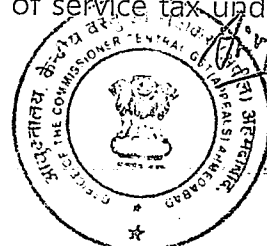


- a) the service tax demand of **Rs.3,96,779/-** under '*Site Formation and Clearance, Excavation and Earthmoving and demolition*' service confirmed alongwith interest and penalties by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise?
- b) the service tax demand of **Rs.39,09,442/-** under '*Works Contract*' service confirmed alongwith interest and penalties by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise?
7. The service tax demand of **Rs.3,96,779/-** was confirmed under '*Site Formation and Clearance, Excavation and Earthmoving and demolition*' in respect of the services rendered to following organizations.

Demand on Site Formation and Clearance, Excavation and Earthmoving and demolition				
Sr.No.	Name of the Service	Year	Receipts	Service Tax demand
1	EMRI 108 Earthwork	2009-10	28,58,286	2,94,403
2	Earth Filling for gardening at Chandola Inspection Bungalow	2011-12	9,93,945	1,02,376
			Total	3,96,779

7.1 In respect of the demand of **Rs.2,94,403/-** pertaining to the service rendered to EMIR (Emergency Management and Research Institute), Ahmedabad, the adjudicating authority held that the services rendered under Work Order No. EM/GJ/INFRA/28009/Earth Work dated 12.06.2009 were for carrying out the earth work of the proposed office premises of EMRI at Naroda Ahmedabad. It was held that the said service does not fall either under exclusion clause as provided under sub-clause (zzza) of clause or under the exemption granted by Notification No. 17/2005-ST, hence taxable.

7.1.1 The appellant on the other hand are disputing the classification of service under '*Site Formation and Clearance, Excavation and Earthmoving and Demolition*' and have claimed that the services rendered to EMRI should be classified under '*Works Contract Service*' defined under Section 65B (54) of the Finance Act, 1994. They claim that CBIC in concept note on Works Contract, has clarified that different activities such as site formation/ excavation /earth moving service, commercial or industrial construction services; erection, commissioning or installation services are covered under '*Works Contract*'. Further, they claim that in terms of Circular No. 123/5/2010-TRU, dated 24-5-2010, '*Commercial or industrial construction services*', cover construction of and the completion, finishing, repair, alteration, renovation, restoration or similar activities pertaining to buildings, civil structures, pipelines or conduits. Therefore, only such electrical works that are parts of (or which result in emergence of a fixture of) buildings, civil structures, pipelines or conduits, are covered under the definition of this taxable service. Further, such activities undertaken in respect of roads, railways, transport terminals, bridges, tunnels and dams are outside the scope of levy of service tax under



this taxable service. Thus, the services rendered to EMRI are classifiable under "Works Contract Service". They claimed that EMRI is a non-profit professional organization operating in the Public-Private Partnership (PPP) mode. The emergency help-lines managed by EMRI are 108 (Ambulance), 100 (Police), 181 (Women Helpline and Rescue Vans) etc which work for non-commercial purposes. Therefore, the building for which earthing work was provided by them should be considered to have been provided for a non-commercial institute and thus shall not be leviable to Service Tax. They placed reliance on the judgments passed in the case M/s. Avas Vikas Ltd. V/s CCE, Jaipur-I -2022 [12] TMI 138 – CESTAT New Delhi and Ratan Das Gupta & Co. V/s CCE Jaipur [2017 (3) TMI 1662 – CESTAT, Delhi.

7.1.2 Further, in respect of the demand of Rs. 1,02,376/- pertaining to Earth filling for gardening at Chadola Lake Inspection Bungalow, the appellant claim that the earth filling work under Work Order no. No. AB/TC/2666/0f 2011 dated 13.06.2011 of Executive Engineer, Ahmedabad Irrigation Division, Ahmedabad was carried out near the water body situated in Chandola. Water bodies constructed by the Government generally have an inspection office to oversee the Lake. In the instant case, certain irrigation work has been done near the inspection office of the Chandola Lake. Thus, the said activities are in relation to water source or water bodies and hence such amount would not be levied to Service Tax as per the exclusion clause of the definition.

7.2 To understand the issue in better perspective and for the sake of convenience, Section 65(105) (zzza) and Section 65(105) (zzzza) are reproduced below:-

"Section 65(105): (zzza) - Taxable Service means any service provided to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities".

"Section 65(97a) "Site formation and clearance, excavation and earth moving and demolition" includes -

- (i) *Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or*
- (ii) *Soil stabilization; or*
- (iii) *Horizontal drilling for the passage of cables or drain pipes; or*
- (iv) *Land reclamation work; or*
- (v) *Contaminated top soil stripping work; or*
- (vi) *Demolition and wrecking of building, structure or road,*

But does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies".

Section 65(105): (zzzza)- Taxable Service means any service provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.



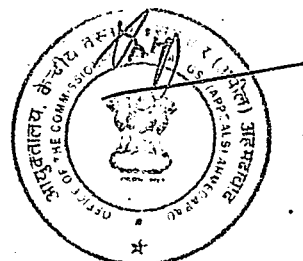
Explanation. — For the purposes of this sub-clause, "works contract" means a contract wherein, —

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out, —
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof; or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

7.3 On going through the Work Order No. EM/GJ/INFRA/28009/Earth Work dated 12.06.2009 it is observed that appellant has undertaken the activity of Earth Work at proposed office premises for EMRI at Naroda Káthwada Road. The term 'earthworks' refers to the removal or placement of soils and other excavated material during construction. The activity of earth work carried out by the appellant clearly falls under the definition of 'Site Formation and Clearance, Excavation and Earthmoving and demolition'; as it covers the activity of earth moving. Since the services rendered by the appellant does not fall under the exclusion clause of the definition of 'Site formation and clearance, excavation and earth moving and demolition' defined under Section 65(97a), hence, the same shall be treated as taxable service.

7.4 Further, their contention that the above activity is covered under the scope of 'Works Contract Service' is also not tenable. Under 'Works Contract Service' there should be transfer of property in goods involved in the execution of such contract and such goods shall be leviable to tax as sale of goods. In the instant case, no such sale of goods was involved hence the services rendered to EMRI shall remain outside the purview of Work Contract service.

7.5 It is observed that the appellant have placed reliance on Para-2(i) of Board's Circular No. 123/5/2010-TRU, dated 24-5-2010 which discusses the scope of 'Commercial or industrial construction services' hence, I find their reliance is misplaced. However, in the same circular, Board at Para-2(iii) & (iv) has clarified the scope of 'Works Contract Service' and 'Site formation and clearance, excavation, earthmoving and demolition services' as;



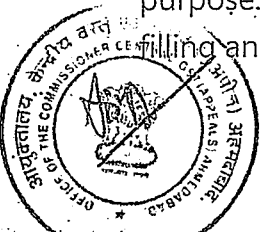
(iii) *'Works Contract'* incorporates the inclusions and exclusions of the aforementioned two taxable services (amongst others) and it is the nature of the contract (i.e. a contract wherein the transfer of property in goods involved is leviable to a tax as sale of goods) rather than the nature of activities undertaken, that distinguishes it from the previously stated taxable services. Thus, even in the case of 'works contract' if the nature of the activities is such that they are excluded from aforesaid two services then they would generally remain excluded from this taxable service as well.

(iv) *'site formation and clearance, excavation, earthmoving and demolition services'* are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road.

7.6 It is also observed that EMRI GREEN HEALTH SERVICES ((formerly known as GVK EMRI)) is definitely a non for profit professional organization operating in the Public-Private Partnership (PPP) mode. However, as no exemption has been granted for the services rendered to such organization under Section 65(105) (zzza). I, therefore, find that in terms of Section 65(97a) and as per Board's above circular, the earth work activity rendered by the appellant to EMRI clearly falls under the scope of definition of 'site formation and clearance, excavation, earthmoving and demolition services', hence shall be a taxable service under Section 65(97a).

7.7 Coming to the argument that the services of earth filling for gardening at Chandola Lake Inspection Bungalow, rendered under Work Order No. AB/TC/2666/Of 2011 dated 13.06.2011 of Executive Engineer, Ahmedabad Irrigation Division Ahmedabad was carried out for irrigation work near the inspection office of the Chandola Lake, which I find is also not tenable. The activity carried out was earth filling for gardening at Chandola Lake. Section 65(97a) "Site formation and clearance, excavation and earth moving and demolition" excludes services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies. I find that the activity of earth filling was done for gardening at Chandola Lake Inspection Bungalow from where the Chandola lake is monitored. Thus, I find that the earth filling at Inspection Bungalow was in respect of the irrigation work hence excluded from the definition of Site formation and clearance, excavation and earth moving and demolition.

7.8 Further, I find that case-laws relied by the appellant are distinguishable on facts. In the case M/s. Avs Vikas Ltd. V/s CCE, Jaipur-I -2022 (12] TMI 138 – CESTAT New Delhi, the assessee was a State Government Company doing civil construction work for government department and recovery was proposed under "construction service". In the case of Ratan Das Gupta & Co. V/s CCE Jaipur [2017 (3) TMI 1662 – CESTAT, Delhi, the assessee has constructed building for educational institutions recognized by AICTC and State Education Board and demand was proposed under "Commercial or Industrial Construction Service", hence it was held that the services were for non-commercial purpose. Whereas in the instant case the service carried out was in the nature of earth filling and earth moving hence the ratio of above decisions cannot be made applicable.



7.9 In view of the above discussions and findings, I uphold the demand of only Rs.2,94,403/- and drop the demand of Rs.1,02,376/- confirmed under Site Formation and Clearance, Excavation and Earth Moving and Demolition.

8. As regards the service tax demand of Rs.39,09,442/- under '*Works Contract*' service confirmed along with interest and penalties by the adjudicating authority, the appellant have provided following break-up.

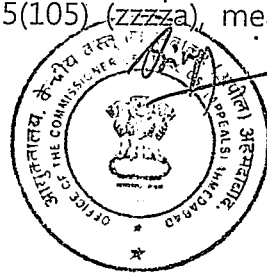
Sr. No.	Nature of Service	Value	Service tax
01	Construction of "D" type Residential Tower in Vastrapur Govt Colony	4,70,72,588/-	19,39,391/-
02	Construction for GETCO Rajapar	6,04,813/-	24,918/-
03	Construction of Police Residence for GSPHCL Chikali (Surat)	2,15,91,246/-	8,89,560/-
04	Construction of Police Station at GSPHCL Kapodara (Surat)	81,65,359/-	3,36,413/-
05	Construction of Police Station at GSPHCL Athwalines (Surat)	1,74,61,155/-	7,19,160/-
		Total	39,09,442/-

8.1 The appellant have stated that the service of construction of "D" Type Residential tower in Vastrapur Govt Colony, Ahmedabad was provided to M/s Backbone Enterprise Ltd during the period 2008-09 to 2011-12. They have claimed that the construction of quarters for the Government is excluded under clause of "PERSONAL USE", though the contract provided by the Government to M/s Backbone Enterprise Ltd was further sub-contracted to them. Hence, service tax cannot be levied on income earned from such construction activity. The adjudicating authority however has held that the Government of Gujarat have engaged M/s. BEL and GSPCL for construction of residential quarters which was further sub-contracted to the appellant. The appellant being a sub-contractor has not rendered the construction service directly to the Government of Gujarat but to BEL and GSPHCL. Hence, shall be covered under Clause (3) of the definition of Works Contract Service. He relied on Para-3 of Board's letter no. 332/16/2010-TRU dated 24.05.2010 in support of his argument. The relevant para is reproduced below;

"Therefore, as for the instant arrangement between Ministry of Urban Development and NBCC is concerned, the Service Tax is not leviable. It may, however, be pointed out that if the NBCC, being a party to a direct contract with GOI, engages a sub-contractor for carrying out the whole or part of the construction, then the sub-contractor would be liable to pay Service Tax as in that case, NBCC would be the service receiver and the construction would not be for their personal use."

8.2 I find that the contract for construction of "D" Type Residential tower in Vastrapur Government Colony, Ahmedabad was provided to M/s Backbone Enterprise Ltd ('BEL' in short) vide Contract No.B-02/06/2008 dated 28.08.2008. This contract was further sub-contracted by M/s. BEL to the appellant on 30.08.2008 which includes supply of goods. Thus, the contract was in the nature of Works Contract and for construction of residential tower in Vastrapur Government Colony.

8.3 "*Works contract*", for the purposes of section 65(105) (zzzza) means a contract wherein,-



- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out,—
- (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof; or**
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

8.4 The terms "residential complex" is further defined in Section 65 (91a)

"residential complex" means any complex comprising of—

- (i) *a building or buildings, having more than twelve residential units;*
- (ii) *a common area; and*
- (iii) *any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,*

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. — *For the removal of doubts, it is hereby declared that for the purposes of this clause, —*

- (a) *"personal use" includes permitting the complex for use as residence by another person on rent or without consideration;*
- (b) *"residential unit" means a single house or a single apartment intended for use as a place of residence;]*

8.5 The appellant have claimed that the construction of new residential complex for Government staff falls under the exclusion clause of "Personal Use" hence exempted. I find that the above definition, excludes the construction of complex constructed by a person directly engaging any other person for construction of complex intended for personal use as residence. The term 'personal use' includes use of complex for use as residence by another on rent or without consideration. The appellant in the instant case has rendered the construction of a new residential complex covered under 'Works Contract Service'. The complex was meant for 'personal use' as constructed for the residential quarters, hence I find that the same shall be exempted.



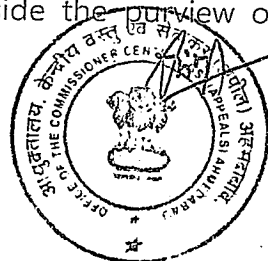
8.6 The appellant have strongly relied on the decisions passed in the case of M/s. Sima Engineering Constructions, M/s. Marimuthu Gounder & Sons, M/s. Khurana Engineering Ltd, etc. I find that in these case laws are squarely applicable to the instant case as the asseesee were providing the construction services of residential complex and the services were directly rendered to Governmental Authorites. In the instant case, the construction service was rendered by the appellant under 'Works Contract service' to M/s. BEL Ltd but ultimately the service was rendered to a governmental body and for the personal use of the staff hence shall be exempted.

8.7 In light of above discussion, I find that the service tax demand of **Rs.19,39,391** in respect of Construction of "D" type Residential Tower in Vastrapur Govt Colony is not sustainable on merits.

9. Similarly, the appellant have claimed that the construction of residential staff quarters for M/s. Gujarat State Police Housing Corporation Ltd. (GSPHCL) at Chikali, Surat was intended for personal use as residence by police personals hence excluded as per explanation (a) of the definition 'personal use'. I have gone through the letter no Gupoha/Tech/Tender/MD/3570 dated 25.09.2008 issued by GSPHCL, Gandhinagar, wherein the contract to construct residential staff quarters was granted to the appellant. The service is rendered is Works Contract Service and is rendered to GSPHCL, which is a Government Company with 100% share holding subscribed by the State Government and which undertakes construction of residential, non-residential and all other types of buildings required for Gujarat Police, Jails, Home Guards and for other in the State of Gujarat. I find that in terms of the exclusion as per explanation (a) of the definition 'personal use' the service tax demand of **Rs. 8,89,560/-** on the above shall not be sustainable on merits.

10. In respect of the construction service rendered under Work Order no. GETCO/CE(PROJ)/SE(C)/LOI/NDD/220KV/Rajpar/9577 dated 21.12.06 in relation to construction of compound wall of power sub-station for Gujarat Energy Transmission Corporation Limited (GETCO). GETCO, the appellant claim were for non-commercial activity hence no Service Tax shall be levied. The adjudicating authority at Para-23.4 has held that M/s. GETCO though a Gujarat Government undertaking is a commercial concern and therefore the services provided to them are taxable.

10.1 I have gone through the aforesaid contract. I find that the appellant were entrusted the work of construction of C.R. Building foundation, Compound Wall, WBM Road, Water supply & Drainage system and other Ancillary Civil Work at 220 KV Rajpat S/S under Nadiad Tr. Circle. It is observed that GETCO is an electrical power transmission company and is a subsidiary of Gujarat Urja Vikas Nigam (GUVN), wholly owned by the Government of Gujarat. GUVN is a Government of Gujarat Company having 100% shares in six other Companies (GSECL, UGVCL, DGVCL, MGVCL, PGVCL & GETCO) which have become their subsidiary Company. GUVNL is engaged in the business of purchase and sale of electricity, whereas GETCO is engaged in transmission of electricity. Thus, since GETCO is wholly State Owned Company, the services provided by the appellant can therefore be held as provided to Government and not for commerce or industry. I therefore, find that the service rendered shall remain outside the purview of Works



Contract as the same is not covered clause (b) of Section 65 (105)(zzzza) hence, the tax demand of **Rs. 24,918/-** is not sustainable on merits.

11. In respect of the service provided to M/s. GSPHCL at Kapodara and Athwalines for construction of Police Station. The appellant claim the same should also be considered as non-commercial as the services were provided to GSPHCL. They claim that the above service is covered under sub-clause (b) of the Section 65 (105)(zzzza) "construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry;" as the construction was for police personals hence exempted. The adjudicating authority has not given any findings on the same.

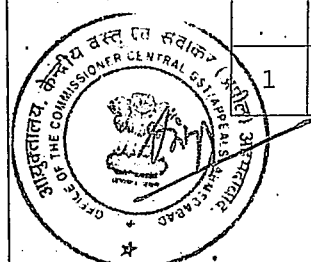
11.1 I have gone through the letter no. Gupoha/Tech/Tender/ MD/3568 dated 25.09.2008 & letter no. Gupoha/Tech/Tender/MD/3548 dated 03.10.2008 issued by GSPHCL, Gandhinagar, issued by GSPHCL, Gandhinagar. I find that the appellant was entrusted the work related to construction of Police Station at Kapodara and Athwalines under Police Modernization project. It is observed that the role and functions of the police in general is to uphold and enforce the law impartially, to protect life, liberty, property, human rights, and dignity of the members of the public; to protect internal security, to prevent and control terrorist activities, breaches of communal harmony, militant activities and other situations affecting Internal Security; to protect public properties, to prevent crimes etc. They are held by State Home Department. So, I find that construction of Police Station cannot be considered as used for commercial or industrial purposes. I, therefore, find that the service rendered by the appellant for construction of Police Station is outside the scope of the "Work Contract" defined under Section 65 (105) (zzzza) hence, the service tax demand of **Rs.3,36,413/- and Rs. 7,19,160/-** shall not sustain on the merits.

12. However, the appellant have claimed the cum-tax benefit as per Section 67(2) of the Finance Act. It is observed that Hon'ble Tribunal in the case of **Commissioner v. Advantage Media Consultant [2008 (10) S.T.R. 449 (Tri.-Kol.)]** has held that Service tax being an indirect tax, was borne by consumer of goods/services and the same was collected by assessee and remitted to government and total receipts for rendering services should be treated as inclusive of Service tax due to be paid by ultimate customer unless Service tax was paid separately by customer. This decision has been maintained by the Apex Court as reported in **2009 (14) S.T.R. J49 (S.C.)**. There are endless quasi judicial and judicial decisions on this issue and hence, I find that this benefit is required to be extended to the appellant and accordingly the tax liability shall be as per the table below:

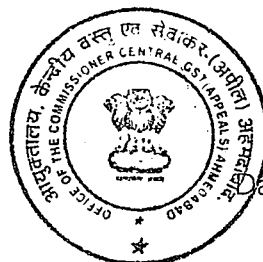
Tax after granting Cum Tax Benefit

Table-A

Demand on Site Formation and Clearance, Excavation and Earthmoving and demolition							
Sr.	Name of the Service	Year	Gross Value	Service tax rate	Taxable Value (Gross Value*100/110. 3%)	S.Tax Payable	
1	EMRI Earthwork	108	2009-10	28,58,286	10	2591374	266912



13. In light of the above discussion, I find that only the demand of **Rs.2,66,912/-** is sustainable on merits. When the demand sustains there is no escape from interest, the same is therefore recoverable with applicable rate of interest. I however, find that remaining demand is not sustainable on merits as discussed in paras above.
14. Further, I find that the penalty imposed on the appellant under Section 78 of the Finance Act, 1994, is also justifiable as it provides for penalty for suppressing the value of taxable services. The crucial words in Section 78(1) of the Finance Act, 1994, are 'by reason of fraud or collusion' or 'willful misstatement' or 'suppression of facts' should be read in conjunction with 'the intent to evade payment of service tax'. 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. The demand in this case was raised based on the audit carried out by the Service Tax Commissionerate. Though it was the responsibility of the appellant to correctly assess and discharge their tax liability, they suppressed the taxable value in ST-3 Returns and resultant non-payment and short payment of tax, undoubtedly bring out the willful mis-statement and fraud with an intent to evade payment of service tax. Thus, imposition of penalty would follow in view of the decisions rendered in the case of *Rajasthan Spinning and Weaving Mills* [2009 (238) E.L.T. 3 (S.C.)] and *Dharamendra Textile Proceesors* [2008 (231) E.L.T. 3 (S.C.)], if any of the ingredients of proviso to Section 73(1) of the Finance Act, 1994 are established then the person liable to pay duty would also be liable to pay a penalty equal to the tax so determined at **para-13** above.
15. As regards the penalty under Section 77 (1) the SCN alleges that the appellant has failed to obtain registration though they were providing taxable services as required under Section 69 of the Finance Act. Penalty under Section 77(2) is proposed on the grounds that the appellant has failed to self-assess the service tax liability. The appellant however have claimed that such penalty can be imposed in case of default or contravention of section under reasonable cause. I find that no reasonable cause is brought out, however considering the reduction in tax liability, I, reduce the penalty of Rs.10,000/- each imposed under Section 77 (1) and Section 77(2) of the Finance Act, 1994 to Rs.5000/- each.
16. In light of above discussion, I uphold the demand and recovery of **Rs.2,66,912/-** alongwith penalties after granting cum tax benefit and drop the demand of **Rs.40,11,818/-**.
17. 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.



31-7-23
(शिव प्रताप सिंह)
आयुक्त (अपील्स)

Date: 31.7.2023

Attested

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

By RPAD/SPEED POST

To,
M/s. Shree Infracon Pvt. Ltd.,
602, Parshwanath E Square,
Corporate Road, Near AUDA Garden,
Prahlanagar,
Ahmedabad- 380015

Appellant

The Joint Commissioner
CGST, Ahmedabad South

Respondent

Copy to:

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



