NATION TAX MARKET

O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

[illegible] 2nd Floor, GST Bhavan
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Appeal File No	O.I.O. No.	Date
[illegible]	[illegible]	[illegible]

[illegible] (Order-In-Appeal No.):

BHV-EXCUS-000-APP-40-2019

Date of Order:	14.02.2019	Date of issue:	18.02.2019

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

[illegible]
[illegible] Rajkot/Jamnagar/Gandhidham

Name & Address of the Appellants & Respondent:

M/s Bileshwar Khand Udyog Khedut Sahakari Mandli, Veraval Road, Kodinar, Junagadh-362725.

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[illegible]

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:: ORDER-IN-APPEAL ::

M/s Shree Bileshwar Khand Udyog Khedut Sahkari Mandli Ltd., Kodinar (hereinafter referred to as "Appellant") has filed Appeal No. V2/524/BVR/2017 against Order in Original No. 5/AC/CGST/BVR-III/DM/2017-18 dated 14.12.2017 (hereinafter referred to as 'impugned order') passed by the Asst. Commissioner, Central Goods & Service Tax, Bhavnagar-II, Bhavnagar Commissionerate (hereinafter referred to as 'lower adjudicating authority').

2. The brief facts of the case are that the Appellant was holding Service Tax Registration No. AAAAB0936EST002 under the categories of 'Transport of Goods by Road Service' and 'Legal Service'. The audit of the records of the Appellant revealed that the Appellant had earned income of Rs. 15,84,095/- on account of renting of Godowns, Shopping Centre and transfer fees during the period 2014-15 to 2015-16 but had not paid Service Tax of Rs. 75,084/-. The Audit further observed that the Appellant had not paid Service Tax of Rs. 2,04,278/- on 'Legal Service' during the period from January, 2013 to March, 2016, on receipt of service.

2.1 Show Cause Notice No. Audit II/Circle-V/51/AC-4/2017-18 dated 29.6.2017 was issued to the Appellant calling them to show cause as to why Service Tax of Rs. 2,80,762/- should not be recovered from them under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'Act') along with interest under Section 75 and also proposing imposition of penalty under Sections 76, 77 and 78 of the Act.

2.2 The Show Cause Notice was adjudicated vide the impugned order which confirmed demand of Service Tax of Rs. 75,084/- under 'Renting of Immovable Property Service' and Rs. 2,04,278/- under 'Legal Service' under Section 73(1) and ordered for its recovery along with interest under Section 75 of the Act and imposed penalty of Rs. 2,80,762/- under Section 78 of the Act and Rs. 10,000/- under Section 77 of the Act.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal, inter-alia, on the following grounds:

(i) The adjudicating authority has erred in holding that the Appellant was liable to pay service tax on the rental income earned on account of renting of Godowns to Gujarat State Warehousing Corporation Ltd which were used for storage and warehousing of ground nuts purchased by them; that as per the rent agreement, Godowns used for storage and warehousing of ground nut by the Gujarat State Warehousing Corporation Ltd. and submitted copy of rent

agreement. The adjudicating [illegible] the provision [illegible] activity of warehousing of agriculture produce [illegible] specifically exempted from payment of service tax [illegible] and hence they are not liable to service tax on renting godown [illegible] housing of agriculture produce and relied upon case law of [illegible] reported as 2017 (4) GSTL 345.

(ii) Their total taxable income [illegible] was Rs. [illegible] and in 2013-14 was Rs. 1,41,800/- and out of [illegible] of Rs. 13,91,299/- in 2014-15, Rs. 12,49,445/- was earned [illegible] renting of godowns used for warehousing of agriculture produce and remaining rent income of Rs. 1,42,305/- earned from renting of shopping Centre [illegible] threshold exemption limit of Rs. 10 lac and hence not liable to service tax. The rent income of Rs. 1,97,800/- earned during 2015 [illegible] exemption limit of Rs. 10 lac and hence they are not liable to service tax and demand for Rs. 75,831/- under "Renting of Immovable Property Service" is liable to be dropped.

(iii) The demand of Rs. [illegible] for [illegible] service by invoking extended period of limitation is illegal as entire situation is revenue neutral. If the Appellant has to pay service tax [illegible] charge basis, they are eligible to avail Cenvat credit and hence [illegible] is revenue neutral as held in the case of Jay Yushin Ltd. [illegible]. The Hon'ble Supreme Court in the case of Narmada Chematur Pharmaceuticals Ltd has held that Department cannot allege suppression of facts or [illegible] intention for invoking larger period of limitation when the transaction is otherwise revenue neutral.

(iv) The transactions [illegible] were recorded in their books of accounts and balance sheet [illegible] various Government agencies. Since balance sheet is a public document, the Appellant cannot be accused of suppressing facts as held in [illegible] - 2008 (231) ELT 341 and Kirloskar Oil Engines Ltd. [illegible] (178) E.L.T. 998. Thus, invocation of extended period of limitation is illegal.

(v) The adjudicating authority has erred in imposing penalty under Section 78 of the Act. The Appellant had not discharged service tax liability because during relevant time there was bona fide impression that they were not liable to service tax. Thus, there were genuine and bona fide reasons for failure and hence no penalty could have been imposed on them.

4. Personal Hearings were fixed in the case on [illegible].11.2018, [illegible].2018 & 26.12.2018 and duly communicated vide PH notices dated [illegible].10.2018, dated [illegible].11.2018 & dated [illegible].12.2018. However, no one appeared on behalf of the

Appellant on any of the given dates or any date thereafter. I take up the appeal for decision on the basis of available records and their Appeal Memorandum as they have been given sufficient opportunities to represent their case.

4.1 The Department vide letter F.No. V2-6/CGST/DIV/2014-15 dated 22.6.2018 reiterated the findings of the impugned order.

<u>Findings</u>:-

5. I have carefully gone through the facts of the case, the impugned order, the Appeal Memorandum of the Appellant and written submissions made by the Department. The issue to be decided in the present case is whether the Appellant is liable to pay Service Tax under the category of 'Renting of Immovable Property Service' on the rent income earned by them and also under the category of 'Legal Service' as recipient of service or not.

6. I find that the lower adjudicating authority has confirmed service tax demand of Rs. 75,884/- on the rent income earned by the Appellant during the period from 2014-15 and 2015-16. The Appellant has contested that out of total rent income of Rs. 13,91,800/- earned in the year 2014-15, Rs. 12,49,495/- was earned by renting of Godowns to Gujarat State Warehousing Corporation Ltd. for storage and warehousing of ground nuts; that activity of warehousing of agriculture produce has been specifically exempted from payment of service tax in terms of Section 66D(d)(v) of the Act w.e.f. 1.7.2012 and hence they are not liable to service tax.

6.1 I find it pertinent to examine the provisions of Section 66D relating to agriculture produce, which are reproduced as under:

> "SECTION 66D. Negative list of services. — The negative list shall comprise of the following services, namely :—
>
> ..
>
> (d) services relating to agriculture or agricultural produce by way of —
>
> (i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;
>
> (ii) supply of farm labour;
>
> (iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;
>
> (iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;

(v) loading, unloading, packing, storage or warehousing of agricultural produce;

(vi) agricultural extension services;

(vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce

6.2 I find that the Appellant had given godown on rent to Gujarat State Warehousing Corporation Ltd for storage of Ground nuts as per the agreement entered between the Appellant and Gujarat State Warehousing Corporation Ltd submitted by the Appellant. I find that services relating to agricultural produce by way of storage or warehousing are covered in the negative list in terms of sub clause (v) of Section 66D(d). I find that the Godown was given on rent by the Appellant for storage of Ground nuts i.e. agriculture produce and hence, not liable to service tax. I rely on the order passed by the Hon'ble CESTAT, New Delhi in the case of Krishi Upaj Mandi Samiti reported as 2017 (4) GSTL 346(Tri-Del.), wherein it has been held that,

> "10. However, we note that with the introduction of Negative List Regime of Taxation w.e.f. 1-7-2012, the appellants' services were excluded from the tax liability. The provisions of Section 66D are as below :
>
> 66D. The negative list shall comprise of the following services, namely :-
>
> ..
>
> (d) services relating to agriculture or agricultural produce by way of -
>
> (i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;
>
> (ii) supply of farm labour;
>
> (iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;
>
> (iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;
>
> (v) loading, unloading, packing, storage or warehousing of agricultural produce;
>
> (vi) agricultural extension services;
>
> (vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce;
>
> 11. It is clear that the appellants being an Agricultural Produce Marketing Committee is excluded from the tax liability in terms of the above provisions

Services relating to agricultural produce by way of storage or warehousing are in the negative list. The scope of negative list was also examined by the Board in the Education Guide dated 20-6-2012. Para 4.13.5 of the said Guide states as below :

4.13.5 Would leasing of vacant land with green house or a storage shed meant for agricultural produce be covered in the negative list?

Yes. In terms of the specified services relating to agriculture 'leasing' of vacant services land with or without structure incidental to its use' is covered in the negative list. Therefore, if vacant land has a structure like storage shed or a green house built on it, which is incidental to its use for agriculture then its lease would be covered under negative list entry.

Further, on APMCs, the guide clarifies as below:-

4.13.6 What are the services referred to in the negative list entry pertaining to Agricultural Produce Marketing Committee or Board?

Agricultural Produce Marketing Committees or Boards are set up under a State Law for purpose of regulating the marketing of agricultural produce. Such marketing committees or boards have been set up in most of the States and provide a variety of support services for facilitating the marketing of agricultural produce by provision of facilities and amenities like, sheds, water, light, electricity, grading facilities, etc. They also take measures for prevention of sale or purchase of agricultural produce below the minimum support price. APMCs collect market fees, licence fees, rents etc. Services provided by such Agricultural Produce Marketing Committee or Board are covered in the negative list. However any service provided by such bodies which is not directly related to agriculture or agricultural produce will be liable to tax e.g. renting of shops or other property.

12. Accordingly, we hold that the appellants are not liable to Service Tax on renting of immovable property used for storage of agricultural produce in the market area. In this connection, we refer to Paras 161 and 162 of the Budget Speech of the Hon'ble Finance Minister while introducing Budget 2012-2013. The same is extracted as below:

161. The proposed inclusions in the negative list comprise all services provided by the Government or local authorities, except a few specified services where they compete with private sector. The List also includes pre-school and school education, recognized education at higher levels and approved vocational education, renting of residential dwellings, entertainment and amusement services and a large part of public transportation including metro, monorail, railways and metered cabs.

162. Agriculture and animal husbandry enjoy a very important place in our lives. Practically all services required for cultivation, breeding, production, processing or marketing up to the stage the produce is sold in the primary markets are covered by the list.

13. It is mentioned that practically all services required for cultivation, breeding, production, processing or marketing, up to the stage the produce is sold in the primary markets are covered by the list. In the present case, we note that we are dealing with the shops and land given out on rent/lease which are in the primary market areas, where agricultural produce are brought for sale. The allotment stipulates that the shops/godowns shall be used for business of notified commodities and licence is issued by the Market Committee. As such, the premises in the primary market areas are let out with reference to agricultural produce, their storage/warehousing, etc. During the course of arguments, the ld.

[illegible] in establishments like banks, [illegible] they are discharging Service Tax on the same.

14. We have examined the above activity in the negative list along with various clarifications issued [illegible] all [illegible] not eligible to Service Tax [illegible] traders for temporary storage [illegible] in the market. In respect of shops, premises, buildings etc. rented/leased out for any other commercial purpose other than with relation to agricultural produce (like bank, general store etc.) [illegible] the appellants are liable to Service Tax.

15. In view of the above position, we find that the appellants are not liable to Service Tax for the period after 1-7-2012."

(emphasis supplied)

6.3 In view of above, I hold that the Appellant is not liable to pay Service Tax on the rent income of Rs. 12,47,453/- earned for renting of Godown during the year 2014-15. Remaining income of Rs. 1,42,505/- earned from renting of shopping Centre and transfer fees during the year 2014-15 is not covered within negative list and consequently liable to service tax. However, I find that said taxable income of Rs. 1,42,505/- is within threshold exemption limit of Rs. 10 lac as their total taxable income in previous year i.e. 2013-14 was Rs. 1,41,800/- and hence, the Appellant is eligible for SSI exemption of Rs. 10 lac in the year 2014-15 in terms of Notification No. 33/2012-ST dated 20.6.2012 and consequently taxable income of Rs. 1,42,505/- for the year 2014-15 is also not liable to service tax. I also find that the Appellant has earned income of Rs. 1,92,600/- during the year 2015-16 which is also within exemption limit of Rs. 10 lac and consequently not liable to service tax. I, therefore, set aside entire demand of Rs. 75,884/- confirmed under 'Renting of Immovable Property Service' and also consequent penalties imposed on the Appellant in this regard.

7. I find that the lower adjudicating authority has confirmed service tax demand of Rs. 2,04,276/- under the category of 'Legal Service' availed by the Appellant as recipient of service on reverse charge mechanism. I find that recipient of legal service is made liable to pay service tax in terms of Rule 2(1)(d)(D) of the Service Tax Rules, 1994, which reads as under:

"(D) in relation to service provided or agreed to be provided by, —

(I) an arbitral tribunal, or

(II) a firm of advocates or an individual advocate other than a senior advocate by way of legal services,

to any business entity located in the taxable territory, the recipient of such service;"

7.1 I find that the Appellant has not disputed about 'Legal Service' availed by them or their liability under reverse charge basis but contested on the grounds that if the Appellant had paid service tax on reverse charge basis, they would have been eligible to avail Cenvat credit and hence, entire exercise is revenue neutral. I find that this argument very strange and purely hypothetical in nature inasmuch as grant of Cenvat credit arises only if Service Tax is paid ! When the liability to pay service tax has been fastened on the recipient of service in terms of Rule 2(d)(D) of the Service Tax Rules, 1994 on specified services, the Appellant cannot escape from liability to pay service tax on reverse charge mechanism only on the ground that entire exercise is revenue neutral. If such a plea is accepted then the provisions contained in Rule 2(d)(D) would become redundant and otiose and no one would pay Service Tax. When provisions and procedures are prescribed by Act/Rules, then the same should be performed in that manner only and not otherwise. I rely on the Order passed by the Hon'ble CESTAT, New Delhi in the case of Axis Electronics Pvt. Ltd. reported as 2000 (117) E.L.T. 571 (Tri-LB), wherein it has been held that:

> "8. In the light of the above findings arrived at by us on the question referred to us, we hold that insistence on production of duplicate copy evidencing payment of duty on the inputs as prescribed by Rules is not a technicality to be complied with for availing Modvat credit. Consequently the view taken by the appellate authority that insistence on duplicate copy of invoice is purely a procedural requirement is against Rules so cannot be sustained. When a particular thing is directed to be performed in a manner prescribed by Rules, it should be performed in that manner itself and not otherwise. A combined reading of the provisions contained in the Rules makes it clear that a manufacturer who wants to take credit of the duty paid on inputs must base his claim on the duplicate copy of the invoice......"

(Emphasis supplied)

7.2 In view of above, I hold that the Appellant can not escape from liability to pay service tax on legal services availed by them, as recipient of service, in terms of Rule 2(d)(D) of the Service Tax Rules, 1994. I, therefore, uphold service tax demand of Rs. 2,04,276/-.

8. The Appellant has contested invocation of extended period of limitation on the ground that the transactions were recorded in their books of accounts and balance sheet, which were filed with various Government agencies and hence, there was no suppression of facts on their part. I find that information reflected in books of accounts and balance sheet have never been submitted by the Appellant along with their letter/Return to the jurisdictional Service Tax

authorities and the Board [illegible] books of accounts and balance sheet of any assessee unless the same has been brought to the notice of the proper officer of Department. [illegible] that non-payment of service tax on legal service was revealed during audit of the records of the Appellant. Had there been no audit of Appellant's records, the non-payment of service tax by the Appellant would have gone unnoticed and hence, ingredients for invoking extended period under Section 73(1) of the Act exists in the present case. Hence, I hold that the demand is not time barred. I rely on the order passed by the Hon'ble CESTAT, Chennai in the case of Sigma Soft Solutions (P) Ltd. reported as 2018 (18) G.S.T.L. 446 (Tri. - Chennai), wherein it has been held that,

> "6.5 Ld. Advocate has taken all pains to point out that there was no mala fide intention on the part of the appellant as it is contended that they were under the impression that the amounts received would come within the scope of [illegible] services hence not taxable. For this reason, Ld. Advocate has contended that extended period of time would not be invocable. However, we find that the adjudicating authority has adverted in this aspect in para [illegible] of the impugned order wherein it has been brought to the fold that appellant had not at all disclosed the receipt of income in respect of the activities done by them in respect of services provided by them in their ST-3 returns.
>
> 6.6 The facts came to light only when the department conducted scrutiny of the annual reports, profit and loss account, balance sheet etc. In such circumstances, the department is justified in invoking the extended period of limitation of five years."

(Emphasis supplied)

9.1 The Appellant has contended that they had not discharged service tax liability as at the relevant time there was bona fide impression that they were not liable to service tax; that there were genuine and bona fide reasons for failure and hence no penalty is imposable on them under Section 78. I find that one can have bona fide belief due to decisions of Hon'ble High Court/CESTAT holding that service tax was not payable or any instructions / Circular issued by CBIC on the subject matter. However, the appellant has not given any reason / justification as to why they were holding such belief. I am of the considered view that failure on the part of the appellant of not paying service tax on legal service as recipient of service was not caused by any bona fide belief as the Appellant is trying it to make now but this is a clear case of evasion of service tax. Since suppression of facts has been held to be applicable in this case, penalty under Section 78 of the Act is mandatory. The Hon'ble Apex Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.) has held that once there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold the penalty imposed on the Appellant under Section

78 of the Act. However, imposition of penalty equal to Service Tax is not correct, legal and proper and in view of proviso to Section 78 of the Act, penalty @50% of Service Tax evaded is only imposable as the transactions have been reflected in the books of account of the Appellant. Therefore, I reduce penalty to Rs. 1,02,139/- under Section 78 of the Act.

8.2 The impugned order has imposed penalty of Rs. 10,000/- under Section 77 of the Act for not filing correct ST-3 returns. I find that the Appellant had not discharged Service Tax on "Legal Service" being recipient of service. I, therefore, uphold penalty of Rs. 10,000/- under Section 77 of the Act.

9. In view of above, I uphold confirmation of demand of Rs. 2,04,278/- under "Legal Service" but set aside demand of Rs. 75,881/- confirmed under "Renting of Immovable Property Service" and reduce penalty to Rs. 1,02,139/- under Section 78 of the Act and uphold penalty of Rs. 10,000/- under Section 77 of the Act.

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

9.1 The appeal filed by the Appellant is disposed off as above.

सत्यापित,
[illegible]

अधीक्षक
[illegible]

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By R.P.A.D.

To,
M/s Shree Bileshwar Khand Udyog Khedut Sahkari Mandli Ltd,
Kodinar,
Gir Somnath District.

प्रति,
श्री बिलेश्वर खांड उद्योग खेडुत सहकारी मंडली लि.,
कोडिनार,
गीर सोमनाथ जिला

प्रतिलिपि :

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, [illegible] को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु एवं सेवा कर [illegible] को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल