::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/ 122/RAJ/2019	12/D/AC/2019-20	16/07/2019

ख अपील आदेश संख्या(Order-In-Appeal No.):

RAJ-EXCUS-000-APP-051-2020

आदेश का दिनांक / Date of Order: **22.04.2020** जारी करने की तारीख / Date of issue: **22.04.2020**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Gopi Nath**, Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants** & Respondent :-

M/s D B Padhiyar, B/314, Siddhraj Zori, Near Sargasan Cross Road, Jamnagar-361140.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती है।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/

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.5000/-, Rs.10,000/- where amount of dutydemand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग,ब्याज की माँग और लगाया गया जुमाना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

सत्यमेव जयते

(i) वित्त अधिनियम,1994की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,
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
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार कोपुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई,वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs 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

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
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.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए है।/
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 such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी 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.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय नयायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding 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 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

आयुक्त अपील केन्द्रीय उत्पाद शुल्क, राजकोट
सत्यमेव जयते

:: ORDER-IN-APPEAL ::

M/s. D.B.Padhiyar, Village – Khareda, P.O. Kotda Sangani, having his office at B/314, Siddhraj Zori, Near Sargasan Cross Road, Sargasan, Gandhinagar – 382 421 (hereinafter referred to as 'appellant') filed present appeal against Order-in-Original No. 12/D/AC/2019-20 dtd. 16.07.2019 (hereinafter referred to as "impugned order") passed by the Assistant Commissioner, Central Excise & CGST, Division – I, Rajkot (hereinafter referred to as "the adjudicating authority"): -

2/- The facts of the case are that the appellant is engaged in providing taxable services under the category "Construction Services in respect of Commercial or Industrial Building and Civil Structures" and "Erection, Commissioning and Installation" under Section 69 of Chapter V of the Finance Act, 1994 (hereinafter referred to as the 'Act') and holding service tax registration for the same.

2.2 During the course of audit conducted by the Department, it was noticed that the appellant has made short payment of Service Tax, to the tune of ` 4,91,497/- for the period October-04 to March-07. The above observations culminated into issuance of show cause notice No. VI(a)/8-190/IA/ST/09-10 dated 22.03.2010 and same was adjudicated by the authority vide his order dated 18.04.2011 wherein he confirmed the service tax of 4,91,497/- under Section 73(1) of the Act along with interest under Section 75 of the Act. The lower authority also imposed penalties of 4,91,497/- under Section 76, penalty of ` 5,000/- under Section 77 and penalty of 4,91,497/- under Section 78 of the Act. The aggrieved appellant preferred appeal and appellate authority vide OIA dated 11.10.2011 upheld the demand but extended cum-duty benefit and directed the adjudicating authority to re-calculate service tax amount, the matter reached before CESTAT, WZB, Ahmedabad who vide Order No. A/10653/2018 dated 09.04.2018 remanded the case for a denovo adjudication by the original adjudicating authority. Adjudicating authority has confirmed demand of Rs. 4,91,497/- along with interest under Section 75 and penalty of Rs. 4,91,497/- under Section 76, penalty of Rs. 5,000/- under Section 77 and penalty of Rs. 4,91,497/- under Section 78 of the Finance Act, 1994 vide impugned order.

3. Aggrieved, the Appellant has preferred the present appeal, inter alia, on the grounds that,

(i) The adjudicating authority erred in pass the order and has passed illegal, improper and invalid order, in as much as same has been passed without proper

appreciation of facts and without following the principle of natural justice. Therefore, same deserves to be set aside that the allegation made by the department are baseless and devoid of merits on the grounds narrated by the appellants. The order does not give any finding or dealt with the submission of the appellant that services provided by the appellant was one of work contract and since works contract came in to effect from 01.06.2007, entire demand of service tax under the category of construction service and erection and commissioning service is not sustainable and is liable to be set aside on this ground; that the demand of Service Tax is based on the income reflected in Balance Sheet pertaining to indivisible works contract executed during the period prior to 01.06.2007 and thus service tax on the said income is not leviable. For the same appellant relied upon judgement in the case of Commissioner V/s. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC).

(ii) The adjudicating authority erred and held that appellant have not submitted any cogent evidences to substantiate their argument for their claim that they have provided services to main contractor and not directly to any parties. For the same, adjudicating authority has not consider affidavit executed by the appellant that they have provided services as sub-contractor only & it is the duty of department to verify that whether main contractors have discharged the service tax or not. The appellant relied upon following case laws in support of their arguments:

(a) Foto Flash V/s. Commissioner – 2008 (9) STR 462 (Tri.Bang)
(b) Evergreen Suppliers V/s. Commissioner – 2008 (9) STR 467 (Tri.Bang)

(iii) Adjudicating authority erred in relied upon CBEC Circular NO. 138/07/2011-ST dated 06.05.2011 along with judgement in the case of M/s. Vijay Sharma & Co. reported in 2010-TIOL-1215-CESTAT-DEL-LB for coming on conclusion that there is no provision in the Finance Act, 1994 to grant immunity to the sub-contractor from levy of service tax undisputedly taxable services were provided by them. No evidence was before it to notice whether service provided by the sub-contractor to the contractor was ever been taxed. For the same, appellant submitted that the work executed by them during the period October – 2004 to March – 2007 and above circular was come into the existence w.e.f. 01.05.2011 and works contract service became taxable w.e.f. 01.06.2007; hence their services was not covered under tax net at the time of service provided by the appellant, that they have undertaken the works on contract basis and therefore, they were not required to discharge the service tax liabilities being sub-contractor, once main contractor has paid the service tax on such services.

The appellant further relied upon following case laws:

(a) 2016 (43) STR 232 (Tri.Hyd), Vishesh Engineering Co. V/s. Commissioner of CEX, Guntur
(b) 2016 (43) STR 174 (Ker), Furnace Fabrica (India) Ltd. V/s. JC, CEX.
(c) 2019 (8) TMI 1027 – Cestat, New Delhi, M/s. Mammen Engineering Works V/s Commissioner, CEX, Raipur
(d) 2014(4) TMI 63 CESTAT Ahmedabad, M/s. Tarachandra Engg. Pvt. Ltd. V/s. CCE, Vadodara-I.
(e) 2015 (8)TMI 162 – CESTAT Ahmedabad, M/s. Mahalaxmi Infracontract Limited V/s. CCE.

4. In hearing, Shri Dipak Lalwani, Chartered Accountant appeared on behalf of the Appellant and reiterated the submissions of appeal memo and submitted copy of judgement of Hon'ble Supreme Court 2015(39) STR 913(SC) in the case of Commissioner of CEX, Kerala V/s. M/s. Larsen & Toubro Ltd. for consideration, wherein grounds of appeal memo are reiterated.

5. I have carefully gone through the impugned order, appeal of the appellant, submission in writing. I find that the issue to be decided in the present proceedings is whether the service tax alongwith interest and penalties imposed on the appellant on "Commercial or Industrial Construction Services" and "Erection, Commissioning and Installation" is just, fair and correct or otherwise.

6. It is an undisputed fact that the appellant had provided the services which were liable to service tax under the category of 'commercial or industrial construction services' in terms of provisions contained in Section 65(105) (zzq) of the Act on the construction activity carried out by the appellant and "Erection, Commissioning and Installation" service as contained under Section 69 of Chapter V of the Act.

6.1 The appellant have not disputed the levy of the service tax on the above services. The appellant have vehemently argued that they, being sub-contractor in nature, have provided the services to their main contractors and not provided the services directly to any party. I find that the appellant have not submitted any clear evidences to prove their arguments. Therefore, the argument submitted by the appellant is not tenable. As regards to their claim that they, being sub-contractor, not liable to service tax as the main contractor has paid the service tax. I find that

again the appellant failed to submit any concrete evidence that the main contractor paid the service tax in support of their argument and thus liable to be rejected being devoid of merits.

6.2 The issue of levy of service tax from the sub-contractor has been clarified by the CBEC vide Circular No. 138/07/2011 – Service Tax dated 06.05.2011. The relevant excerpts of the circular are re-produced below:

"999.03/ 23.08.07	A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

4. It is clarified that the services provided by the subcontractors/ consultants and other service providers are classifiable as per Section 65 A of the Finance Act, 1994 under respective sub clauses (105) of Section 65 of the Finance Act, 1944 and chargeable to service tax accordingly."

The above circular is very clear and specific on the issue of levy of service tax from the sub-contractor who has provided the services to main contractor. My views are well supported by the judgements in the case of M/s Vijay Sharma & Co reported in 2010-TIOL-1215-CESTAT-DEL-LB which was relied upon in the judgement reported at 2011-TIOL-61-CESTAT-DEL. In the above judgements, it was held that "there is no provision in the Finance Act, 1994 to grant immunity to the sub-contractor from levy of service tax when undisputedly taxable services were provided by them. No evidence was before it to notice whether the service provided by the sub-contractor to the contractor was ever been taxed."

7. Further, I find that appellant has contended that the Show Cause Notice is based on the income reflected in the Balance Sheet pertaining to indivisible works contract executed prior to 01.06.2007 and that works contract service came into tax net w.e.f. 01.06.2007 and thus service tax on the said income is not leviable. From the records available it is clear that the appellant again failed to submit any cogent evidence like copy of contract between them as sub-contractor and the main contractor, the copy of contract between the main contractor and the ultimate

customer etc. Further the appellant has not produced any evidence that the main contractor has paid the service tax. I also find that the names shown as debtors in the balance sheet has nothing to do whether they are main contractor or the ultimate customer on whose behalf the work was carried out by the appellant.

7.1 From the Audit Report No. D-209/2009-10 dated 05.02.2010, it appears that during course of audit, the audit team had obtained copies of some contracts made by the appellant and scrutiny of the same indicates that the appellant had directly provided services to firms and the appellant had issued the bills on their letter head and not numbered. In counter of this, the appellant has not produced any material. Thus, the arguments put forth by the appellant are devoid of merits.

8. The appellant has claimed that, as the main contractor has paid the service tax, they were not required to pay any service tax being sub-contractor; for the same I held that the onus is on the appellant to prove that the main contractors have paid the service tax as they are claiming relief from payment of service tax. For the same I find that adjudicating authority has correctly relied on case law of Srinivasa Trading Co. V/s. Commissioner of Customs, Chennai reported in 2013 (295) ELT 614 (Tri. Chennai) (Final Order No. 269/2012 dated 19.03.2012).

9. Further, appellant has contended that question of invocation of extended period does not arise in their case as all the books of accounts were maintained by them in as much as there is no suppression of facts with an intent to evade payment of service tax and therefore the demand of service tax is time barred by limitation as the SCN was issued beyond period of one year. They also relied on number of judgements in support of their claim. I observed that the department had detected the evasion through the audit of the records maintained by the appellant conducted by the audit party. Further the appellant have not disclosed these facts at any given stage. Further the appellant has neither obtained the service tax registration nor paid the service tax. They refuse to accept the observation raise by the audit and did not pay the service tax. Therefore, this is nothing but the suppression from the department with a sole intention to evade the service tax. I find that it proves to the effect that they had the mens rea to evade payment of tax and did not come forward to pay the tax even after the audit of the records by the department. As far as the question of extended period is concerned, I rely upon the decision of Hon'ble Gujarat High Court in the case of Commissioner of Central Excise Surat-I Vs Neminath Fabrics Pvt. Ltd. (Reported as 2010 (256) ELT 369). The relevant extract of the decision is reproduced below:

Termini from which period of "one year" or "five years" is computed is relevant

date as defined in sub-section (3)(ii) of Section 11A of Central Excise Act, 1944 - Concept of knowledge of departmental authority entirely absent - Importing of said concept in Section 11A(i) ibid or the proviso ibid would tantamount to rewriting statutory provision and rendering defined term "relevant date" nugatory - Reasoning, that once knowledge acquired by Department there is no suppression, fallacious as once suppression admitted, merely because Department acquires knowledge of irregularities, suppression not obliterated - Impugned Tribunal order introducing novel concept of date of knowledge contrary to provisions of Section 11A ibid, hence quashed and set aside. - *Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom. By no stretch of imagination the concept of knowledge can be read into the provisions. [paras 15, 16, 18, 20, 26]*

9.1 I also find that Hon'ble Supreme Court in the case of Commissioner of Central Excise, Vishakhapatnam Vs M/s. Mehta & Co. reported at 2011-TIOL-17-SC-CX held that "Intention to evade - Limitation -- Show Cause Notice issued within five years from the date of knowledge of the Department is valid: Although, the respondent has pleaded that it was done out of ignorance, but there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (i) of the Act would get attracted to the facts and circumstances of the present case. The cause of action, i.e. date of knowledge could be attributed to the department in the year 1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15.5.2000 the demand made was clearly within the period of limitation as prescribed, which is five years. My views are further supported by the judgment of Hon'ble Supreme Court in case of M/s Rajasthan Spinning and Weaving Mills reported at 2009 (238) ELT 3 (S.C.). Thus the arguments made by the appellant are devoid of merit and I reject the same.

10. Further Section 75 of Finance Act, 1994 states that:

Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest [at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette for the period by which such crediting of the tax or any part thereof is delayed.]

11. Another argument of the appellant is that the penalties under Section 76 and Section 78 of the Act cannot be imposed simultaneously in view of amendment made in Finance Act in the year 2008. They also relied upon number of judgements of the higher forums. On this count, I find that the mens rea on the part of the appellant has been proved as they have not paid the service tax and also not obtained the service tax registration till the 16.06.2011 i.e. only after the impugned order has been issued. Further the period of dispute covered under the present case is upto March-2007 and the amendment come into force in the year 2008 only which is not retrospective but prospective in nature. Since the period of dispute is prior to enactment of Finance Act, 2008, I find that both sections are not mutually exclusive. I also find that my views are supported by the judgment of Hon'ble High Court of Kerala in the case of Assistant Commissioner of Central Excise V/s. Krishna Poduval reported at 2006 (1) S.T.R. 185 (Ker) and decisions of the Tribunal in the case of Aakriti Cable Network V/s. Commissioner, Central Excise, Jaipur -- 2009 (15) S.T.R. 338 (Tri Delhi) and Commissioner of Central Excise, Chandigarh V/s. Grewal Trading Company -- 2010 (18) STR 350 (Tri. Delhi). Therefore, the penalties imposed upon the appellant under Section 76 and Section 78 of the Act is correct and I uphold the impugned order.

12. Regarding penalty imposed under Section 78 of the Act, I find that nonpayment of service tax provided by the Appellant was unearthed during Audit undertaken. Had there been no Audit of the records of the Appellant, the non-payment of service tax by the Appellant would have gone unnoticed. So, there was suppression of facts and extended period of limitation was rightly invoked in the impugned order. Since the Appellant suppressed the facts of non-payment of Service Tax, penalty under Section 78 of the Act is mandatory as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when 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 penalty as proposed by the adjudicating authority.

12. In view of the foregoing facts, discussion and findings, I uphold the impugned order and reject the appeal.

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

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

22/4/2020

(GOPI NATH)
Commissioner(Appeals)

Attested

(S.D.Sheth)
Superintendent (Appeals)

By RPAD

To, M/s. D.B.Padhiyar, B/314, Siddhraj Zori, Near Sargasan Cross Road, Sargasan, Gandhinagar – 382 421	सेवा में, मे॰ डी बी पाटियार,बी / ३१४, सिद्धराज जोरी, सर्गासन क्रॉस रोड के पास, सरगासन, गांधीनगर - 382421

प्रति:-

1) प्रधान 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 आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, मण्डल-1, राजकोट को आवश्यक कार्यवाही हेतु।
4) गार्ड फाइल।