

:: ORDER -IN -APPEAL ::

1.0. BRIEF FACTS AND GROUNDS OF APPEAL:

1.1 The subject appeal has been preferred by M/s. Satish Construction Co., Satish Krupa, Opp. Bhaveshwar Temple, M. G. Road, Panesar - 360570 (hereinafter referred to as "the Appellant") against the Order in Original No. B17/CSTAX/DIV/2018-17, dttd 08.03.2017 (hereinafter referred to as "the Impugned order") passed by the Assistant Commissioner (AC), Service Tax Division Bhavnagar (hereinafter referred to as "the Adjudicating authority"). The Appellant are engaged in providing taxable services of categories "Commercial & Industrial Construction", "Works Contract services" etc. and they are registered with service tax vide Registration No. AAD7681902D001.

1.2 Intelligence was gathered to the effect that the Appellant were providing "Works contract services" as defined under the erstwhile 65(105)(zzar) of the Finance Act, 1994 (hereinafter referred to as "the Act") and Section 68(4) of the Act during the period from 2011-12 to 2015-16. Further, it was revealed that ever after withdrawal of exemption vide notification "Commercial and Industrial Construction service" and "Works contract services" as per clause 12(a)(c)&(f) of Notification No. 25/2012-ST, dttd.20.05.2012 as amended with effect from 01.04.2014, the Appellant did not make payment of service tax on the services being provided by them. Hence, inquiry was initiated and statements of the partner of the Appellant were recorded on 27.05.2018 and 30.09.2018.

1.3 Pursuant to the investigation, it was revealed that the Appellant had not disclosed the value of taxable services provided by them in the ST-3 returns filed by them under self assessment mode during April 2011 to March, 2016, which resulted in their payment of service tax with intention to evade the payment of service tax of Rs.14,50,424/-. For this a SCN dttd.10.10.2018 was issued to the Appellant, asking their explanation in respect of demand of service tax of Rs.14,50,424/- to be demanded and recovered from them with interest and penalties on them under Section 77(2) and 78 of the Act. In reply, the Appellant submitted that generally the construction for the Government would not be taxable and in the instant case the services provided to Nagarpalika of Veraval Talim and Forbanar, which are the local authority as defined under Section 65(4)(31) of the Act, hence the demand is required to be dropped. Construction of Fish market and Vegetable market by Nagarpalika should be considered as non-commercial activity, which is used by the general public. The department has failed to advance evidence to substantiate that the construction of Vegetable market and Fish market was predominantly for commercial or business or trading purposes. The Appellant relied upon the case law of M/s. Shreegiri Telecom. & Comms. Pvt. Ltd., M/s. B. S. Satish Construction Technology Private Ltd. (2014 (12) STR 77 (Tri. Mumbai) and M/s. Ganware Kytoms Ltd. (1998 (87) ELT 12 (SC)).

1.4 The adjudicating authority had vide OIO dtd.08.03.2017 confirmed the demand with findings that the establishment of Police station quarters, compound wall to the GSPPM, fish market, vegetable market, office building of GNSSB etc. being for the commercial activity liable to service tax. The services of 'Site clearance, Excavation and earth work' provided to Garrison Engineer (1), have is liable to service tax under Section 69B of the Act. Moreover, the Appellant did not provide copy of the Invoic raised by them for providing services to Garrison Engineer (1) Army. The case law relied upon by the Appellant were not applicable in the context of the present case of the Appellant. Accordingly, the demand of service tax of Rs.14,50,424/- was confirmed under Section 73(1) of the Act with interest therein under Section 75 of the Act. Penalty of Rs.10,000/- was also imposed on the Appellant under Section 77 of the Act. Penalty of Rs.14,50,424/- was also imposed on the Appellant under Section 76(1) of the Act with option of reduced penalty.

1.5 Being aggrieved by the OIO dtd.08.03.2017, the Appellant has filed the present appeal mainly containing the following grounds:

(i) The adjudicating authority had not at all dealt with the plea made in written reply to the SCN, while passing the impugned order.

(ii) The findings made by the adjudicating authority were absolutely vague and without considering the reply to the SCN filed by them, hence the Appellant reproduce the grounds raised by them in their defence reply to the SCN as grounds of appeal. No new grounds provided by the Appellant.

(iii) The OIO dtd.20.03.2017 was received by the Appellant on 10.03.2017 and the appeal has been filed on 24.04.2017. While filing the appeal the Appellant represented that they had made pre-appeal of Rs.5,00,000/- vide GAN 7 Chalan, DIN 0350052121120160301E dtd 12.11.2016 under Accounting Code 054/0410.

1.6 The Central Board of Excise and Customs had vide Notification No 26/2017 CE (NT), dtd.17.10.2017 read with Board's Order No. 06/2017-ST dtd.16.10.2017 has appointed the undersigned as appellate authority under Section 85 of the Central Excise Act, 1944 for the purpose of passing orders in the present appeal.

1.7 Accordingly the Appellant were granted opportunity of hearing on 01.02.2016, which was attended by Shri K. S. Balar's Authorized representative of the Appellant. During hearing, he reiterated the grounds in appeal. He submitted that the Appellant had provided services for construction of Police Station Quarters, Mamedar Office, Boys and Girls Government Hostel for Jawahar Nandeya Vidyalaya, Bridge, CC Road, Fish market, and various other Government works; that the SCN alleged that the subject activities are covered under the taxable service i.e. Works Contract service under Section 65 (135)(zzzzz) of the Act for the period upto 30.06.2012 and the subject activities are not covered under the negative list as

specified under Section 62D of the Act with effect from 01.07.2012; that the Central Excise Voucher Circular No. 110251/22A dated March 19, 2014 dated 10.02.2014 that the Government buildings or soil construction are used for residential, office purposes or providing civil amenities; thus, primarily the Government construction would not be taxable; that only if such construction is for commercial purpose like local government bodies getting shops constructed for taking them out such activities would be commercial and builders would be liable to service tax, that in this context as laid by the Patna High Court in *Saswari, Pawanji & Company Pvt. Ltd.* case, the services provided by the Appellant to the Nagarpalika of Varanasi Patna and Patna are local authority hence the same is exempted for service tax; that it has been alleged in the DIO that the services provided for construction of Fish market, Vegetable market etc. predominantly for commercial and business or trading purpose, hence the Appellant is not eligible for the benefit of exemption, all the said allegations are based on presumption and assumptions not supported by any documents, hence the demand raised in this respect should not sustain; that for levy of service tax on the construction services for commercial etc. purpose, the exemption granted earlier was withdrawn vide Notification No. 02/2015-ST dated 02.02.2015, but at the same time, the revenue has not withdrawn the Circular

1.4. Copy of the appeal memo was provided to the Assistant Commissioner, Service Tax Division, Bhanuagar vide letter dt. 05.05.2017 and they were also informed about the hearing schedule, but nothing has been received from them.

2.1. FINDINGS:

2.1. I have carefully gone through the appeal papers placed before me and the submissions made by the Appellant during the proceedings, which took place before me. I find that the Appellant has made pre-deposit of Rs.5,20,000/- vide CAR 7 Chetan CIN 03500021211201200018 dated 2.11.2012 under Accounting Code 04440410, which is more than 7.5% of the amount of service tax of Rs.14,52,421/- contained in the impugned Order. Thus, I find that there is substantial compliance to Section 35B of the Central Excise Act, 1944 read with Section 83 of the Act. Accordingly, I proceed to decide the appeal.

2.2. Primarily, I find that the issues for determination in the present appeal in terms of Section 35A (4) of the Central Excise Act, 1944 read with Section 83 of the Act, are the following:

- (a) Whether the services provided by Appellant were exempted from service tax?
- (b) What should be the amount of service tax demand to be confirmed? Is there any case for imposing penalty on the Appellant under Section 78(1) of the Act and if so, what should be the quantum of such penalty? Is there any

case for imposing penalty on the Appellant under Section 77(2) of the Act and what should be quantum of such penalty?

(c) What should be the order, which is just and proper in the context of the grounds of appeal set on record made by the Appellant during hearing and merits of the case before me?

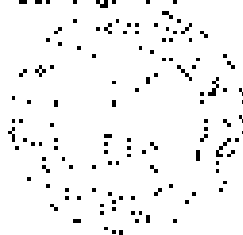
2.3. As regards the point (a) and (b) above, I find from the appeal papers provided by the Appellant that the Appellant were holding service tax registration and they were also providing taxable services to their clients. It is a fact of the record that the taxable services being provided by the Appellant were classifiable in the category of "Works Contract Services" as defined under the proviso Section 65(10)(zzzzz) of the Act during the period from 2011-12 to 2015-16. It was alleged by the department in the SCN issued to the Appellant that they had not properly assessed the service tax liability and did not discharge their due service tax payable by them. In this regard, in the SCN after detailed discussion on each of the work contract, the demand of service tax has been raised. Against this, the Appellant has argued that the liability of service tax would depend primarily upon whether the building or civil structure is used or to be used for commerce or industry. The Government buildings which are providing civil amenities would not be taxable, as held by Patna High Court in the case of *M/s. Shapoorji Palanji & Co. Pvt. Ltd.* where construction of academic block of IIT, Patna was disputed by the department. In the Patna High Court, it was held that the Institute of IIT is of national importance and it was set up under an act of the Parliament (IT Act, 1956), hence exemption from the service tax was valid. It has been argued that Nagarathna being local authority as defined in Section 65(5)(21) of the Act. Though some amount was being charged for usage of its facility, construction of Sports stadium complex was considered as non-commercial activity in the case of *M/s. B. G. Shirke Construction Technology Pvt. Ltd.* In that case construction of Fish market and Vegetable market also to be considered as non-commercial activity. Relying on the Supreme Court decision in the case of *M/s. Genere Nylons Ltd.*, it was also argued by the Appellant that it is on the taxing authorities to show that the particular case concern in question is taxable. The Appellant had also relied upon the CBEC Circular No. WDSS/22/Audit/MS/1/2014, and 16/27/2005, to substantiate their stand of the services provided by them being eligible for exemption. It has been argued by the Appellant that with effect from 01.04.2015, in the context of Notification No. 13/2015-ST, dtd.01.04.2015, the works contract services provided by the Appellant were withdrawn from the exemption, but the CBEC Circular No. WDOST/22/Audit/MS/1/2014, dtd.16.07.2005 was not withdrawn; hence they were eligible to claim exemption. The Appellant also argued that there being no deliberate defiance of the provisions of the law, the penalties were not to be attracted.

2.4. Against this, the adjudicating authority has maintained the stand taken in the SCN and confirmed the demand with interest and penalties. In the appeal filed by the Appellant against the same, no additional grounds raised and the grounds submitted by them before the adjudicating authority has been reiterated.

2.5. I have carefully gone through the Appeal papers and the submissions made by the Appellant and it appears from Para 5 of the SCN dt.16.10.2016 issued to the Appellant that the Appellant had provided the following services, as per the statement dt.27.05.2012 of Shri Anilbhai Prabhobhai Thakkar, Partner of the Appellant:

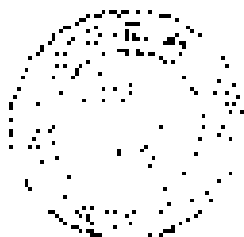
- (a) Construction of Gujarat Police Staff Quarters on behalf of M/s. Gujarat State Police Housing Corporation Ltd. (GSPHCL) at Porbandar, Jamkalyanpur
- (b) O&M&S Project at Porbandar originally assigned to M/s. CKG Project Ltd., which was re-assigned to the Appellant.
- (c) Construction of Mandak or Office at Jamkalyanpur
- (d) Construction of Boys and Girls Government Hostel for Jawahar Navodaya Vidyalaya at Porbandar
- (e) Construction of Fish Market at Porbandar
- (f) Construction of Bridge at Amelast, Masa Road in Navsari Dist.
- (g) Construction of CC Road within the Municipality limit of Valsad.
- (h) Construction of School building at Village Ujmanabara, Tal. Jam. Anambhaliya
- (i) Construction of Traffic Circle, Vegetable Market, Library building and Fire station at Verava
- (j) Construction of Vegetable Market and Ward office building at Prabhas Patan.
- (k) Construction of Police Staff Quarters for SRP Group A at Gandol.
- (l) Construction of Police Station and Staff Quarters at Virsu
- (m) Construction of Village Police Station at Gondal
- (n) Work for providing Haman Ground at Naval Base, Porbandar
- (o) Construction of Library building at Jamjodhpur
- (p) Work for rehabilitation, renovation and redevelopment of Kana Saklaji grounds at Porbandar

Sd/-



- (e) RCC foundation for transformer at Velaad
- (f) Construction of Police station at Kalyana
- (g) Construction of Police sta. Tausiers at Jannagar 32 & 34 Links
- (h) Construction of S.P. Office at Porbandar
- (i) Construction of overhead tank at Sushash Nagar, Dlip Ground, Porbandar started by GWSGH Porbandar to M/s. Kap Prestressed Products Ltd., from whom this work was taken under sub-contracting.
- (j) Construction of water tank at three villages of Porbandar Dist
- (k) Providing to supply water pipeline at various houses in village Derava
- (l) Construction of concrete wall at Police HQ and Chhaya Chowkay at Porbandar.
- (m) Construction of office building for GWSGH at Kalyana

2.6 It also appears prima facie from the facts of the case that the Appellant had not provided the services of "Construction of commercial and/or residential buildings service" but they had acted under the "Work contract service" as defined under Section 66(2)(b)(7777) of the Act. Hence the fact relating to providing of "work contract service" by the Appellant is not being denied by the Appellant. The Appellant have only argument with them is that the services provided by them were being of the non-commercial purpose and for developing the public amenities. The same should be considered for exemption from the service tax. In this context, each of the aforesaid services (a) to (m) are required to be examined by the Adjudicating authority in the context of the relevant work order/contract. However, there appears no such attempt to cover all the aforesaid services within the purview of adjudication, but some major services have been selected for this purpose. The impugned order passed by the Adjudicating authority is not speaking categorically about other services which were not taken for examination during adjudication. The Appellant has also mentioned in their submission specifically that before concerning the demand, the Adjudicating authority has not come to the final decision on the basis of the substantiating evidences and merely issued cryptic order hence they were compelled to reiterate the same grounds which they had raised before the Adjudicating authority. At this stage, this authority is enforcing appellate jurisdiction to check each and every facts of each of the contract/work order. Hence, I am of the opinion that at this stage, it would be proper that without expressing any opinion on the eligibility of the Appellant to avail exemption from the service tax as well as on the legal validity of imposition of penalties on the Appellant under Section 77 and 78




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of the Ad. The appeal of the Appellant is disposed of by setting aside the impugned order and the matter is redrafted to the Adjudicating authority to decide the matter afresh on merits of each of the services after following the principles of natural justice. I pass my order accordingly and also directing the Appellant to submit their written submission providing their explanation in respect of each of the aforesaid services mentioned as (a) to (x) above, before the Adjudicating authority along with any other evidence, if they intend to submit in support of their written submission. The Appellant is further directed to submit their written submission within one month from the date of receipt of this order so as to enable the Adjudicating authority to decide all the aspects involved in the matter on merits at the earliest and provide reasoned and speaking order as an outcome thereof. Since the matter is being remanded back, the points (a) and (b) are determined as discussed above.

2.7. As regards point (c), I dispose the appeal by way of allowing the appeal filed by the Appellant by way of remand in above terms.

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P. A. Vasave
Commissioner (Appeals)


(P. A. Vasave)
Commissioner (Appeals)
Commissioner
CGST & Cent. Excise,
Kutch (Canchikhera)

F. No. V27300042017

Date: 18.03.2018

By: R.P.A.J.

To,

M/s. Gatal Construction Co.
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(E-mail: gas-prc@vsnl.net)

Copy to:-

M/s. K. S. Behara,
Joint Superintendent of Central
Excise and Customs and
Consultant
Bhavnagar.

Copy to:

1. The Chief Commissioner, CGST & C. Ex., Ahmedabad Zone, Ahmedabad.
 2. The Commissioner, CGST & C. Ex., Bhavnagar
 3. The Additional Commissioner, CGST & C. Ex. (System), Bhavnagar
 4. Assistant Commissioner CGST & C. Ex., Junagadh Division, Junagadh.
5. Closed file.