आयुक्त का कार्यालय,
केंद्रीय जी. एस. टी. एवं
केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर,
कस्टम हॉउस, प्रथम तल,
नवरंगपुरा ,अहमदाबाद- 380009

OFFICE OF COMMISSIONER
CENTRAL GST & CENTRAL EXCISE,
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निवन्धित पावती डाक द्वरा/By R.P.A.D

DIN-**20230764WT000000C336**

फा.सं./F.No. STC/15-169/OA/2021-22

आदेश की तारीख़/Date of Order :- 26.07.2023

जारी करने की तारीख़/Date of Issue :- 26.07.2023

द्वारा पारित/Passed by:- लोकेश डामोर /*Lokesh Damor*
सयुक्त आयुक्त /*Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 23/JC/ LD /2023-24

जिस व्यक्ति (यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।
This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015–को प्रारूप संख्या एस टी –४ (ST–4) में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त (अपील) के समक्ष नियमानुसांर पूर्व जमा के धनराशी का प्रमाण देना आवश्यक है ।

An appeal against this order shall lie before the Commissioner (Appeal) on giving proof of payment of pre deposit as per rules.

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या एस टी –४ (ST–4) में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।
(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू .5 00. पांच रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form एस टी –४ (ST–4) in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.
(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.5.00.

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice F.No. STC/15-169/OA/2021-22 dated 23.04.2021 issued to M/s Ronak Prakashbhai Khunti, 51 Iscon Greens, Nr. Lalgebi Ashram, Bopal Ghuma Road, Ahmedabad-380058.

BRIEF FACTS OF THE CASE

M/s. Ronak Prakashbhai Khunti, 51, Iscon Greens, Nr.Lalgebi Ashram, Bopal Ghuma Road, Ghuma, Ahmedabad, Gujarat - 380058 (hereinafter referred to as "the said assessee" for the sake of brevity) are engaged in providing services and for the same was registered with Service Tax Department having Service Tax Registration No. BKTPK8113JSD002 and BKTPK8113JSD004.

2. An analysis of "Sales/Gross Receipts from Services (Value from ITR)", the "Total Amount Paid/Credited under 194C, 194H, 194I, 194J" and "Gross value of Services Provided" was undertaken by the Central Board of Direct Taxes (CBDT) for the F.Y. 2015-16 to 2016-17, and details of said analysis was shared by the CBDT with the Central Board of Indirect Taxes (CBIC).

3. On going through the Third party Data received from CBDT of the said assessee for the F.Y. 2015-16 to 2016-17, the Sales/Gross Receipt from Services (Value from ITR) are not tallied with Gross Value of Service Provided, as declared in ST-3 Return of the F.Y. 2015-16 to 2016-17. It appears that the said assessee have declared less/not declared any taxable value in their Service Tax Return (ST-3) for the F.Y. 2015-16 to 2016-17 as compared to the Service related taxable value declared in their Income Tax Return (ITR)/Form 26AS for the F.Y. 2015-16 to 2016-17. The details of difference as per CBDT data for the F.Y. 2015-16 to 2016-17 are as under :

Sr. No.	Financial Year	VALUE DIFFERENCE in ITR & STR / TDS & STR) (Whichever is higher) (in Rs.)	Service Tax (in Rs.)
1.	2015-16	59240696	8265229
2.	2016-17	64451619	9613886
	TOTAL	123692316	17879115

Therefore, the said assessee has less discharged their Service Tax liability and thus is liable to pay Service tax including Cess [@ 12.36% for F.Y. 2015-16 & from 01-04-2015 to 31-05-2015] ; [@ 14% from 01-06-2015 to 14-11-2015] ; [@ 14.50% from 15-11-2015 to 31-05-2016] and [@15% from 01-06-2016 to 31-03-2017] for amounting to Rs.17879115/- on the differential value amounting to Rs. 123692316/- along with applicable interest and penalty for the F.Y. 2015-16 to 2016-17.

4. As per the provisions of Section 72 of the Finance Act, if any person, liable to pay service tax having made a return, fails to assess the tax, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

5. As per the provisions of Section 73(1) of the Finance Act where any service tax has not been levied or paid or has been short levied or short paid by the reasons of willful mis-statement or suppression of facts with intent to evade

payment of service tax, the Central Excise Officer may within five years from the relevant date, serve notice on the person chargeable with service tax which has not been levied or paid of which has been short levied or short paid requiring him to show cause why he should not pay amount specified in the notice.

6. As per Rule 6 of the Service tax Rules, 1994, the service tax shall be paid to the credit of the Central Government by 5th day of the month, immediately following the said calendar month in which the payments are received, towards the value of taxable service. Rule 7 of the Service Tax Rules, 1994 stipulates that assessee shall submit their service tax returns in the form of ST-3 within the prescribed time.

7. From the foregoing paras, it appeared that the said assessee have failed to pay/short paid/deposit service tax to the extent of Rs. 1,78,79,115 /- on the difference of taxable value during the period 2015-16 to 2016-17 by declaring less value in their ST-3 Returns vis-a-s their ITR/Form 26AS, in such manner and within such period prescribed in respect of taxable services received/provided by them with an intent to evade payment of service tax. Thus, it appears that the said assessee have failed to discharge the service tax liability of Rs. 1,78,79,115/- (inclusive of applicable Cess i.e., EC, SHEC, SBC & KKC) worked out on value of Rs. 12,36,92,316/- and therefore, service tax is required to be demanded/recovered from them under Section 73(1) of the Finance Act, 1994 read with Section 68 of the Finance Act, 1994.

8. In view of above, it was noticed that the said assessee have contravened the provisions of :

(a) Section 66 of the Finance Act, 1994 in as much as they have failed to collect and pay the service tax as detailed above, to the credit of Central Government.

(b) Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, as amended, in as much as they have not paid the service tax as mentioned above to the credit of the Government of India within the stipulated time limit;

(c) Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994, as amended, in as much as they had failed to properly assess their Service Tax liability under Rule 2(1)(d) of Service Tax Rules, 1994 and failed to declare correct value of taxable services as well as exempted services to the department in the prescribed return in Form ST-3.

9. It has been noticed that at no point of time, the said assessee has disclosed full, true and correct information about the value of the services provided by them or intimated to the Department regarding receipt/providing of Service of the differential value that has come to the notice of the Department only after going through the Third Party CBDT data generated for the Financial Year 2015-16 to 2016-17. The Government has from the very beginning placed full trust on the service providers and accordingly measures like self-assessment etc., based on mutual trust and confidence are in place. From the evidences, it appeared that the said assessee has knowingly suppressed the facts regarding receipt of/providing of services by them worth the differential value as can be seen in the table hereinabove and thereby not paid/short paid/not deposited Service Tax thereof to the extent of Rs. 1,78,79,115 /-. Thus, it appeared that there is a deliberate withholding of

essential and material information from the department about service provided and value realized by them. All these material information have been concealed from the department deliberately, consciously and purposefully to evade payment of service tax.

10. As per Section 75 ibid 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, is liable to pay simple interest (as 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. It appears that the said assessee has short paid/non-payment of Service Tax of 1,78,79,115/- on the actual value received towards taxable services provided which appears to be recoverable under proviso to Section 73(1) of the Finance Act along with interest under Section 75 ibid not paid by them under Section 68 of the Finance Act read with Rule 6 of Service Tax Rules, 1994 inasmuch as the said assessee has suppressed the facts to the department and contravened the provisions with an intent to evade payment of Service Tax. The said assessee has not discharged their Service tax liability and hence is liable to pay interest under Section 75 of the Finance Act.

11. All the above acts of contravention on the part of the said assessee resulted into non-payment of Service Tax appears to have been committed by way of suppression of material facts and contravention of provisions of Finance Act, 1994 with an intent to evade payment of service tax as discussed in the foregoing paras and therefore, the said amount of service tax amounting to Rs. 1,78,79,115 /- (inclusive of applicable Cess i.e., EC, SHEC, SBC & KKC) not paid is required to be demanded and recovered from them under the proviso to Section 73(1) of the Finance Act, 1994 alongwith Interest thereof at appropriate rate under the provisions of Section 75 of the Finance Act, 1994.

12. All these acts of contravention of the provisions of Section 67, Section 68 and Section 70 of the Finance Act, 1994 read with Rule 6 & Rule 7 of the Service Tax Rules, 1994 is to be punishable under the provisions of Section 76 and 77 of the Finance Act, 1994 as amended from time to time. In view of the above, it appears that the said assessee have contravened the provisions of Finance Act, 1994 and the rules made there under. All the contraventions and violations made by the said assessee appeared to have rendered themselves liable to penalty under Section 76 & Section 77 of the Finance Act.

13. Moreover, in addition to the contravention, omission and commission on the part of the said assessee as stated in the foregoing paras, the said assessee has willfully suppressed the facts, nature and value of service provided by them with an intent to evade the payment of service tax rendering themselves liable for penalty under Section 78 of the Finance Act,1994.

14. Therefore M/s.Ronak Praksshbhai Kunti, called upon to show cause as to why;

(i) Differential amount of Service Tax amounting to Rs.1,78,79,115/- (Rupees One Crore Seventy Eight Lakh Seventy Nine Thousand One Hundred Fifteen only) (inclusive of Edu. Cess and S&H Edu. Cess) short paid/not paid by them, should not be confirmed/demanded under proviso to Section 73(1) of the Finance Act, 1994.

(ii) interest at the appropriate rates should not be recovered from them as prescribed under Section 75 of the Finance Act, 1994 from the due date on which the Service Tax was liable to be paid till the date on which the said Service Tax is paid.

(iii) penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 for the failure to make payment of service tax payable by them within prescribed time-limit.

(iv) penalty should not be imposed upon them under Section 77 of the Finance Act, 1994 for the failure to assess the correct tax liability.

(vi) penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 as amended for suppressing and not disclosing the value of the said taxable service provided by them before the department with an intent to evade payment of service tax.

DEFENCE REPLY

15. The assessee vide letter dated 28.03.2023 stated that he is proprietor of M/s.Victor Engineering and are engaged in the business of construction of roads, canal, dams, roads and other Government non commercial infrastructure and other Govt. financed projects. Service tax demand is based on certain data shared by CBDT and taking cognizance of the same and without adducing any documents, undertaking any inquiry or verifying any documents or facts. They stated that they are not agree with the allegations. The SCN is not served within time limit and hence the demand is not sustainable. They further stated that the SCN is based on certain data of Form 26AS and ITR and therefore the SCN is not maintainable. Apart from the said value of income there is no other details of information or materials available on record of the department and without offering any reasoning and citing the relevant legislative provision by virtue of which alleged ST is payable by them for the FY 2015-16 & 2016-17. The SCN is cryptic, illegal and presumptive. It has never been discussed the nature of activities carried out by them and how the same is chargeable to service tax and how they are not eligible for any exemption notification. In support of their claim, they relied upon the following case laws:

- SBQ steels Ltd Vs C.C.,C.Ex & ST Guntur 2014(300) ELT 185(AP)
- CCE Vs Shemco India Transport 2011 (24) STR 409 (Tri-Del)
- Amrit Foood Vs CC 2005 (190) ELT 433 (SC)
- Kush Constructions Vs CGST NACIN 2019 (24) GSTL 606 (Tri-All)
- M/s.Quest Engineers & Consultants P.Ltd Vs.C, CGST & CE , Ahllahabad 2022 (58) GSTL 345 (Tri-All)

16. The assessee have also contended that service tax demand based on merely data of Form 26AS and ITR without adducing any further evidence, documents, detais, information and investigations and therefore the SCN is not are not maintainable. For which they have also relied upon a number of case laws in their favour. They have also reconciled the figures as under:

Particulars	FY 2015-16	FY 2016-17	Remarks
Income as per Form 26AS	59240696	64451620	
Income as per Books	58885339	64342122	
Excess value on income shown in Form 26AS	355358	109498	
Income as per Books	58885339	64342122	
Services for construction of ponds for ash disposal in order to control pollution by way of works contract	6185470	51268936	Exempt under Sl.No.13(d) of Noti.No.25/2012 dated 20.06.12
Services by way of Hiring of vehicle to SEZ unit	4719697	12930170	Exempt under Sl.No.13(d) of Noti.No.12/2013 dated 01.07.13
Services for transportation of goods	7608831	143016	Covered in RCMNoti.No.30/2012
Total Exempt and Non taxable	18513998	64342122	
Total taxable value	40371341	0	
Taxable value shown in ST 3	40372511	0	
Differnece	(-)1170		

17. They further stated that the income earned by them are under negative list and exempt under Mega Exemption Notification No.25/2012 service tax dated 20.06.2012 & 12/2013 dated 01.07.2013. They sated that section 66D of the Finance Act, 1994 defines the negative list of the services which are not chargeable to service tax, since the same have been excluded from the charging section 66Bof the Finance Act, 1994. Accordingly services by way of transportation of goods falls under Section 66D(p), hence are not taxable. They have provided services in relation to transportation of goods, provided to M/s.Essar Oil Ltd of Rs.77,51,846.89 during the FY 2015-16 & 2016-17 is covered under Negative List under Section 66D(p) and therefore no service tax is payable by them. They further stated that service to the tune of Rs. 5,74,54,406/- provided to M/s.Adani Power Maharashtra Ltd during the FY 2015-16 and 2016-17 in relation to construction of pond for ash disposal which is in the nature of original works. The pond is used as a land fill to prevent the release of ash into atmosphere and therefore the construction is for pollution control the said services is falling under the service tax exemption under Sl.No.13(d) of Noti.No.25/2012-ST dated 20.06.2012.

18. The assessee further stated that vehicle hiring services of Rs.1,76,49,866.90 provided by them to M/s.Reliance Industries Ltd , SEZ firm are exempted under Noti.No.12/2013 dated 01.07.2013. The provision of SEZ Act and Rules are overriding to the exemption Notification issued under Finance Act, 1994 and hence substantive benefits cannot be deprived off merely because procedural inflictions. As per Section 26 of SEZ Act, services provided to a developer or unit carry out authroised operations in SEZ would be exempted from payment of service tax and therefore these services to SEZ are not taxable. They relied upon case law of M/s. Reliance Ports & Terminals Ltd Vs Commissioner of CE&ST, Rajkot 2015 (40) STR 200 (Tri-

Ahmd.) & M/s.Norasia Container Lines Vs. Commr of Central Excise, New Delhi 2011-TIOL-574-CESTAT-DEL) etc. Accordingly they submitted that mere procedural infraction pertaining to not obtaining list of specified services and /or Form A-1 at the time of provision of service for availing benefit under Notification No.12/2013 service tax dated 01.07.2013 cannot result into denial of substantive benefit granted under the statute.

19. They further services of Rs.5,74,54,406/- provided to M/s.Adani Power Maharashtra during the FY 2015-16 & 2016-17 in relation to construction of ponds for Ash disposal which is in nature of original works. They stated that such ash ponds, also known as coal ash basin or surface impoundment is an engineered structure used at coal fired power stations for the disposal of two types of coal combustion products. Bottom ash and fly ash and which falls under Noti.No.25/2012 dated 20.06.2012. They also claim that these services are covered under the works contract services. The said work is also falls under original work as defined. In the instant case assuming but without admitting to the fact that subject transaction of service tax is taxable then also the tax would be leviable only on the abated value i.e.40% of the gross value.

20. They are proprietor ship firm providing services to body corporate so in respect of those services which are provided to body corporate the liability of service tax if any would be only 50% on the assessee and balance on service receiver. The SCN is worked out without considering the admissible deduction on value of goods, services covered under negative list, non taxable services, abatement admissible under notification No.26/2012-ST dated 20.06.2012 and liability of service receiver as per Noti.30/2012 dated 20.06.2012 and therefore the tax demanded is not sustainable.

21. They further stated that the services provided by them should be treated as cum tax. Therefore the calculation of service tax is not correct. In views of section 67 sub section (2) of the finance act 1994 and various judgments the consideration received for the services provided should be considered cum tax and tax liability calculated by the department is not correct as they did not receive the amount of tax in addition to that. They relied upon a number of case laws in support of their claim. They further claimed that extended period of limitation also cannot be invoked as there is no suppression of facts in the instant case. As the assessee are not liable to pay any service tax no penalty or interest is payable by them. In these points also the assessee relied upon a number of case laws in support of their claim. Finally they requested to set aside the demand along with interest and penalty.

PERSONAL HEARING

22. Personal Hearing in the instant case was held on 11.07.2023. Shri Pratik Trivedi, CA, authorized representative appeared on behalf of the assessee and he reiterated their written submissions dated 28.03.2023 and requested to decide the SCN on merits.

DISCUSSION AND FINDINGS

23. The proceedings under the provisions of the Finance Act, 1994 and Service Tax Rules, 1994 framed there under are saved by Section 174(2) of the Central Goods & Service Tax Act, 2017 and accordingly I am proceeding to adjudicate the SCN.

24. In this connection, I have carefully gone through the SCN, reply to SCN, records of the case, submission made by the assessee, Audited Balance Sheet, and copies of invoices and other documents for the FY 2015-16 & 2016-17. In the instant case, Show Cause Notice was issued to the assessee demanding Service Tax of Rs.1,78,79,115/- for the F.Y 2015-16 & 2016-17 on the basis of data received from Income Tax authorities. The Show Cause Notice alleged non-payment of Service Tax, charging of interest in terms of Section 75 of the Finance Act, 1994 and penalty under Section 76, 77 and 78 of the Finance Act, 1994. Accordingly, I find that the issue which requires determination as of now is whether the assessee is liable to pay service tax of Rs. 1,78,79,115/ on the differential taxable value for the F.Y 2015-16 & 2016-17 under proviso to section 73(1) of Finance Act, 1944 or not.

25. Prior to the introduction of Negative list w.e.f. 1.7.2012, various services were classified according to the different category of services. Further after introduction of negative list with effect from 01.07.2012, service has been defined as:

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the constitution or

(iii) a transaction in money or actionable claim.

(b) A provision of service by an employee to the employer in the course of or in relation to his employment.

(c) fees taken in any court or tribunal established under any law for the time being in force.

From the definition it is evident that any activity carried out by any person to another person for any consideration is covered under the above definition of service.

Further the term "taxable service" is defined under Section 66B(51) of the Finance act, 194 as under:
(51) taxable service means any service on which service tax is leviable under Section 66B.

It is clear that the service tax is levied under Section 66B of the Finance Act, 1994 which reads as under:

Section 66B : Charge of service tax on and after Finance Act, 2012- There shall be levied a tax (hereinafter referred to as the service tax) at the rate fourteen percent on the value of all services other than those services specified in negative list, provided r agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed"

26. According to which service tax is levied on all services other than those specified in negative list (Section 66D of Finance act, 1994) in the taxable

territory by one person to another. In this context the services covered under Negative list, defined in Section 66D (inserted by the Finance Act, 2012 w.e.f. 1-7-2012), comprise of the following services viz.,

SECTION 66D. Negative list of services.— The negative list shall comprise of the following services, namely :—

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere—

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) transport of goods or passengers; or 9

(iv) Any service, other than services covered under clauses (i) to (iii) above, provided to business entities;

(b) services by the Reserve Bank of India;

(c) services by a foreign diplomatic mission located in India;

(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;

(e) trading of goods;

(f) [****].;

(g) selling of space for advertisements in print media;

(h) service by way of access to a road or a bridge on payment of toll charges;

(i) betting, gambling or lottery; Explanation. - For the purposes of this clause, the expression "betting, gambling or lottery" shall not include the activity specified in Explanation2 to clause (44) of section 65B;

(j) [* * * *]

(k) transmission or distribution of electricity by an electricity transmission or distribution utility; 10

(l) [* * * *]

(m) services by way of renting of residential dwelling for use as residence;

(n) services by way of—

(i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;

(ii) inter se sale or purchase of foreign currency amongst banks or authorized dealers of foreign exchange or amongst banks and such dealers;

(o) service of transportation of passengers, with or without accompanied belongings, by—

(i) [* * * *]

(ii) railways in a class other than— (A) first class; or (B) an air-conditioned coach;

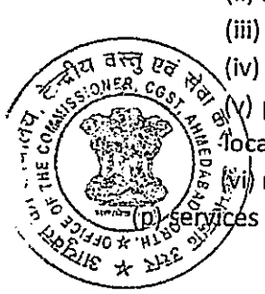
(iii) metro, monorail or tramway ,

(iv) inland waterways;

(v) public transport, other than predominantly for tourism purpose, in a vessel between places located in India; and

(vi) metered cabs or auto rickshaws

(p) services by way of transportation of goods—



(i) by road except the services of— (A) a goods transportation agency; or (B) a courier agency;
(ii) [* * *]
(iii) by inland waterways;
(q) funeral, burial, crematorium or mortuary services including transportation of the deceased.

27. Thus with effect from 01.07.2012, the negative list regime came into existence under which all services are taxable and only those services that are mentioned in the negative list are exempted. It is not disputed that the assessee has provided works contract services/vehicle hire income/transportation income and the service provided by them are not mentioned in the negative list given under Section 66D of the Finance Act, 1994. In view of the above the services provided by the assessee are covered under service tax and they are also liable to pay service tax on the said services.

28. On perusal of SCN, reply to SCN and other records, I find that the assessee is providing works contract services/vehicle hire income/transportation income to various clients. They have also paid service tax and filed service tax return for the FY 2015-16(April –Sept) but not paid any service tax or filed ST3 return for the Oct- 2015 to March 2016 and FY 2016-17 as required under Finance Bill, 1994 and Rules made thereunder. Show Cause Notice was issued to recover service tax of Rs.1,78,79,115/- on the income shown in the Form 26 AS of the assessee for the FY 2015-16 & 2016-17.

29. In this connection, I have gone through the rely to SCN filed by the assessee and find that they have provided works contract service for construction of ash pond for M/s.Adani Power Maharashtra Limited and claimed exemption from service tax under clause 13(d) of Notification No.25/2012 dated 20.06.2012. In this connection, I have gone through the definition given under Section 65 of Finance Act, 1994 of works contract service which reads as follows.

Clause 44 of section 65B of Finance Act, 1994, defines the Work-Contact as follows: "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

30. According to which the services provided such as civil work for ash pond as original works is covered under the definition of works contract service. The assessee in their reply stated that they are providing the said services along with material and therefore the said service provided is categorized under the Works contract service. As the material is involved in these services the taxable value is to be determined as per Rule 2A of service tax (Determination of value Rules) 2006 which reader as under:

"2A. Determination of value of service portion in the execution of a works contract.- Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Explanation.- For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services; 1 amended by Service Tax (Determination of Value) Second Amendment Rules, 2012 vide Notification no 24/2012-ST, dated 6.06.2012 w.e.f. 1.7.2012.

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

Explanation 1. - For the purposes of this rule,-

(a) "original works" means-

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(b) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or

in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-
(i) the amount charged for such goods or services, if any; and
(ii) the value added tax or sales tax, if any, levied thereon: Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.
Explanation 2.--For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004."

31. On perusal of the copies of invoices and description of works and other records, I find that the assessee has provided works contract services such as construction of ash pond which is correctly covered under the definition of original works and accordingly the assessee is liable to pay service tax on 40% of the total value as provided under Rule 2A(ii)(A) of service tax (Determination of value Rules) 2006.

32. The assessee further claimed that Service provider is under obligation to discharge the service tax liability on service portion in execution of a work contract. However in few cases this obligation is partially shifted to service recipient. Notification No.30/2012-ST dated 20.06.2012 bring the concept of partial Reverse Charge Mechanism on service portion in execution of a work contract according to which taxable services provided by a partnership firm to business entity registered as body corporate, located in taxable territory, the service provider is liable to pay only 50% of the service tax and the remaining 50% will be deposited by the service recipient and therefore they are liable for payment of service tax only 50% of the total service tax liability. The relevant portion of the Notification is as under:

GSR.....(E).-In exercise .....the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely:-

I. The taxable services,-

(A) *(i) provided or agreed to be provided by an insurance agent to any person carrying on the insurance business;*

(ii) provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,-

(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);

(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;

(c) any co-operative society established by or under any law;

(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;

(e) any body corporate established, by or under any law; or

(f) any partnership firm whether registered or not under any law including association of persons;

(iii) provided or agreed to be provided by way of sponsorship to anybody corporate or partnership firm located in the taxable territory;

(iv) provided or agreed to be provided by,-

(A) an arbitral tribunal, or

(B) an individual advocate or a firm of advocates by way of support services, or

(C) Government or local authority by way of support services excluding,-

(1) renting of immovable property, and

(2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994,

to any business entity located in the taxable territory;

(v) provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers to any person who is not in the similar line of business or supply of manpower for any purpose or ***service portion in execution of works contract by any individual****, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons,* ***located in the taxable territory to a business entity registered as body corporate,*** *located in the taxable territory;*

(B) *provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory;*

(II) *The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in (I) shall be as specified in the following Table, namely:-*

Table

Sl.No.	*Description of a service*	*Percentage of service tax payable by the person providing service*	*Percentage of service tax payable by the person receiving the service*
9.	*in respect of services provided or agreed to be provided in service portion in execution of works contract*	*50%*	*50%*

Explanation-I. - The person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as the person who receives the service for the purpose of this notification.

Explanation-II. - In works contract services, where both service provider and service recipient is the persons liable to pay tax, the service recipient has the option of choosing the valuation method as per choice, independent of valuation method adopted by the provider of service.

33. According to which the works contract service provided to in execution of works contract by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory. Here in the instant case the service provider is a proprietary firm and the service receiver is body corporate therefore the service receiver is liable to pay 50% of the service tax liability. Accordingly in this case the assessee, the service provider, is required to pay 50% of the service tax liability.

34. Further, in reply to the show cause notice, the said assessee submitted and claimed that they have provided service of transportation of goods by road which covered under GTA and under Reverse Charge Mechanism hence they are not liable to pay service tax in virtue of Noti No.25/2012 dated 20.06.2012. Now I would like to go through the legal aspects of the taxability of GTA services.

Rule 2(d)(B)(V) of the Service Tax Rules, 1994 provided that;

(d) "person liable for paying service tax", -
(i) (B) in relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—
(I) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);
(II) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;
(III) any co-operative society established by or under any law;
(IV) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;
(V) any body corporate established, by or under any law; or
(VI) any partnership firm whether registered or not under any law including association of persons; any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage : Provided that when such person is located in a non-taxable territory, the provider of such service shall be liable to pay service tax.

35. Para 1(A)(ii) and Para II of Notification No. 30/2012-ST dated 20.06.2012 as amended provided that service tax payable on services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—

(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);
(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;
(c) any co-operative society established by or under any law;
(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;
(e) any body corporate established, by or under any law; or
(f) any partnership firm whether registered or not under any law including association of persons;

(II) The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in (I) shall be as specified in the following Table, namely :-

TABLE

Sl. No.	Description of Service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving service
01	in respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road	NIL	100%

36. As per provisions contained in Rule 2(d)(B)(V) of the Service Tax Rules, 1994 read with Notification No. 30/2012-ST dated 20.06.2012 as amended, service tax on GTA service provided to a body corporate established, by or under any law; partnership firm whether registered or not under any law including association of persons; a factory registered under or governed by the

Factories Act, 1948 (63 of 1948) and dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made there under is payable in RCM by the service recipient . Therefore, I find that the liability to pay service tax is falls on the service recipient and therefore the assessee is not required to pay service tax on the income derived from GTA services.

37. The assessee further claimed that they have constructed ash pond at power plant of M/s.Adani Power Maharashtra Limited and claimed exemption from payment of service tax. The assessee claimed that the pond is used as a land fill to prevent the release of ash into atmosphere and therefore the construction is for pollution control the said services is falling under the service tax exemption under Sl.No.13(d) of Noti.No.25/2012-ST dated 20.06.2012. In this connection, I would like to go through the relevant portion of the Notification which is as under:

Sr.No.13 Services provided by way of Construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of :

d. a pollution control or effluent treatment plant, except located as a part of a factory.

38. In this connection, I have gone through the above clause and find that the exemption was granted to a pollution control or effluent treatment plant except located as a part of a factory. Herein the instant case the assessee was provided construction of ash pond also known as a coal ash basin or is an engineered structure used at coal fired power stations for the disposal of bottom ash and fly ash. The pond is used a s landfill to prevent the release of ash into the atmosphere. The said pond was constructed within the premises of power generating unit of M/s.Adani Power Maharastra Limited. On perusal of the sub clause (d) of clause 13, I find that the exemption is available to a pollution control plant except located as a part of a factory. On careful reading of the clause, it mandates that the exemption is not available for a pollution control plant located as a part of a factory. Herein the instant the case the ash pond used for pollution control, but is constructed as a part of the factory and therefore the said service is not exempted from payment of service tax as envisaged in sub clause (d) of clause 13 of Nto.N.25/2012 dated 20.06.2012. In view of the above, I find that the assessee is required to pay service tax on the income derived from provided works contract services to M/s.Adani Power Maharashtra Limited for construction of Ash Pond.

39. Moreover, the assessee in their reply to SCN submitted and claimed that they accrued income by providing vehicle hiring services to M/s.Reliance Industries SEZ and claimed exemption from service tax under Notification No.12/2013-ST dated 01.07.2013. In this connection, I have gone through the said Notification which reads as under:

3. This exemption shall be given effect to in the following manner:

(i) The SEZ Unit or the Developer shall get an approval by the Approval Committee of the list of the services as are required for the authorised operations (referred to as the 'specified services' elsewhere in the notification) on which the SEZ Unit or Developer wish to claim exemption from service tax.

(II) The ab-initio exemption on the specified services received by the SEZ Unit or the Developer and used exclusively for the authorised operation shall be allowed subject to the following procedure and conditions, namely:-

(a) the SEZ Unit or the Developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, along with the list of specified services in terms of condition (I);

(b) on the basis of declaration made in Form A-1, an authorisation shall be issued by the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be to the SEZ Unit or the Developer, in Form A-2;

(c) the SEZ Unit or the Developer shall provide a copy of said authorisation to the provider of specified services. On the basis of the said authorisation, the service provider shall provide the specified services to the SEZ Unit or the Developer without payment of service tax;

40. The Notification laid down the procedure to be followed by the SEZ unit for getting the exemption from payment of services tax for the services provided to SEZ unit. According to which the jurisdiction DC/AC will issue Form A-2 to the SEZ unit on the basis of declaration in Form 1 and the SEZ unit is required to provide a copy of the said Form A- 2 to the service provider. In the instant case, the assessee claimed that they have provided services to Reliance SEZ, however they did not provide any copy of Form A-2 wherein the services provided is required to be mentioned. In the absence of Form A-2, it is not possible to ascertain and accept the claim of the assessee that they have provided the services of hiring of vehicle to the SEZ unit M/s.Reliance Industries Ltd. In view of the above, the exemption claimed by the assessee is not supported with required Form A2 and therefore, the claim of the assessee that the services are exempted cannot be accepted. Accordingly the assessee is required to pay service tax on the hiring income derived from M/s.Reliance Industries, an SEZ unit as they have not fulfilled the conditions of the Notification No.132/2013 dated 01.07.2013. Therefore, I find that, the assessee is required to pay service tax on the income earned by way of vehicle hiring. For the sake of clarity, I would like to discuss the taxability Financial Year wise:

FINANCIAL YEAR 2015-16

41. On perusal of the SCN, reply to SCN, copy of ST 3 Return, Form 26AS, financial records, copies of invoices and reconciliation statement for the FY 2015-16, I find that the service tax of Rs.82,65,229/- is demanded on the differential value of Rs.5,92,40,696/-. In this connection, the assessee in their reply to SCN claimed that they have an income of Rs.76,08,830/- received from providing GTA services to body corporate therefore the liability to pay service tax falls on the service receiver and therefore they are not liable to pay any service tax on this income. I have also gone through the Form 26AS, ledger accounts, various invoices and other records and find that the assessee has provided services to the tune of Rs. 76,08,830/- for the FY 2015-16 to body corporate. As this income is derived from services provided to body corporate as envisaged in Noti.No.30/2012 dated 20.06.2012, I find that the service provider i.e. the assessee is not required to pay any service tax on the said income as the liability to pay service tax falls on the service receiver as per the Notification.

42. As per provisions contained in Rule 2(d)(B)(V) of the Service Tax Rules, 1994 read with Notification No. 30/2012-ST dated 20.06.2012 as amended, service tax on GTA service provided to a body corporate established, by or under any law; partnership firm whether registered or not under any law including association of persons; a factory registered under or governed by the Factories Act, 1948 (63 of 1948) and dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made there under is payable in RCM by the service recipient. In view of the above, the assessee is not required to pay service tax on the transportation income of Rs. 76,08,830/- received from transporters.

43. Further, the assessee in their reply to SCN, stated that they have provided service to the tune of Rs. 4,15,67,414/- to M/s.Adani Power Maharashtra Ltd during the FY 2015-16 in relation to construction of pond for ash disposal which is in the nature of original works. The assessee claimed that the pond is used as a land fill to prevent the release of ash into atmosphere and therefore the construction is for pollution control the said services is falling under the service tax exemption under Sl.No.13(d) of Noti.No.25/2012-ST dated 20.06.2012.

44. In this connection, I have gone through the above clause and find that the exemption was granted to a pollution control or effluent treatment plant except located as a part of a factory. Herein the instant case the assessee was provided construction of ash pond also known as a coal ash basin is an engineered structure used at coal fired power stations for the disposal of bottom ash and fly ash. The pond is used a s landfill to prevent the release of ash into the atmosphere. The said pond was constructed within the premises of power generating unit of M/s.Adani Power Maharastra Limited. On perusal of the sub clause (d) of clause 13, I find that the exemption is available to a pollution control plant except located as a part of a factory. On careful reading of the clause, it mandates that the exemption is not available for a pollution control plant located as a part of a factory. Herein the instant the case the ash pond used for pollution control, but is constructed as a part of the factory and therefore the said service is not exempted from payment of service tax as envisaged in sub clause (d) of clause 13 of Nto.N.25/2012 dated 20.06.2012 and therefore the assessee is required to pay service tax on the said income of Rs.4,15,67,414/-.

45. In response to this demand, the assessee stated that they have provided service to the tune of Rs. 4,15,67,414/- to M/s.Adani Power Maharashtra Ltd during the FY 2016-17 in relation to construction of pond for ash disposal which is in the nature of original works. Therefore they are eligible for abatement of 60% as per Rule 2A of service tax (Determination of value Rules) 2006. In this connection, I have gone through the nature of work provided by the assessee to M/s.Adani Power Maharashtra Ltd and find that the said service is covered under the definition of original works. In view of the above, I find that the service provided by the assessee and therefore the taxable value is to be determined as per Rule 2A of service tax (Determination of value Rules) 2006. According to which the assessee is eligible for abatement of 60% of total receipts and accordingly liable to pay service tax on abated value of 40 % of the total amount received from the works contract services provided by the assessee. Accordingly the assessee is liable to pay service tax on 40%

(Rs.1,66,26,966/-) of the total receipts i.e. Rs. 4,15,67,414/- received by the assessee during the period.

46. Further the assessee claimed that they are proprietary firm and the service receiver is a business entity registered as body corporate, hence 50% liability of the service tax will be on the service receiver ie. M/s.Adani Power Maharashtra Ltd and the remaining 50% will be paid by them. In this connection, I have gone through the Notification No.30/2012 dated 20.06.2012 and find that in the above Notification at Sl.No.9, it has been clarified that in respect of services provided or agreed to be provided in service portion in execution of works contract, 50% is to be paid by the service receiver and remaining 50% the service tax will be paid by service provider works contract by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory. In the instant case, I find that the assessee is proprietor and as the details of service receiver is a corporate body, hence, I find that the Notification No.30/2012 is applicable in this case. Accordingly the assessee is liable to pay service tax on 50% of value i.e.Rs.83,13,483/- under partial RCM and the remaining service tax or 50% will be paid by the service receiver being the service receiver as per the above Notification.

47. Moreover, the assessee accrued income of Rs.97,09,094/- by providing vehicle hiring services to M/s.Reliance Industries SEZ and claimed exemption from service tax under Notification No.12/2013-ST dated 01.07.2013. The Notification laid down the procedure to be followed by the SEZ unit for getting the exemption from payment of services tax for the services provided to SEZ unit. According to which the jurisdiction DC/AC will issue Form A-2 to the SEZ unit on the basis of declaration in Form 1 and the SEZ unit is required to provide a copy of the said Form A 2 to the service provider. In the instant case, the assessee claimed that they have provided services to Reliance SEZ, however they did not provide any copy of Form A-2 wherein the services provided is required to be mentioned. In the absence of Form A-2, it is not possible to ascertain the claim of the assessee that they have provided the services of hiring of vehicle to the SEZ unit M/s.Reliance Industries Ltd. In view of the above, the exemption claimed by the assessee is not supported with required Form A2 and therefore, the claim of the assessee that the services are exempted cannot be accepted. Accordingly the assessee is required to pay service tax on the hiring income derived from M/s.Relicnce Industries, an SEZ unit as they have not fulfilled the conditions of the Notification No.132/2013 dated 01.07.2013. Therefore they are required to pay service tax on the income of Rs.97,09,094/- earned by way of vehicle hiring.

48. In this connection, I have gone through the ST 3 return filed for the period April to September 2015-16 and find that they have paid service tax of Rs.16,18,336/- therefore I consider the same payment from the service tax payable for the FY 2015-16. For the sake of clarity, I would like to reconcile the figures as under:

Sl.No.	Particulars	2015-16
01	Gross value on which service tax demanded as per SCN/26AS	59240695

02	Less: Income exempted vide Clause (2) of Noti.30/2012 dt.20.06.2012 under RCM as discussed	7608831
03	Difference	51631864
04	Less: abatement @ 60% of works contract service of Rs. 4,15,67,414/- as discussed	24940448
05	Difference	26691416
06	Less: 50% of abated value of RS.24940448/-on which ST to be paid by service receiver under RCM under Noti.No.30/2012 as discussed	12470224
07	Taxable income	14221192
08	Service tax (incl. Cess) @ 14.5%	2062073
09	S.T. already paid as per ST 3 return	1618336
10	ST Payable (incl.cess)	443737

Accordingly the assessee is required to pay service tax of Rs.4,43,737/- for the FY 2015-16 and therefore the remaining service tax of Rs.78,21,492/- (Rs.82,65,229/- - Rs.4,43,737/-) is required to be dropped.

FINANCIAL YEAR 2016-17

49. On perusal of the SCN, reply to SCN, copy of ST 3 Returns, Form 26AS, financial records and reconciliation statement for the FY 2016-17, I find that the service tax of Rs.96,13,886/- is demanded on the differential value of Rs.6,44,51,619/-. In response to this demand, the assessee stated that they have provided service to the tune of Rs. 5,12,68,936/- to M/s.Adani Power Maharashtra Ltd during the FY 2016-17 in relation to construction of pond for ash disposal which is in the nature of original works. The assessee claimed that the pond is used as a land fill to prevent the release of ash into atmosphere and therefore the construction is for pollution control the said services is falling under the service tax exemption under Sl.No.13(d) of Noti.No.25/2012-ST dated 20.06.2012. In this connection, I would like to go through the relevant portion of the Notification which is as under:

Sr.No.13 Services provided by way of Construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of :

d. a pollution control or effluent treatment plant, except located as a part of a factory.

In this connection, I have gone through the above clause and find that the exemption was granted to a pollution control or effluent treatment plant except located as a part of a factory. Herein the instant case the assessee was provided construction of ash pond also known as a coal ash basin or surface impoundant is an engineered structure used at coal fired power stations for the disposal of bottom ash and fly ash. The pond is used a s landfill to prevent the release of ash into the atmosphere. The said pond was constructed within the premises of power generating unit of M/s.Adani Power Maharastra Limited. On perusal of the sub clause (d) of clause 13, I find that the exemption is available to a pollution control plant except located as a part of a factory. On careful reading of the clause, it mandates that the exemption is not available for a

pollution control plant located as a part of a factory. Herein the instant the case the ash pond used for pollution control, but is constructed as a part of the factory and therefore the said service is not exempted from payment of service tax as envisaged in sub clause (d) of clause 13 of Nto.N.25/2012 dated 20.06.2012 and therefore the assessee is required to pay service tax on the said income of Rs.5,12,68,936/-.

50. In this connection, the assessee stated that they have provided service to the tune of Rs. 5,12,68,936/- to M/s.Adani Power Maharashtra Ltd during the FY 2016-17 in relation to construction of pond for ash disposal which is in the nature of original works. Therefore they are eligible for abatement of 60% as per Rule 2A of service tax (Determination of value Rules) 2006. In this point, I have gone through the nature of work provided by the assessee to M/s.Adani Power Maharashtra Ltd and find that the the service provided by the assessee is falls under original works and accordingly the taxable value is to be determined as per Rule 2A of service tax (Determination of value Rules) 2006. According to which the assessee is eligible for abatement of 60% of total receipts and accordingly liable to pay service tax on abated value of 40 % of the total amount received from the works contract services provided by the assessee. Accordingly the assessee is liable to pay service tax on 40% (Rs.2,05,07,574/-) of the total receipts i.e. Rs. 5,12,68,936/- received by the assessee during the period.

51. In their reply to SCN, the assessee claimed that they are proprietary firm and the service receiver is a business entity registered as body corporate, hence 50% liability of the service tax will be on the service receiver ie. M/s.Adani Power Maharashtra Ltd and the remaining 50% will be paid by them. In this connection, I have gone through the Notification No.30/2012 dated 20.06.2012 and find that in the above Notification at Sl.No.9, it has been clarified that in respect of services provided or agreed to be provided in service portion in execution of works contract, 50% is to be paid by the service receiver and remaining 50% the service tax will be paid by service provider works contract by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory. In the instant case, I find that the assessee is proprietary firm and as the details of service receiver is a corporate body, hence, I find that the Notification No.30/2012 is applicable in this case. Accordingly the assessee is liable to pay 50% of applicable service tax under partial RCM and the remaining service tax or 50% will be paid by the service receiver being the service receiver as per the above Notification. Accordingly, I find that the assessee is required to pay service tax on Rs.1,02,53,787/- being 50% of the value as discussed above.

52. Moreover, the assessee accrued income of Rs.1,29,30,170/- by providing vehicle hiring services to M/s.Reliance Industries SEZ and claimed exemption from service tax under Notification No.12/2013-ST dated 01.07.2013. The Notification laid down the procedure to be followed by the SEZ unit for getting the exemption from payment of services tax for the services provided to SEZ unit. According to which the jurisdiction DC/AC will issue Form A-2 to the SEZ unit on the basis of declaration in Form 1 and the SEZ unit is required to provide a copy of the said Form A 2 to the service provider. In the instant case, the assessee claimed that they have provided services to

Reliance SEZ, however they did not provide any copy of Form A-2 wherein the services provided is required to be mentioned. In the absence of Form A-2, it is not possible to ascertain the claim of the assessee that they have provided the services of hiring of vehicle to the SEZ unit M/s.Reliance Industries Ltd. In view of the above, the exemption claimed by the assessee is not supported with required Form A2 and therefore, the claim of the assessee that the services are exempted cannot be accepted. Accordingly the assessee is required to pay service tax on the hiring income derived from M/s.Relicnce Industries, an SEZ unit as they have not fulfilled the conditions of the Notification No.132/2013 dated 01.07.2013. Therefore they are required to pay service tax on the income of Rs.1,29,30,170/- earned by way of vehicle hiring.

53. Further, the assessee in their reply to SCN claimed that they have an income of Rs.1,43,016/- received from providing GTA services to body corporate therefore the liability to pay service tax falls on the service receiver and therefore they are not liable to pay any service tax on this income. I have also gone through the Form 26AS, ledger accounts, various invoices and other records and find that the assessee has provided services to the tune of Rs. 1,43,016/- for the FY 2016-17 to body corporate. As this income is derived from services provided to body corporate as envisaged in Noti.No.30/2012 dated 20.06.2012, I find that the service provider i.e. the assessee is not required to pay any service tax on the said income as the liability to pay service tax falls on the service receiver as per the Notification.

54. As per provisions contained in Rule 2(d)(B)(V) of the Service Tax Rules, 1994 read with Notification No. 30/2012-ST dated 20.06.2012 as amended, service tax on GTA service provided to a body corporate established, by or under any law; partnership firm whether registered or not under any law including association of persons; a factory registered under or governed by the Factories Act, 1948 (63 of 1948) and dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made there under is payable in RCM by the service recipient. In view of the above, the assessee is not required to pay service tax on the transportation income of Rs. 1,43,016/- received from transporters. For the sake of clarity, I reconcile the figures as under:

Sl.No.	Particulars	2016-17
01	Gross value on which service tax demanded as per SCN/26AS	64451619
02	Less: Income exempted vide Clause (2) of Noti.30/2012 dt.20.06.2012 under RCM as discussed	143016
03	Difference	64308603
04	Less: abatement @ 60% of works contract service of Rs. 5,12,68,936/- as discussed	30761362
05	Difference	33547241
06	Less: 50% of abated value of RS.30761362/-on which ST to paid by service receiver under RCM under Noti.No.30/2012 as discussed	15380681
07	Taxable income	18166560
08	Service tax (incl. Cess) @ 15%	2724984

55. In view of the above facts, after allowing the eligible abatement and deduction, the assessee is required to pay service tax of Rs.27,24,984/- as discussed above and the remaining service tax demand of Rs.68,88,902/- (Rs.96,13,886/- - Rs.27,24,984/-) is required to be dropped for the FY 2016-17.

56. Accordingly, on the basis of above facts and figures, I find that the assessee is required to pay total service tax of Rs.31,68,721/- (Rs.4,43,737/- for FY 2015-16 and Rs.27,24,984/- for the FY 2016-17). Subsequently the service tax demand of Rs.1,47,10,394/- (Rs.78,21,492/- for FY 2015-16 and Rs.768,88,902/- for the FY 2016-17) is required to be dropped from the total demand of Rs.1,78,79,115/- as proposed vide instant SCN.

57. The government has from the very beginning placed full trust on the service tax assessee so far as service tax is concerned and accordingly measures like self-assessments etc., based on mutual trust and confidence are in place. All these operate on the basis of honesty of the service tax assessee; therefore, the governing statutory provisions create an absolute liability, when any provision is contravened or there is a breach of trust, on the part of service tax assessee, no matter how innocently. From the information/data received from CBDT, it appeared that the assessee has not discharged service tax liability in spite of declaring before Income Tax Department. Non-payment of service tax is utter disregard to the requirements of law and the breach of trust deposed on them which is outright act of defiance of law by way of suppression, concealment & non-furnishing value of taxable service with intent to evade payment of service tax. All the above facts of contravention on the part of the service provider have been committed with an intention to evade the payment of service tax by suppressing the facts. Therefore, service tax amounting to Rs. 31,68,721/- as discussed above for Financial Year 2015-16 & 2016-17 is required to be recovered from them under Section 73 (1) of Finance Act, 1994 by invoking extended period of five years under the proviso to Section 73(1) of the Finance Act, 1994.

58. Further the onus is on the assessee to prove that they are eligible for any exemption Notification. In this connection the Hon"ble Supreme Court of India in the case of Commissioner of Central Excise New Delhi Vs. Hari Chand Shri Gopal reported in2010(260) ELT 3 (SC) clarified that the person claims exemption or concession has to establish that he is entitled to that exemption or concession. The relevant portion of the order is reproduced as under:

*"**22.** The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. In Novopan Indian Ltd. (supra), this Court held that a person, invoking an exception or exemption provisions, to*

relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave - (1996) 2 SCR 253, held that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption." . Here in the instant case the assessee failed to prove that they are eligible for the exemption Notifications.

59. Further, as per Section 75 *ibid*, every person liable to pay the tax in accordance with the provisions of Section 68 *ibid*, or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the prescribed period is liable to pay the interest at the applicable rate of interest. Since the said assessee had failed to pay their Service Tax liabilities in the prescribed time limit, I find that the said assessee is liable to pay the said amount along with interest. Thus, the said Service Tax is required to be recovered from the assessee along with interest under Section 75 of the Finance Act, 1994.

60. As far as imposition of penalty under Section 78 of Finance Act, 1994 is concerned, on perusal of the facts of the case and in view of the above discussion, I find that this is a fit case to levy penalty under section 78 of Finance Act, 1994 as they failed to pay the correct duty with the intend to evade the same. It is also a fact that they had deliberately suppressed the value of services provided by them, with an intent to evade the proper payment of service tax on its due date. These facts would not have come to light had the CBDT not shared the data. The assessee had thus, willfully suppressed the actual provision of taxable service provided by them with an intent to evade the Service Tax. Hence it is found that the said assessee, as a service provider, deliberately suppressed the actual provision of the taxable services provided by them, from the Jurisdictional Service Tax Authority and failed to determine and pay the due Service Tax with an intention to evade payment of Service Tax in contravention of the various provisions of the Finance Act, 1994 and Rules made thereunder, as discussed hereinabove. Hence, I find that this is a fit case to impose penalty under Section 78 of Finance Act,1994.

61. In this regard, I rely upon the decision of Larger Bench of Hon'ble Supreme Court in the case of UIO Vs Dharmendra Textile Processors -2008 (231)ELT 3(SC) and further clarification in the case of M/s Rajasthan Spinning & Weaving Mills [2009 (238) E.L.T. 3 (S.C) wherein, it was, inter alia held that:

"23. The decision in Dharmendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no jurisdiction in quantifying the amount and penalty must be imposed equal to the duty determined under sub section (2) of Section 11 A. that is what Dharmendra Textile decides". With the above observation, the Hon'ble Apex court held that mens rea is not an essential ingredient to impose penalty under Section 11AC of the Central Excise Act, 1944 and there is no discretion available on quantum of penalty imposable under that section. As penal provisions of Section 78 of

the Finance Act, 1944 and Section 11 AC of Central Excise Act, 1944 are pari materia, the ratio of decision of the Apex court is applicable to Service Tax matters also.

62. Various Courts including the Apex Court have clearly laid down the principle that tax liability is a civil obligation and therefore, the intent to evade payment of tax cannot be established by peering into the minds of the tax payer, but has to be established through evaluation of tax behaviour. The said assessee deliberately not supplied their documents, the actual service provisions rendered by them and service tax involved thereon, with intent to evade the proper payment of service tax on its due date, but only after going through the CBDT data these facts would have come to light. The said assessee himself admits in their reply to SCN that they were provided various services. Moreover, the Hon'ble apex court in the case of Rajasthan Spinning and Weaving Mills / High Court of Gujarat at Ahmedabad in Tax Appeal No. 338 of 2009 in the case of Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd. dated 22.04.2010 has made the following observations regarding applicability of the extended period in different situations.

"11. A plain reading of sub-section (1) of section 11A of the Act indicates that the provision is applicable in a case where any duty of excise has either not been levied/paid or has been short levied/short paid, or wrongly refunded, regardless of the fact that such non-levy etc. is on the basis of any approval, acceptance or assessment relating to the rate of duty or valuation under any of the provisions of the Act or Rules thereunder and at that stage it would be open to the Central Excise Officer, in exercise of his discretion to serve the show cause notice on the person chargeable to such duty within one year from the relevant date.

12. The Proviso under the said sub-section stipulates that in case of such non-levy, etc. of duty which is by reason of fraud, collusion, or any mis - statement or suppression of facts, or contravention of any provisions of the Act or the rules made there under, the provisions of sub-section (1) of section 11A of the Act shall have effect as if the words one year have been substituted by the words five years.

13. The Explanation which follows stipulates that where service of notice has been stayed by an order of a Court, the period of such stay shall be excluded from computing the aforesaid period of one year or five years, as the case may be.

14. Thus the scheme that unfolds is that in case of non-levy where there is no fraud, collusion, etc., it is open to the Central Excise Officer to issue a show cause notice for recovery of duty of excise which has not been levied, etc. The show cause notice for recovery has to be served within one year from the relevant date. However, where fraud, collusion, etc., stands established the period within which the show cause notice has to be served stands enlarged by substitution of the words one year by the words five years. In other words the show cause notice for recovery of such duty of excise not levied etc., can be served within five years from the relevant date.

15. To put it differently, the proviso merely provides for a situation where under the provisions of sub-section (1) are recast by the legislature itself extending the period within which the show cause notice for recovery of duty of excise not levied etc. gets enlarged. This position becomes clear when one reads the Explanation in the said sub-section which only says

that the period stated as to service of notice shall be excluded in computing the aforesaid period of one year or five years as the case may be.

16. The termini from which the period of one year or five years has to be computed is the relevant date which has been defined in sub-section (3)(ii) of section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.

17. The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term relevant date nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section (1) of section 11A, is clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder , the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. 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.

20. Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of section 11A would be applicable. However, such reasoning appears to be fallacious in as much as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated.

21. It may be noticed that where the statute does not prescribe a period of limitation, the Apex Court as well as this Court have imported the concept

of reasonable period and have held that where the statute does not provide for a period of limitation, action has to be taken within a reasonable time. However, in a case like the present one, where the statute itself prescribes a period of limitation the question of importing the concept of reasonable period does not arise at all as that would mean that the Court is substituting the period of limitation prescribed by the legislature, which is not permissible in law.

22. The Apex Court in the case of Rajasthan Spinning and Weaving Mills (supra) has held thus :
"From sub-section 1 read with its proviso it is clear that in case the short payment, nonpayment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any willful mis -statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in default within one year from the relevant date (defined in sub-section 3). In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years."

23. This decision would be applicable on all fours to the facts of the present case, viz. when non-payment etc. of duty is intentional and by adopting any of the means indicated in the proviso, then the period of notice gets extended to five years."

In view of the above facts, the extended period is correctly invoked while issuing this Show Cause Notice. Further, the assessee in their reply to SCN relied upon a large number of case laws in their favour on various points, however, I find that the said case laws are not relevant on the disputed points.

63. In the instant SCN penalties under section 76 and 78 have been proposed. However, penalty under Section 76 and Section 78 of the Finance Act, 1994 cannot be imposed simultaneously. The Finance Act, 2008 (18 of 2008) which came into force from 10-5-2008, the Parliament has made the legal position clear by introducing a proviso to Section 78. Therefore, as per the prevailing provisions of law, penalty can be imposed either under Section 76 or Section 78 of the Finance Act, 1994 w.e.f 10.05.2008. As I propose to impose penalty u/s.78 of the Finance Act, 1994, I refrain from imposing any penalty u/s.76 of Finance Act, 1994 in this case.

64. In view of the above discussion and findings, I pass the following order:-

ORDER

(i) I hereby confirm the demand of service tax of Rs.31,68,721/- (Rupees Thirty One Lakh Sixty Eight Thousand Seven Hundred Twenty One Only), not paid by the assessee and order to recover the same from the assessee under proviso to Sub-section (1) of Section 73 of Finance Act,1994. I drop the remaining demand of Service Tax amounting to Rs.1,47,10,394/- as discussed above;

(ii) I confirm the demand of Interest at the appropriate rate and order to recover the same from them for the period of delay of payment of service tax mentioned at (i) above under Section 75 of the Finance Act, 1994;

(iii) I impose penalty of Rs.10,000/- on M/s. Ronak P Khunti under Section 77(2) of the Finance Act, 1994;

(iv) I impose Penalty of Rs.31,68,721/- (Rupees Thirty One Lakh Sixty Eight Thousand Seven Hundred Twenty One Only) under Section 78 of the Finance Act, 1994, as amended. I further order that in terms of Section 78 (1) of the Finance Act, 1994 if M/s.Ronak P Khunti pays the amount of Service Tax as determined at Sl. No. (1) above and interest payable thereon at (2) above within thirty days of the date of communication of this order, the amount of penalty liable to be paid by M/s.Ronak P Khunti shall be twenty-five per cent of the penalty imposed subject to the condition that such reduced penalty is also paid within the period so specified.

65. Accordingly the Show Cause Notice bearing F.No. STC/15-169/OA/2021/dated 23.04.2021 is disposed off.

(Lokesh Damor)
Joint Commissioner
Central GST & Central Excise
Ahmedabad North

BY SPEEDPOST/BY HAND
No. STC/15-169/OA/2021

Dt.26.07.2023

To
M/s.Ronak Prakashbhai Khunti,
51, Iscon Greens, Nr.Lalgebi Ashram,
Bopal Ghuma Road, Ghuma, Ahmedabad,
Gujarat - 380058

Copy to:

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. The DC/AC, CGST & Central Excise, Division-VI Ahmedabad North.
3. The Supdt., Range-I, Division-VI, CGST & C. Excise, Ahmedabad North
4. The Supdt (System), CGST & C. Excise Ahmedabad North for uploading the order on website.
5. Guard File.