



<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद - उत्तर, कस्टम हाँउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		 <p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
<p>फ़ोन नंबर/ PHONE No.: 079-27544557</p>	<p>फैक्स/ FAX : 079-27544463</p>	<p>E-mail:- oaahmedabad2@gmail.com</p>

निबन्धित पावती डाक द्वारा/By R.P.A.D
फा.सं./F.No. STC/4-46/OA/15-16

DIN-20231264WT000000EF4A
देश की तारीख/Date of Order: - 12.12.2023
जारी करने की तारीख/Date of Issue :- 12.12.2023

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

मूल आदेश संख्या / Order-In-Original No. 47/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 विरुद्ध 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 नियमानुसार 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 जाएंगे।

- (1) उक्त अपील की प्रति।
- (2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू.5) 00. पांच रुपये (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/4-46/OA/2015-16 dated 14.10.2015 issued to M/s Sorath Builders., 92, City Centre, Near Swastik Cross Road, Navrangpura, Ahmedabad-380009.



BRIEF FACTS OF THE CASE:

M/s Sorath Builders situated at 92, City Centre, Near Swastik Cross Road, Navfangpura, Ahmedabad-380009 (the "noticee") were engaged in providing taxable Services viz. (1) Goods Transport Agency Service as defined under Sub clause (zzp) (2) Work Contract Service as defined under sub-clause (zzzza) & (3) Other Taxable Service Other Than the 119 listed, of clause (105) of Section 65 of the Finance Act, 1994 and were holding Service Tax Registration (No. AAHFS7484FST001) since 18.12.2007. The noticee firm was a partnership firm.

2 A search was conducted in the office premises of the noticee - 92, City Centre, Near Swastik Cross Road, Navrangpura, Ahmedabad-380009 on 09.07.2015 and the files containing Balance Sheet, IT Returns, Ledgers, Form 26AS were resumed under panchnama for further investigation.

3. A statement of Shri Dineshkumar Laxmanbhai Patel, Partner of noticee firm was recorded on the spot on 09.07.2015 under Section 14 of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994, wherein, Shri Dineshkumar, inter-alia, stated that they had provided construction services to the following Government Bodies:

- a. Road and Building Department, Government of Gujarat.
- b. Navsari Agricultural University.
- c. Gujarat State Land Development Corporation Limited.
- d. Gujarat State Police Housing Corporation Limited.
- e. Narmada Water Resources.
- f. Western Railways.

4 Further statement of Shri Dineshkumar Laxmanbhai Patel was recorded on 21.09.2015, wherein, Shri Patel, inter-alia, with regard to service tax liability of Rs.66,69,463/- worked out by the officers, he stated that his firm was engaged in providing services of Construction of Government Buildings/Projects; that he did not agree with the tax liability of Rs.66,69,463/-; that construction work of Jail and University, Residential Quarters was exempt from service tax before 01.07.2012; that he agreed with the liability in respect of work carried out for Gujarat State Police Housing Corporation Limited after 01.07.2012; that they had not collected service tax from their client; that he agreed with cum duty tax liability occurred after 01.07.2012; that their tax liability, after 01.07.2012 till 2014-15, was of Rs.2,75,923/-. Shri Patel also stated that they had filed ST-3 returns till March 2014.

5. It, therefore, appeared that the noticee had provided construction services under works contract service to Government Bodies, viz; Road and Building Department, Government of Gujarat; Navsari Agricultural University; Gujarat State Land Development Corporation Limited; Gujarat State Police Housing Corporation Limited; Narmada Water Resources; Western Railways.

6. The noticee was not paying service tax for the services provided to above mentioned clients as, according to them, the work carried out by them is for Government authority and therefore it is not taxable. Also, the

noticee was paying service tax regularly on the GTA services on the freight expenses incurred for the construction activities. It, however, appeared that services provided to Gujarat State Police Housing Corporation Limited was taxable and applicable service tax was liable to be paid by the noticee.

7. As per CBE&C Circular No.116/10/2009-S.T., dated 15.9.2009, it appeared that the services provided to Gujarat State Police Housing Corporation Limited were not exempted. The relevant portion of the said circular is reproduced as under:

"Dams, irrigation projects, buildings or infrastructure construction under turnkeys/ EPC contract by Government not covered under Works Contract service.-

The issue is about Government taking up construction activity of dams, irrigation projects, buildings or infrastructure construction etc. through turnkey or EPC (Engineering Procurement & Construction) mode. The said service is covered under Section 65 (105)(zzzza) of Finance act, 1994. The said section itself excludes works contract in respect of dams, tunnels, canals or irrigation projects, road, airports, railways, transport terminals & bridges executed through such turnkey or EPC mode. Hence works contract in respect of above works even if done through turnkey or EPC mode are exempt from payment service tax.

5.3 As per the provision of section 65(105) (zzzza) of the Finance Act, 1994, the term "Work Contract services" defined is reproduced below:

(A) Prior to 01.07.2012, taxable service in respect of works contract was defined under section 65(105) (zzzza) which is reproduced below:

"Taxable Service" means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

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

(i) *transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*

(ii) *such contract is for the purpose of carrying out,-*

(a) *erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or*

(b) *construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*

(c) *construction of a new residential complex or a part thereof; or*

(d) *completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or*

(e) *turnkey projects including engineering, procurement and construction or*

(f) *commissioning (EPC) projects;*

6. Moreover, the noticee had failed to produce any document which would support their claim for exemption. It was also observed from the RA bills

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(f) *commissioning (EPC) projects;*

6. Moreover, the noticee had failed to produce any document which would support their claim for exemption. It was also observed from the RA bills

produced by the noticee as sample copies vide letter dated 05.10.2015 and also as stated by Shri Dinesh kumar Patel that the noticee was not charging service tax separately. Therefore, it appeared that taxable value was required to be considered as cum duty tax value.

7. Further, it appeared that the noticee had not filed ST-3 returns for the year 2014-15 which were due to be filed by 25.10.2014 and 25.4.2015 (half yearly returns).

8. Based on reconciliation of the figures of taxable income reflected in the Books of Accounts & 26 AS, the service tax liability, in respect of services provided to Gujarat State Police Housing Corporation Limited, was worked out to be Rs. 57,67,136/- for the period from 2010-11 to 2014-15, under the category of works contract service, as detailed in the table below —

Year	Contract Income	Exempted Income	Net Taxable Income	Effective Rate of Service Tax	Cum Duty Ser Tax Liability (a)	Liability as per Partial Reverse Charge Mechanism (b)	Total Service Tax payable (a+b)
2010-11	74369310	0	74369310	4.120	2942773	N.A.	2942773
2011-12	64403789	0	64403789	4.120	2548440	N.A.	2548440
2012-13(April To Jun)	0	0	0	0	0	N.A.	N.A.
2012-13 (Jul to Mar)	15509689	0	15509689	4.944	0	201805	201805
2013-14	0	0	0	4.944	0	0	0
2014-15	3746203	0	3746203	4.944	0	74118	74118
Total	158028991	0	158028991		5491213	275923	5767136

9. From the investigation made, it appeared that M/s Sorath Builders has provided services under "**Work Contract Services**", which is defined as taxable service under sub-clause (zzzza) of clause (105) of Section 65 of the Finance Act, 1994. From reading of the scope of service as mentioned in definition of "**Work Contract Service**", it transpires that M/s Sorath Builders, from the beginning, failed to assess their Service Tax liability towards rendering of service, failed to pay the required Service Tax and also failed to file correct Service Tax Returns for the taxable income received by them.

10. It further appeared that non-assessment of tax liability at their own, non-payment of Service Tax and filing of incorrect Service Tax Returns was found to be intentional one on the part of M/s Sorath Builders. Thus, it can be said that M/s Sorath Builders was fully aware of their legal obligations on non-payment of Service Tax, which they did not fulfill with the mala fide intention of evading payment of Service Tax.

11. On scrutiny of the documents furnished by M/s Sorath Builders and the investigation carried out in the matter revealed that they have rendered "Work Contract Services" which are chargeable to Service Tax with effect from 01.06.2007. M/s Sorath Builders, Ahmedabad has engaged themselves in doing activities as described under Section 65(25b) of Chapter V of the Finance Act, 1994, as amended and provided taxable services as defined under Section 65(105)(zzzza) of the Act. For doing these activities they have received consideration and shown it as income under various heads of accounts in their Books of Accounts, wherein they have not paid Service Tax in Government Account and thereby evaded payment of it. Therefore, M/s Sorath Builders was liable to pay Service Tax on the gross income / amount received from their customers / service recipients. Thus, it appeared that M/s. Sorath Builders has not properly discharged their Service Tax liability on the income shown in their Books of Accounts.

12. The services rendered or received by the noticee, upto 30.06.2012, appeared classifiable under category of "Work Contract Service" as defined under Section 65(105)(zzzza) of the Finance Act, 1994 and hence they were liable for payment of Service Tax as a provider receiver of services. From 01.07.2012, since there is no service wise classification due to introduction of Negative List and since the activities carried out by the noticee appeared to fall under the purview of definition of "Service" in terms of Section 66B(44) read with Section 66D of the Finance Act, 1994 and since the activities were not covered under negative list nor under any Exemption Notification, notice appeared liable to pay Service Tax for the services provided or received by them after 01.07.2012 also. Further, w.e.f. 01.07.2012, since the introduction of Reverse Charge Mechanism(RCM), as mentioned at Sr. No. 7(b), 8 & 9 of the Table in Notification No. 30/2012 dated 20.06.2012, the new partial reverse charge mechanism was applicable to services provided or agreed to be provided by way of:

(a) xxxxx

(b) xxxxx

(c) service portion in execution of a Works Contract ;

And accordingly, noticee appeared liable to pay 50% of the Service Tax and the remaining 50% of the Service Tax was to be paid by the service recipient

13. According to Section 67 of the Finance Act, 1994, as amended, where Service Tax is chargeable on any taxable service with reference to its value, then such value shall be the gross amount charged by the service provider for such service provided or to be provided by him. The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service. In the present case, M/s Sorath Builders, have not paid Service Tax on the gross amount charged / received for the taxable services provided by them and thereby contravened the provisions of Section 67 of the Finance Act, 1994 read with Rule 6 of the Service Tax rules, 1994.

14. As per the provisions of the Finance Act, 1994 and rules made there under, the service provider was required to assess correct value for the service provided by them as well as to pay Service Tax on the actual amount of income received by them for services rendered/received in due course as prescribed and to follow all the procedure laid down in the Act and Rules. In

this case, M/s Sorath Builders has failed to pay due Service Tax leviable on the taxable value charged. They have failed to file correct ST-3 Returns for the taxable services rendered by them and suppressed the facts for the period from 2010-11 to 2014-15. It, therefore, appeared that they have failed to make timely payment of Service Tax, as provided in Section 68 of the Act read with Rule 6 of the Rules.

15. As per Section 68(1) of the Act, 'Every person providing taxable service to any person shall pay Service Tax at the rate specified in Section 66 in such manner and within such period as may be prescribed'. The manner and period of payment of Service Tax has been prescribed under Rule 6(1) of the Service Tax Rules, 1994. In this case, it appeared that M/s Sorath Builders has not paid Service Tax to the tune of Service Tax liability of Rs. 57,67,136/- on "Work Contract Service" thereby contravened the provisions of Section 68(1) of the Act, read with Rule 6 of the Service Tax Rules, 1994.

16. As per Section 70(1) of the Act, 'Every person liable to pay the Service Tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed'. The form, manner and frequency of return are prescribed under Rule 7 of the Service Tax Rules, 1994. In this case, it appeared that M/s. Sorath Builders has not assessed the tax dues properly, on the services provided by him, as discussed above, and failed to file correct ST-3 Returns for the Year 2010-11 to 2014-15 within stipulated time limit thereby violated the provisions of Section 70(1) of the Act read with Rule 7 of the Service Tax Rules, 1994.

17. Further, it appeared that material information and value of taxable services were concealed by the noticee from the department deliberately and consciously to evade payment of service tax purposefully by not declaring the amount received against the services rendered. Therefore, service tax not paid was required to be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994 by invoking extended period of five years time as the noticee has suppressed/not declared the nature and value of the taxable services. Thus, it appeared that the total amount of Service Tax Rs. 57,67,136/- on "Work Contract Service" requires to be recovered from M/s Sorath Builder by applying the extended period of five years time.

18. From the foregoing paras and discussion made hereinabove, it appeared that the noticee has contravened the provisions under Section 67 of the Finance Act, 1994, Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 and Section 73(1) of Finance Act, 1994.

19. Further, it also appeared that the value of Taxable Service in respect of aforesaid services rendered by them was not subjected to assessment. Eventually, they have willfully made mis-statement and not paid Service Tax. Thus, M/s Sorath Builder has failed to self-assess the Service Tax payable on the Taxable Value of income received correctly. They have failed to file ST-3 Returns correctly as required under the Finance Act, 1994, and also failed to pay the Service Tax at the applicable rate on the Taxable Value. It clearly appeared that M/s Sorath Builder has

deliberately and willfully evaded payment of Service Tax on Taxable Income received, as discussed above.

20. In view of the foregoing paras, it appeared the aforementioned omission and commission was well intended through which they have willfully avoided the payment of Service Tax. As non-payment of Service Tax was intended willful and the same was suppressed from the department and therefore the provisions of proviso to Section 73(1) are required to be invoked and the said Service Tax not paid by them is required to be demanded and recovered from them under the proviso to Section 73(1) of the Finance Act, 1994, as amended by invoking extended period of five years time. Thus, M/s Sorath Builder, has contravened provisions of the Finance Act, 1994 and the rules made there under with sole intention to evade payment of Service Tax and therefore the amount of Service Tax Rs. 57,67,136/- on "Work Contract Service" is required to be recovered along with Interest under Section 75 of the Finance Act, 1994 by invoking extended period of five years time, as per the proviso to Section 73(1) of the Finance Act, 1994.

21. 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 prescribed period is liable to pay the interest at the applicable rate of interest". Since the service provider has failed to pay their Service Tax liabilities in the prescribed time limit, they are liable to pay the said Service Tax and the same is required to be recovered from them along with interest under Section 75 of the Finance Act, 1994.

22. It appeared that they are liable to penalty under Section 77(2) of the Finance Act, 1994 in as much as they have failed to assess their actual Service Tax liability and also failed to file their correct ST-3 Returns from time to time, as required under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994.

23. Further, it appeared that the noticee has not taken into account the incomes received and expenses incurred by them for rendering taxable services for the purpose of payment of service tax and thereby, Service Tax liabilities were not properly discharged by them. The non-filing of correct ST-3 Returns and thereby non-declaration of correct taxable value of service in ST-3 Returns and not paying the due amount of Service Tax was in utter disregard to the requirements of law and is tantamount to breach of trust deposited on them. Such outright act in defiance of law appears to have rendered them liable for stringent penal action as provided under the provisions of Section 78 of the Finance Act, 1994 for making suppression and concealment or non furnishing of value of Taxable Service with intent to evade payment of Service Tax.

24. It appeared from the above that M/s Sorath Builders is liable to penalty under Section 78 of the Finance Act, 1994 in as much as they have willfully and intentionally suppressed the figures of taxable income and did not assess their Service Tax liability and not paid the required Service Tax on the same. They have obtained Service Tax Registration, however not paid any Service Tax and also failed to file correct Service Tax Returns. This act of willful omission and commission becomes more

serious and intended one, when Shri DineshkumarL. Patel, who happened to be Partner of M/s Sorath Builders. In spite of obtaining Service Tax Registration and non-payment of Service Tax was well intended one. Apparently, it appears that they were aware of provisions of the Finance Act, 1994 and rules framed there under and non-compliances of provisions of the Finance Act, 1994 was intended one. This appears that the act of non-payment of Service Tax was outcome of sole intention to evade payment of Service Tax.

25. It appeared that all the above mentioned acts of contravention of the various provisions of the Finance Act, 1994, as amended from time to time, and Rules framed there under, on the part of M/s Sorath Builders, has been committed by way of suppression of facts with sole intention to evade payment of Service Tax and therefore, the said Service Tax not paid by them is required to be demanded and recovered under the proviso to Section 73(1) of the Finance Act, 1994, as amended from time to time, by invoking extended period of five years time. All these acts of contravention of the provisions of Section 67, 68, 69 & 70 of the Finance Act, 1994, as amended, read with Rules 4, 6 and 7 of the Service Tax Rules, 1994 appeared to be punishable under the provisions of Section 77 & 78 of the Finance Act, 1994, as amended from time to time.

26. Therefore, show cause notice F.No.STC/4-46/0&A/15-16 dated 14.10.2015 was issued by the Principal Commissioner, Service Tax, Ahmedabad, calling upon the noticee to show cause as to why -

i) The Income of Rs. 15,80,28,991/- received by them from M/s Gujarat State Police Housing Corporation Limited during the Year from 2010-11 to 2014-15 should not be considered as Taxable Income for the purpose of levy of Service Tax under the category of "Work Contract Service" falling under Section 65(105)(zzzza) of the Finance Act, 1994 up to 30.06.2012 (as tabulated in Annexure-B attached to the SCN) and as "Service" in terms of Section 65B(44) read with Section 65D of the Finance Act, 1944 with effect from 01.07.2012 onwards;

ii) the Service Tax amounting to Rs.57,67,136/- (*inclusive of Edu. cess + HSEC*)(Rupees Fifty Seven Lakhs Sixty Seven Thousand One Hundred Thirty Six only) on the aforementioned Taxable Income of Rs. 15,80,28,991/- received during the Year from 2010-11 to 2014-15 should not be demanded and recovered from them under proviso to Section 73(1) read with Section 68 of the Finance Act, 1994, by invoking extended period of five years.

iii) Interest at the prescribed rate should not be charged and recovered in terms of the provisions of Section 75 of the Finance Act, 1994, as amended from time to time;

iv) the Penalty under sub-Section (2) of Section 77 of the Finance Act, 1994 should not be imposed on them in as much as they failed to assess their correct Service Tax liability and failed filed their correct Service Tax Returns, as required under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994;

v) the Penalty under Section 78 of the Finance Act, 1994, as amended should not be imposed on them for suppressing the material facts of providing Taxable Service from the department and for not disclosing the value of the said taxable service from the department with sole

intention to evade payment of applicable Service Tax.

27. The then adjudicating authority vide OIO NO. 35/JC/MT/2020-21 dated 19.01.2021 had decided the SCN F. No. STC/4-46/O&A/15-16 dated 14.10.2015 as under:

" I order that the Income of Rs. 15,80,28,991/- received by them from M/s Gujarat State Police Housing Corporation Limited during the Year from 2010-11 to 2014-15 be considered as Taxable Income for the purpose of levy of Service Tax under the category of "Work Contract Service" falling under Section 65(105)(zzzza) of the Finance Act, 1994 up to 30.06.2012 and as "Service" in terms of Section 65B(44) read with Section 65D of the Finance Act, 1944 with effect from 01.07.2012 onwards;

I confirm the Service Tax amounting to Rs.57,67,136/- (inclusive of Edu. cess + HSEC)(Rupees Fifty Seven Lakhs Sixty Seven Thousand One Hundred Thirty Six only) on the aforementioned Taxable Income of Rs. 15,80,28,991/- received by them during the Year from 2010-11 to 2014-15 and order that the said Service Tax amount be recovered from M/s.Sorath Builders, Ahmedabad under proviso to Section 73(1) read with Section 68 of the Finance Act, 1994, by invoking extended period of five years.

I order recovery of interest at the prescribed rate on the amount of Service tax confirmed above in terms of the provisions of Section 75 of the Finance Act, 1994.

I impose a penalty of Rs.10,000/- (Rupees ten thousand only) on M/s.Sorath Builder under sub-Section (2) of Section 77 of the Finance Act, 1994.

I impose a penalty of Rs. 57,67,136/- (Rupees Fifty Seven Lakhs Sixty Seven Thousand One Hundred Thirty Six only)the Penalty under Section 78 of the Finance Act, 1994, on M/s.Sorath Builders, Ahmedabad.

I further Order that in the event the entire amount demanded as above is paid within thirty days from the receipt of this Order along with applicable interest, the amount of penalty liable to be paid by them shall be 25% (twenty five per cent) of the penalty imposed at Sr. No.(v) above, subject to the condition that such reduced penalty is also paid within the said period of 30 days (thirty days) in terms of clause (ii) of Section 78(1) of the Finance Act, 1994".

28. Being aggrieved with the said OIO, the noticee had filed an appeal before the Com(A), Ahmedabad and Com(A), Ahmedabad vide its Order No. AHM-EXCUS-002-APP-64/2021-22 dated 07.02.2022 has remanded back the matter to the adjudicating authority for reconsidering the classification of the service, benefit of Noti.No.25/2012 dated 20.06.2012 and appropriation of Rs.8,20,563/- paid by the appellant vide challan dated 23.10.2015

DEFENCE REPLY:

29. The noticee vide their letter dated Nil received on 21.09.2023 have tendered their written submission, where they have interalia stated that they have provided following types of works:

- a. Construction of Police Staff residential quarters.
- b. Construction work at Raksha University.
- c. Construction of Entrance Gate, Guest House, Security Cabin and Flag Post, Utility Room, Generator Room, Visitor waiting, Vehicle

Parking, Toilet Block, Grain Store, Electric Substation, Laundry wash area, Barrack with Kitchen at Lajpore Surat Jail.

d. Renovation work at Laboratory at Gandhinagar.

30.1 M/s.GSPHCL was incorporated on 1/11/1988 under Companies Act, 1956. This is a Government Company with 100% share-holding subscribed by the State Government. The main objectives pursued by the Corporation as per memorandum and article of the association is as under:

- a. To undertake construction of residential, non-residential and all others type of buildings required for Gujarat Police, Jails, Home Guards and for other in the state of Gujarat.
- b. To undertake all kinds of construction & allied works as also welfare activities required for the Gujarat Police and others entrusted by the Government from time to time.
- c. To carry out the above works departmentally or through approved contractors or both.
- d. To formulate and various housing schemes for serving and retired employee in the Police Department, Government of Gujarat.

30.2 They also stated that they did not charge Service tax in their invoices from GSPHCL is not in dispute as confirmed by the SCN and OIO both and demand here is calculated on cum duty basis. The Learned Adjudicating Authority has classified the said construction service provided to GSPHCL as work contract services under section 65 (105)(zzzza) of the Finance Act, 1994. The Noticee contended that Construction of Residential Quarters for Police personnel is primarily classifiable in section 65 (105)(zzzh) – “Construction of Complex” and not under section 65 (105)(zzzza) – “works contract services”. We have reproduced the relevant defections as below:

Section 65 (105) (zzzh) reads as under:

(zzzh) to any person, by any other person, in relation to construction of complex.]

Explanation.—For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;

Term ‘Construction of Complex is defined in section 65(30a) as under:

(30a) “construction of complex” means—

- (a) construction of a new residential complex or a part thereof; or*
 - (b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services;*
- or*

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;]

Term Residential complex is defined in section 65 (91a) as under:

(91a) "residential complex" means any complex comprising of—

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

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

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

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;]

30.3 On conjoint reading of above provisions, it is clear that a specific entry for construction of residential buildings is provided for in the statute. Further this entry specifically excludes residential complex constructed for personal use. Further term 'personal use' has been defined to include buildings given for use to another person on rent or without consideration. GSPHCL is an organisation created by the Government of Gujarat. The corporation is set up as a "Nodal Agency" by Government of Gujarat to undertake various projects relating to construction / maintenance and repairs of residential and non-residential buildings as per the directive and requirement of the State / Central Government and is working on "No Profit No Loss" basis. The expenditure incurred for such project is shown as "cost of building works" in the Statement of Income & Expenditure Account. The cost of 'Completed Projects' handed over to the respective agencies are adjusted against respective grant / advances in the financial statement.

30.4 Government of Gujarat provides funds to GSPHCL as grants using which they construct various assets and hand it over back to them. It is just a nodal agency and not an independent contractor. They have also submitted audited Balance Sheet of GSPHCL for the year 2015-16 (as **Annexure-F**) which substantiates the fact that it received a grant of Rs. 441.33 crores whereas income was only 1.09 crores. The paper book Revenue recognition policy of the corporation is defined as under:

Revenue Recognition: The company acts as a nodal agency for the execution of the construction / repairs and maintenance work of residential and non-residential projects awarded by the State Government / Central Government / Government Departments on "No Profit No Loss" basis. Entire cost incurred on these projects,

including employees cost and administrative cost (net of income, if any, realized during course of activities), is adjusted against the fund provided by the agencies awarding the respective construction projects and therefore, no revenue accrues to the company. Centage charges recovered on certain works contract on completion of the projects from other Government departments is treated as "Income from Operations".

30.5 In turn, Govt of Gujarat (Home Department) hands over these constructed residential apartments to its police personnel either on rent free basis or taking a nominal rent. Policy of providing residential accommodation to Government employees including police personnel is governed through Gujarat Civil Services (Occupation of Residential Accommodation) Rules, 2002. These rules empower the government to provide apartments to its employees and it also regulates whether and how much rent can be collected from the employees and these rules also provide for powers to waive the rent. As per Rule 23 of the said rules, appendix III has been notified which provides for category of employees who are eligible for rent free accommodation. As per point 12 of this Appendix III, Police personnel are eligible employees for getting accommodation. They have also attached copy of Gujarat Civil Services (Occupation of Residential Accommodation) Rules 2002. They further stated that alternatively, even if we considered the services provided by the Noticee covered under Section 65 (105) (zzzza) of the Finance Act, 1944, the same will not be leviable under service tax.

30.6 Section 65 (105) (zzzza) of the Finance Act, 1944 defines work contract services read as under:

(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

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

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out, —

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or waterproofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

30.7 Above section is conglomeration of many services including that of construction of building or civil structure meant primarily for commercial purposes. It is not in dispute that the construction activity undertaken by us for GSPHCL is of construction of residential accommodation, Raksha University, Jail etc., all these assets are for non-commercial use only. Hence even if they classify their services as works contract services their services are excluded from it. Term 'Residential Complex' as defined in section 65(9)(a) will also apply to the entry of Works contract services [65(105)(zzzza)(ii)(c)] and therefore the personal use exclusion given in said definition will apply mutatis mutandis here as well. SCN as well as OIO heavily rely on Circular no. 116/10/2009-ST dated 15.09.2009 but reproduces only selective abstract from it to justify the demand. We would like to quote the entire circular for clarity purposes:

Subject: Leviability of service tax on construction of canals by Government agencies – reg.

On a reference being received by the Board, two following issues were examined for a clear understanding of facts. The first is regarding leviability of service tax on construction of canals for Government projects.

1. As per section 65 (25b) of the Finance Act, 1994 "commercial or industrial construction service" means —

(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is —

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

2. Thus the essence of the definition is that the "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry.

As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

3. The second issue is about Government taking up construction activity of dams, buildings or infrastructure construction etc. through EPC (Engineering Procurement & Construction) mode. The said service is covered under section 65 (105) (zzzza) of Finance Act, 1994. The said section itself excludes works contract in respect of dams, road, airports, railways, transport terminals, bridges & tunnels executed through EPC mode. Hence works contract in respect of above works even if done through EPC mode are exempt from payment of service tax.

30.8 They further stated that the said circular was issued for clarifying taxability of construction of canals and not Police Housing works, hence entire context of the circular is different and not applicable to the matter under appeal. Even if for argument sake they agree that the said circular is applicable to facts of their case, it goes entirely in their favour as it concludes that canal works as is the case with police housing works done for government will be out of the levy because they are used primarily for non-commercial purposes. Further para 2 of the circular clarifies taxability of contracts given on EPC (engineering, procurement and construction) mode whereas in their case neither the SCN nor the OIO substantiates brings out this fact whether their contracts are on EPC mode or not. We do not undertake the engineering part of the works which is entirely done by GSPHCL hence none of their contract is on EPC mode. Copy of said Circular is also attached by them.

Taxability of works done for period 2010-11, 2011-12 and Apr-Jun 2012

30.9 As per submission made above, their services of construction of residential quarters, Jail, Raksha University and miscellaneous renovation works are all used primarily for non-commercial purposes and therefore fall under the exclusion carved in section 65(105)(zzzh) of the Finance Act 1994, therefore will not be taxable under Service tax. Therefore, after considering the above submission made by the Noticee it clearly evident the services provided to GSPHCL for the period prior to June 2012 is not chargeable under Service Tax.

30.10 The second aspect to be re-examined as narrated in the OIA by the Learned Adjudicating Authority is regarding the exemption benefit claimed by the noticee is regarding Exemption claimed under Entry 12 of Notification 25/2012 dated 20.06.2012

Taxability of works done for period Jul 2012 to March 2013 and 2014-15

It is clearly evident from the SCN and OIO, demand raised by the Learned Adjudicating Authority is spread cross F.Y. 2010-11 to F.Y. 2014-15. However, Service tax law was amended w.e.f. 1.07.2012 onwards whereby Negative list-based system was introduced along with it a mega exemption notification 25/2012-ST dated 20.06.2012 to provide for all exemptions. In total eleven (11) work order were issued by the GSPHCL to the appellant. Out of eleven work order, nine contracts mentioned at Sr. No. 1 to 9 of the lists were in relations for construction of police staff quarter. Of these nine (9) contracts, contract dated 09.08.2010 (Sr.No.8) covers period post exemption list and rest all other covers period of prior to exemption list. Contract dated 18.11.2010 (Sr.No.10) was related to construction of entrance gate, guest house, security cabin, flag post, utility room, electrical substation, vehicle parking etc. which pertains to pre-exemption list period. Contract dated 24.09.2013 (Sr.No.11) was related to renovation & furniture work at laboratory which pertains to post-exemption list period. Hence, the Learned Adjudicating Authority should consider effect of exemption-list introduced through Notification 25/2012 dated 20.06.2012. They have claimed exemption of the said Construction services provided to GSPHCL for period after 20.06.2012. For the reference Entry 12 of notification 25/2012-ST dated 20.06.2012 is reproduced as under:

12. *Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -*
- (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;*
 - (b) historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);*
 - (c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;*
 - (d) canal, dam or other irrigation works;*
 - (e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or*
 - (f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Act;*

30.11 Exemption Entry 12 (a) and (f) reproduced above cover the works done by them and therefore they are eligible for the said exemption. Since services provide by the Noticee stand exempted, question of paying tax under partial reverse charge mechanism doesn't arise.

30.12 The Noticee has paid amount of Rs.2,40,265/- in the nature of precautionary deposit. The Noticee has paid the said amount along with interest and penalty in the nature of precautionary deposit even though the no service tax was leviable on them. They are not liable to pay any service tax which is clearly evident from the submission made above. Considering the above representation made, any amount collected by the authority would therefore resemble amount collected without authority of law. Therefore, the amount paid by the noticee should not be considered as service tax but a mere deposit with the authority. The Noticee relies on the judgement of COMMISSIONER OF CENTRAL EXCISE (APPEALS), BANGALORE v/s KVR CONSTRUCTION - 2012 (7) TMI 22 - KARNATAKA HIGH COURT, wherein the Hon'ble High court states that when amount paid by the noticee was not charged to the person whom services are rendered and paid out of his own pockets when the fact that said services rendered itself was not chargeable under service tax needs to be refunded. The relevant portion of the judgment is reproduced as below:

13. According to the petitioner, above said amounts were paid under a mistaken impression that they were liable to pay such service tax and the amount of refund claimed by them was not charged by them and collected from the person to whom they rendered service. In other words, according to them, they have paid above said amounts under a mistaken notion that they were liable to pay even though they are not liable to pay by virtue of circular dated 17-9-2004 and accordingly sought for refund of the said amount.

14. While adjudicating the refund claim of petitioner, the adjudicating authority accepted the contention of petitioner and held the services rendered by petitioner were not eligible to service tax. As a matter of fact, the order of the Assistant Commissioner of Central Excise dated 19-11-2008 reads as follows:

"Thus, it is evident that if the building or the civil structure are for the use of organizations or institutions being established solely for the educational religious, charitable, health, sanitation or philanthropic purposes and not for the purpose of profit are not taxable, being non-commercial in nature. Since this clarification issued by the Board vide Circular No. 30/10/2004 dated 17-9-2004 is very clear on the issue, the construction services undertaken by M/s. KVR Construction is not taxable in nature and the assessee is not liable to pay any service tax and he has paid it under the misunderstanding of law. Since the amount collected by the Government is not at all payable by the assessee, this amount would resemble the amount collected without any authority of law Hence, the amount paid by them is not service tax but in the nature of deposit with the Government."

(Emphasis supplied)

30.13 Further reliance is also placed on the judgment in the case of M/s. National Building Construction Corporation Limited Vs Commissioner of Service Tax - 2015 (5) TMI 454 – CESTAT, New Delhi. Therefore, the amount deposited should be refunded to Noticee as the services rendered to the GSHPCL is not leviable under service tax regime prior to the introduction of exemption notification and the same was exempted as per Entry 12 of the Notification 25/2012 dated 20.06.2012 post introduction of the said notification. Alternatively, the amount already paid must be considered towards demand if any. The Noticee have already paid Tax amounting Rs.2,40,265/- paid vide challan no. 02202822310201500307 dated 23.10.2015 and paid Interest of Rs. 1,11,723 and penalty of Rs. 36,040 totaling to Rs. 3,88,028/-. They have also attached copies of challan. OIO in Para 30 acknowledges their submission where they have stated as under:

30. The Appellant further submitted that the service tax liability of Rs. 3,88,028/- towards services provided in relation to constructor of police housing quarters on or after 01.07.2012 is discharged with Interest & penalty before Issuance of SCN. The respective challan are attached by the Appellant with the reply.

30.14 However, OIO fails to take the payment made by the noticee in account and give a specific finding thereon. The same needs to be appropriated against the demand if any confirmed in this case. In Para 7.3 of the OIA has addressed the above matter and also substantiated that the adjudicating authority was silent on the appropriation on Rs.3,88,028/- paid the noticee vide Challan dated 23.10.2015 against the demand if confirmed any. The relevant para is reproduced as under:

7.3 Another argument put forth by the appellant is that OIO is silent on the appropriation of Rs.8,20,563/- paid by them vide Challan dated 23.10.2015, against the demand confirmed. I have examined para-30 of the OIO, wherein appellant's above contention is mentioned as part of their defence reply filed before the adjudicating authority, however, the impugned order is silent on this contention, though this matter was before the adjudicating authority. Therefore, this aspect also needs to be re-examined.

30.15 The Appellant during its submission has relied upon various judgments listed below:

- Shri S. Kadirvel Vs CCE & ST, Trichy 2018 (6) TMI 926 - CESTAT Chennai
- M/S. Sima Engineering Constructions, S. Rajangam, T.M. Saravanan, M/S. Mmarimuthugaudar & Sons Vs CCE, Trichy 2018 (5) TMI 405 - CESTAT Chennai
- Khurana Engineering Ltd. Versus C.C.E., Ahmedabad 2011 (21) S.T.R. 115 (Tri. - Ahmd.)

30.16 In this case, demand was raised on the noticee for providing services of construction of flats for Income Tax Department employees. Tribunal dropped the demand and held as under:

"We have already explained the submission of learned advocate in brief and as explained by him in this case, residential complex constructed by the appellant is meant for use by the Income Tax department to provide the same on rent to the employees and therefore, it is clearly covered by the explanation given for "Personal use" in the definition. In this case the CPWD has engaged the appellant for construction of residential complex for giving it on rent to the employees of Income Tax department and therefore this service cannot be included in the definition of residential complex services. It is basically the case of one department taking the help of another department to get the work done basically because of specialization of that department in preparing documents and get the work executed.

3. *We also find alternative submissions made by the learned advocate are to be sustained. The first alternative submission made was that the show cause notice was issued on 4-10-2007 whereas, the service tax was payable for the period from 16-6-2005 to 30-7-2007 and therefore, a portion of the demand is time barred. Even if a view is taken that CPWD is to be treated as separate entity, in our opinion appellant would be justified to entertain a belief that CPWD and Income Tax department are to be treated as part of the Govt. of India and therefore, services provide by him would not be liable to service tax. Further, as submitted by the appellant in his submission, the agreement also provides that in case of liability of any tax, the service receiver is liable to pay. In these circumstances, the appellants had no reason to resort to suppression or misdeclaration of the facts to avoid payment of service tax since if the service tax was liable, as per the contract, CPWD was liable to pay service tax. Under these circumstances, invocation of extended time limit cannot be justified in this case. Therefore, penalties imposed under various sections of Finance Act, 1994 also cannot be upheld"*

30.17 They further stated that in the instant case, the SCN has been issued on 14.10.2015 proposing to demand Service Tax for the period April, 2010 to March, 2015 invoking proviso to Sec. 73(1). It is submitted that demand for period April, 2010 to Sept, 2013 is time barred. Detailed submissions in this regard are made in the following paragraphs.

Proviso to Sec. 73(1) of The Act is reproduced below for reference:

*"Provided that where any service tax has not been levied or paid or has been short-levied or Short-paid or erroneously refunded by reason of—
(a) Fraud; or*

- (b) Collusion; or
- (c) Wilful mis-statement; or
- (d) Suppression of facts; or
- (e) Contravention of any of the provisions of this Chapter or of the rules made thereunder

*With intent to evade payment of service tax,
By the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted."*

30.18 In view of the clear language of the above proviso, it is necessary that there must be suppression of facts or wilful mis-statement with intent to evade payment of tax for invoking extended period of limitation. SCN vide its para 8 has proposed to invoke extended period of limitation on the grounds that:

- a. We have failed to make full disclosure of our tax liability in the returns.
- b. Had DGGI not investigated the matter, non-payment of service tax by us would have gone unnoticed.
- c. Both the above acts were committed with an intent to evade payment of tax.
- d. Accordingly, non-disclosure of the alleged 'Incentive income' in our ST3 return and uncovering thereof in investigation by the DGGI are reasons enough for establishing Suppression with intent to evade tax.

30.19 SCN fails to substantiate the intention to evade payment of tax at their end, so extended period cannot be invoked. In the case of Tata Consultancy Services Limited vs Commissioner, the Hon'ble Supreme Court held that Extended period not invocable where no evidence showing suppression of facts on part of assessee and Penalty not imposable when dispute relates to interpretation of statute. They further stated that the allegation of suppression is not supported by proper evidences in SCN. In the case of Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur, 2013 (288) E.L.T. 161 (S.C.), relied upon the case of Anand Nishikawa Co. Ltd v. Commissioner of Central Excise, Meerut, 2005 (188) E.L.T. 149 (S.C.), held that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. It also held that the Act contemplates a positive action which shows a negative intention of willful default. On the interpretation of the proviso, it was held that since it contemplates more serious cases, something more must be show, in comparison to ordinary default, to invoke the proviso.

30.20 No positive action shown by the department relating to intention to evade payment of taxes at their end. It is submitted that the SCN has not shown any positive act done by the Appellant which proves the intention of evasion of service tax. For this reason, itself the SCN has failed to justify the invocation of extended period under the proviso to Section 73(1) of the Act. The Appellant also places reliance on the following decisions Continental Foundation Jt. Venture v. CCE, Chandigarh-I, 2007 (216) E.L.T. 177 (S.C.):

The expression 'suppression' has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty.

When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement.

CCE, Mumbai IV v. Damnet Chemicals Pvt. Ltd., 2007 (216) E.L.T. 3 (S.C.):

In the circumstances, we find it difficult to hold that there has been conscious or deliberate withholding of information by the assessee. There has been no wilful misstatement much less any deliberate and wilful suppression of facts. It is settled law that in order to invoke the proviso to Section 11A (1) a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be wilful.

30.21 To conclude, SCN as well as the OIO has wrongly classified their services as Works Contract Services whereas correct classification would be as Construction of Complex. Further even if classification as WCS is accepted, their services fall under the exclusion given under it. It is submitted that the interest under the provisions of Section 75 of the Act is not recoverable since the demand of Service Tax itself is not payable. It is submitted that a bare perusal of Section 75 of the Act provides that person who is 'liable' to pay service tax as per the provisions of Section 68 of the Act, fails to pay service tax then the person is liable to pay interest at the prescribed rate. It is submitted that the Appellant is not liable to pay service tax based on the submissions made above. Thus, the interest is not recoverable from the Appellant since the service tax itself is not payable.

30.22 It is submitted that penalty under Sections 77 and Section 78 of the Act is not imposable since the service tax itself is not payable and the noticee has not contravened any of the provisions of the Act. For imposition of penalty under Section 78 one of the grounds, as is required for invoking the extended period of limitation must be present. They have already given a detailed submission to the effect that no such ground was present and hence penalty under Section 78 cannot be imposed. It is submitted that for imposing penalty, there should be an intention to evade payment of duty, or there should be suppression or concealment. The penal provisions are only a tool to safeguard against contravention of the rules. It is submitted that Appellant has always been and is still under the bona fide belief that there is no short payment of Service Tax and it was not required to proportionately reverse the CENVAT credit availed on the input services. Such bona fide belief was based on the grounds given above. Therefore, no penalty is imposable on the noticee. Moreover, to impose penalty the Department must show that the noticee evaded the payment of duty. It is submitted that there was no positive action on the part of the Appellant to evade payment of tax. In support of the above view, reliance is placed on the decision of the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. v The State of Orissa reported in AIR 1970 (SC) 253. The above decision of the Apex Court, was followed by the Tribunal in the case of Kellner Pharmaceuticals Ltd. Vs CCE, reported in 1985 (20) ELT 80, and it was held that proceedings under Rule 173Q are quasi-criminal in nature and as there was no intention on the part of the Appellant to evade payment of duty the imposition of penalty cannot be justified. The ratio of these decisions applies in all force to the present case. In the present case, there was no

intention to evade payment of tax. In view of the foregoing, no penalty can be imposed on the Appellant.

30.23 The SCN further proposes to impose penalty under Section 77 of the Act for the Appellant's alleged failure to assess correct tax and file correct Service tax returns. It is submitted that the Appellant has indeed assessed its tax liability and discharged the same as per the provisions of the Act. It is further submitted that the Appellant registered itself with the Service Tax Department and has regularly paying Service tax and filing its ST-3 Returns regularly. Therefore, penalty is not imposable under Section 77 as it has not contravened any provision of the Act or the Rules made thereunder. In the present case, the OIO has imposed penalty under Section 78 of the Act. It is humbly submitted that since there is a specific provision available viz. Section 76 and 78 for the alleged violation on part of the Appellant, there can be no simultaneous proposal for imposition of penalty under Section 77, a residuary penalty provision. The OIO has also imposed penalty under Section 78 of the Act. It is to be noted that Section 78B has been inserted vide Section 115 of the Finance Act, 2015 by way of transition provision. Section 78B of the Finance Act, 2015 states that in case a SCN has been served under Section 73(1) but no order has been passed before the date on which the Finance Bill, 2015 receives the assent of the President, (i.e. 14.05.2015) then the provisions of Section 76 & 78 as amended by the Finance Act, 2015 shall be applicable. In view of the express language of Section 78, it is submitted that for imposition of penalty under this Section, all the ingredients of invocation of extended period are required. It is seen that the aforesaid penalty is leviable only in cases of fraud, suppression of facts, wilful mis-statement, etc. with an intention to evade service tax. Thus, penalty under Section 78 of the Act is proposed only when an assessee commits any positive act for evading service tax. Mere failure to disclose or declare would not amount to 'suppression'.

3.1 Reliance in this regard can be placed on the case of:

- Anand Nishikawa Co. Ltd. v. C. of Central Excise, Meerut (Supra)
- Collector v. Chemphar Drugs & Liniments — 1989 (40) E.L.T. 276 (S.C.);
- Padmini Products v. Collector of Central Excise, Bangalore (Supra);
- Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara - (2005) 2 SCC 168 = 2005 (179) E.L.T. 3 (S.C.);
- Pahwa Chemicals Pvt. Ltd. v. Com. — 2005 (189) E.L.T. 257 (S.C.)
- Uniworth Textiles Ltd. v. Com. — 2013 (288) E.L.T. 161 (S.C.)

30.24 It is submitted that for imposing penalty, there should be an intention to evade payment of tax, or there should be suppression or concealment. The Appellant submits that there is no suppression or concealment on behalf of the Appellant. The Appellant was cooperative with the Department during the Audit and communicated all the information required by the Department. It is submitted that the penal provisions are only a tool to safeguard against contravention of the rules. It is submitted that the Appellant has always been and is still under the bona fide belief that it is not liable to pay service tax. Such bona fide belief was based on the grounds given above. The Appellant had no intention to evade payment of service tax as mentioned in the grounds above. Therefore, no penalty is imposable on the Appellant. It is submitted that penalty under Section 78 of the Act can be imposed only for

reasons identical to those required for invoking extended period of limitation. As discussed at length above, the Appellant has never suppressed any fact with an intention to evade payment of service tax. Therefore, penalty under Section 78 of the Act is not imposable. In the present case, the Appellant was of the bona-fide belief that it was not liable to pay service tax, which is based on submissions made above. Therefore, there was reasonable cause for failure, if any, on part of the Appellant to pay service tax on the incremental value. Hence, in terms of Section 80, penalties cannot be imposed under Sections 77 & 78 of the Act. In this regard, reliance is placed on the following judgments:

ETA Engineering Ltd. vs. CCE, Chennai, 2004 (174) E.L.T 19 (Tri-LB)
 Flyingman Air Courier Pvt. Ltd. vs. CCE 2004 (170) ELT 417 (Tri.- Del.)
 Star Neon Singh vs. CCE, Chandigarh, 2002 (141) ELT 770 (Tri. - Del)

30.25 Thus, penalty proposed under Section 77 and 78 and interest under Section 75 of the Act is liable to be dropped. The Appellant would rely on the all the submission and judgements submitted with all the authorities till date as well as would like to rely on the additional case laws which are provided here as under:

RD CONTRACTOR & COMPANY VERSUS COMMISSIONER OF CENTRAL
 EXCISE & ST, ANAND - 2023 (2) TMI 946 - CESTAT AHMEDABAD,

SHRI S. KADIRVEL VERSUS CCE & ST, TRICHY

M/S. SIMA ENGINEERING CONSTRUCTIONS,

S. RAJANGAM, T.M. SARAVANAN,

M/S. MARIMUTHU GOUNDER & SONS VERSUS CCE, TRICHY.

DH PATEL VERSUS C.C.E. & S.T. -SURAT-I - 2023 (4) TMI 920 - CESTAT
 AHMEDABAD

DR MAKWANA, KR MAKWANA, TR PRAJAPATI VERSUS C.C.E. & S.T. -
 VADODARA-I - 2023 (8) TMI 348 - CESTAT AHMEDABAD

SHANTI CONSTRUCTION VERSUS COMMISSIONER OF CENTRAL EXCISE &
 ST, RAJKOT - 2023 (7) TMI 1019 - CESTAT AHMEDABAD

RIDDHI SIDDHI CONSTRUCTION VERSUS C.C.E. & S.T. -VADODARA-II - 2023
 (5) TMI 340 - CESTAT AHMEDABAD

AMPLE CONSTRUCTION COMPANY VERSUS COMMISSIONER OF CENTRAL
 EXCISE & ST, RAJKOT - 2023 (7) TMI 1021 - CESTAT AHMEDABAD

In view of the above submissions and judgements, the appellant request to set aside the service tax demand as stated in the SCN No. STC/4-46/O&A/15-16 dated 14.10.2015 and grant the necessary reliefs.

PERSONNAL HEARING

31. In the instant case, personnel hearing was granted to the noticee on 26.10.2023 and Shri Nitesh Jain, C.A., duly authorised representative, attended the P.H. on behalf of the noticee. He reiterated their written submission filed on 21.09.2023 and requested to decide the SCN on merits.

DISCUSSION AND FINDINGS

32. I have carefully gone through the subject show cause notice, submissions made by the noticee in their written replies as well as during the course of Personal Hearing held before my predecessor, copies of work agreements made between M/s.GSPHCL and the noticee, other documents / evidences available on record and OIA passed by the Com(A) dated 08.02.2022. On perusal of the said documents, I find that the moot issues, as ordered by the Com(A), to be decided in the present proceedings are:

i) Whether the Income of Rs. 15,80,28,991/- received by the noticee, contract wise, from M/s Gujarat StatePolice Housing Corporation Limited during the period from 2010-11 to 2014-15 should be considered as Taxable Income for the purpose of levy of Service Tax under the category of "Work Contract Service" falling under Section 65(105)(zzzza) of the Finance Act, 1994 up to 30.06.2012 (pre negative list regime)and to be counted as "Service" in terms of Section 65B(44) read with Section 65D of the Finance Act, 1944 with effectfrom 01.07.2012 onwards(post negative list regime);

ii) Whether the Service Tax amounting to Rs.57,67,136/- (*inclusive of Edu. Cess+HSEC*)(Rupees Fifty Seven Lakhs Sixty Seven Thousand One Hundred Thirty Six only) on the aforementioned Taxable Income of Rs. 15,80,28,991/- received during the Year from 2010-11 to 2014-15 demanded and proposed to recover from them under proviso to Section 73(1) read with Section 68 of the Finance Act, 1994, by invoking extended period of five years is justified.

iii) Appropriation of Rs.8,20,563/- paid by the notice vide challan dated 23.10.2015 against the confirmed demand, if any.

33. In this connection, I have gone through the above referred documents with regard to instant issue and find that M/s Sorath Builder have provided construction services under works contract service to the following Government Bodies:

- a. Road and Building Department, Government of Gujarat.
- b. Navsari Agricultural University.
- c. Gujarat State Land Development Corporation Limited.
- d. Gujarat State Police Housing Corporation Limited.
- e. Narmada Water Resources.
- f. Western Railways.

34. It was also noticed that M/s Sorath Builder, had neither paid any service tax for providing taxable service under the works contract service in respect of the above mentioned clients nor filed the ST-3 returns for the year 2014-15 which were due to be filed by 25.10.2014 and 25.4.2015 (half yearly returns). Based on reconciliation of the figures of taxable income reflected in the Books of Accounts & 26 AS, the service tax liability, in respect of services provided to Gujarat State Police Housing Corporation Limited, works out to be Rs. 57,67,136/- for the period from 2010-11 to 2014-15, under the category of works contract service, as detailed in the table below:

Year	Contract Income	Exempted Income	Net Taxable Income	Effective Rate of Service Tax	Cum Duty Ser Tax Liability (a)	Liability as per Partial RCM (b)	Total Service Tax payable (a+b)
2010-11	74369310	0	74369310	4.120	2942773	N.A.	2942773
2011-12	64403789	0	64403789	4.120	2548440	N.A.	2548440
2012-13 (Apr to Jun)	0	0	0	0	0	N.A.	N.A.
2012-13 (Jul to Mar)	15509689	0	15509689	4.944	0	201805	201805
2013-14	0	0	0	4.944	0	0	0
2014-15	3746203	0	3746203	4.944	0	74118	74118
Total	158028991	0	158028991		5491213	275923	5767136

35. In the instant case, the Show Cause Notice alleges that M/s Sorath Builders has provided services of construction under "Work Contract Services", which is defined as taxable service under sub-clause (zzzza) of clause (105) of Section 65 of the Finance Act, 1994. However the noticee claimed that they are not covered under the works contract service but under construction of complex services. They also claimed that even if the services provided by them are classified under Works Contract Services, they are not liable to pay any service tax as the services provided by them are not for the purpose of commerce. Therefore they are not liable to pay any service tax in this regard. In this connection, I would like to go through the definition of works contract service which reads as under:

36. As per the provision of section 65(105) (zzzza) of the Finance Act, 1994, the term "Work Contract services" defined is reproduced below:

(A) Prior to 01.07.2012, taxable service in respect of works contract was defined under section 65(105) (zzzza) which is reproduced below

"Taxable Service" means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

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

(iii) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(iv) such contract is for the purpose of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(g) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(h) construction of a new residential complex or a part thereof; or

(i) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(j) turnkey projects including engineering, procurement and construction or

(k) commissioning (EPC) projects;

37. I find that upto to 30.06.2012, the services rendered by the noticee appeared classifiable under category of "Work Contract Service" as defined under Section 65(105)(zzzza) of the Finance Act, 1994 and hence they were liable for payment of Service Tax as a provider of services. From 01.07.2012, since there is no service wise classification due to introduction of Negative List and since the activities carried out by the noticee appeared to fall under the purview of definition of "Service" in terms of Section 66B(44) read with Section 66D of the Finance Act, 1994 and since the activities were not covered under negative list nor under any Exemption Notification, noticee is liable to pay Service Tax for the services provided or received by them after 01.07.2012 also.

38. In this connection, I have gone through the reply to SCN received on 21.09.2023 wherein the noticee has submitted copies of work order for construction of police staff residential quarter and other constructions as detailed below: (Amt.in rupees)

Sl.No	date	work	Pre negative list period	Post negative list period	Total
1	25.02.2009	Construction of police staff residential quarter	81,64,525	0	81,64,525
2	25.02.2009	do	1,00,58,069	0	1,00,58,069
3	25.02.2009	do	28,67,039	0	28,67,039
4	25.02.2009	do	19,61,713	0	19,61,713
5	12.08.2009	do	92,73,937		92,73,937
6	25.03.2010	do	1,08,21,391		1,08,21,391
7	21.06.2010	do	1,20,67,797		1,20,67,797
8	09.08.2010	do	1,45,59,709	1,01,99,974	2,49,59,683
9	09.08.2010	do	3,09,92,564	0	3,09,92,564
10	18.11.2010	Construction work at Central Jail at Lajpore, Surat Dist.	4,31,16,070	0	4,31,16,070
11	24.09.2013	Renovation of pesticide laboratory at G'nagar	0	37,46,203	37,46,203
		TOTAL	14,40,82,814	1,39,46,177	15,80,28,991

39. With regards to this, as directed in the OIA, I have gone through all the above mentioned 11 agreements and find that out of eleven work orders, nine contracts mentioned at Sr. No. 1 to 9 of the lists were in relation to construction of police staff quarter. Of these nine (9) contracts, contract dated 09.08.2010 (Sr.No.8) covers period post negative list regime list and rest all other covers period of prior to negative list regime. Contract dated 18.11.2010 (Sr.No.10) was related to construction of entrance gate, guest house, security cabin, flag post, utility room, electrical substation, vehicle parking etc. which pertains to pre-negative list regime. Contract dated 24.09.2013 (Sr.No.11) was related to renovation & furniture work at laboratory which pertains to post-negative list regime.

40 The said noticee have also provided ledger account of each project wherein the total amount received has mentioned. They have also field copies of audit report of the service receiver Gujarat State Police Housing Corporation Ltd. On perusal of the said records, I find that the assessee has provided works contract services to the said entity i.e. Gujarat State Police Housing Corporation Ltd. for construction residential quarters for police personnel at various places in Gujarat State and other civil construction works and have received payments from the work completed by them. Now I would like to go through the core issue whether the Income of Rs. 15,80,28,991/- received by the noticee from M/s Gujarat State Police Housing Corporation Limited during the period from 2010-11 to 2014-15 should be considered as Taxable Income for the purpose of levy of Service Tax under the category of "Work Contract Service" falling under Section 65(105)(zzzza) of the Finance Act, 1994 up to 30.06.2012 and to be counted as "Service" in terms of Section 65B(44) read with Section 65D of the Finance Act, 1944 with effect from 01.07.2012 onwards;

41. Section 65 (105) (zzzza) of the Finance Act,1944 defines work contract services read as under:

(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

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

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out, —

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metalwork, thermal insulation, sound insulation, fire proofing or waterproofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

Term Residential complex is defined in section 65 (91a) as under:

(91a) "residential complex" means any complex comprising of—

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

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

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

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;]

Further, in this connection, I would like to reproduce herewith the relevant portion of the said Notification :

"Notification 25/2012 ---

.....the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

1.....

2.....

3.....

.....

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;]

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or

(f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Act;”

42. However, the exemption to Entry no. (a), (c) and (f) was withdrawn with effect from 01.04.2015 vide notification 06/2015-ST dated 01.03.2015. Hence the assessee is not eligible for exemption under this entry from 01.04.2015. Further vide notification 09/2016 -ST dated 1.3.2016 a new entry 12 A was inserted in notification 25/2012-ST dated 20.06.2012 which read as under. –

“12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or

(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act;

under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date:

provided that nothing contained in this entry shall apply on or after the 1st April, 2020;”

vide this entry the exemption was partially restored but the condition specifically stated that the contract to provide the said service should have been entered into before 1.03.2015 and appropriate stamp duty is also to be discharged before 1.3.2015. According to which the services provided to Government, a local authority or a governmental authority by way of erection, construction, maintenance, repair, alteration renovation or restoration of a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession is exempted from the ambit of service tax.

43. Now, I would like to discuss the taxability of services provided in relation to construction of police quarters for the period pre negative list regime and post negative list regime. On perusal of the agreements for construction of police quarters between Gujarat State Police Housing Corporation Limited and the noticee, I find that out of the total 9 contracts for construction residential quarter, 8 contracts were exclusively for pre negative list period and one covers both the periods. In this connection, I have gone through the relevant provisions and find that a specific entry for construction of residential buildings is provided for in the statute. Further this entry specifically excludes residential complex constructed for personal use. The term ‘personal use’ has

been defined to include buildings given for use to another person on rent or without consideration also. Herein this case the residential complex constructed by the appellant is meant for use by the Gujarat State Police Housing Corporation Ltd to provide the same to the police personnel and therefore it clearly covered under personal use in the definition. In the instant case the GSPHCL has engaged the noticee for construction of residential complex for giving it to police personnel therefore the service cannot be treated as taxable service upto 30.06.2012.

44. As far as the construction of residential complex by the noticee after 01.07.2012 is concerned, I find that the said services are covered under clause 12 (a) of exemption Notification No.25/2012 dated 20.06.2012 wherein the construction of civil structure for the Government or Govt. agency is exempted from service tax. In the instant case, I find that M/s.GSPHCL is a 100% Govt. undertaking and therefore I consider it as Government authority and therefore the said services provided to them are not covered under the service tax.

45. Further, on perusal of contract dated 18.11.2010 shown at Sl.No. 10 of the list, I find that the noticee has engaged in the construction of civil work at central jail at Lajpore , Dist Surat. On perusal of the definition of works contract service, I find that construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry is taxable under service tax ambit. However, in the instant case, the construction of civil structure is related to central jail at Lajpore which is not intended for any commerce or industrial purpose therefore the said service provided by the noticee is also not covered under the ambit of service tax as the service received M/s.GSPHCL is an 100% owned entity of Government of Gujarat and therefore, I find that the said construction is not for the purpose of commerce or industry. Therefore the said services provided is also covered under the service tax net clause 12 (a) of exemption Notification No.25/2012 dated 20.06.2012 and therefore exempted from service tax.

46. Now I would like to examine the agreement shown at Sl. No.11 i.e. Renovation and furniture work at pesticide laboratory, Gandhinager. On perusal of the work order dated 24.09.2013, I find that work was allotted by M/s. GSPHCL to the notice involving an amount of Rs.37,46,203/-. As the said work is also for renovation and furniture work of pesticide laboratory for Govt. of Gujarat and also the service receiver is government authority, i.e. M/s.GSPHCL, I find that the said services are also exempted in view of clause 12(a) of Notification No.25/2012 dated 20.06.2012 as the said renovation and furniture work is for use other than for commerce, industry or any other business or profession. Therefore the said service is also not covered under the ambit of service tax and therefore no service tax is payable by the notice on this amount also.

47. In this connection, I have gone through the submissions made by the noticee during the course of adjudication and on perusal of the annual report of the Gujarat Police Housing Corporation Limited, I find that Gujarat State Police Housing Corporation Ltd. was incorporated on 1/11/1988 under Companies Act, 1956. This is a Government Company with 100% share holding subscribed by the State Government. The said corporation established by the Government of Gujarat to undertake construction of

residential, non-residential and all others type of buildings required for Gujarat Police, Jails, Home Guards and for other in the state of Gujarat, to engage in the business of builders, contractors, engineers, architects, surveyors, estimators and designers in respects of all type of police buildings, office accommodations, residential buildings, administrative offices etc. including maintenance thereof, Introducing innovative ideas for buildings and designs, to undertake all kinds of construction & allied works as also welfare activities required for the Gujarat Police and others entrusted by the Government from time to time, to carry out the above works departmentally or through approved contractors or both and to formulate and various housing schemes for serving and retired employee in the Police Department, Government of Gujarat.

48. To fulfill their obligations M/s.Gujarat State Police Housing Corporation Limited have engaged various service providers for carrying out construction of residential quarters for the police personnel at various places of Gujrat state. For which they are engaged approved contractors as envisaged in their agenda. Accordingly, the said notice was also awarded contract for construction of various residential quarters and other works, as mentioned above, for Gujarat State Police Hosing Corporation Limited. As far as the taxability of the services provided to the said Govt. entity is concerned, on perusal of the annual report of the said firm, I find that the said entity is constituted by the Govt.of Gujarat with 100% share owned by the Government of Gujarat and therefore I consider M/s. Gujarat State Police Hosing Corporation Limited as a Government authority. Accordingly, the services provided to the said organization is exempted from the purview of services tax for the period prior to introduction of negative list regime i.e.01.07.2012.

49. I further find that 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 taxable service and the service provided by them are not mentioned in the negative list given under Section 66D of the Finance Act, 1994. The assessee in their reply to SCN are not contending that the taxable nature of service provided by them however they are contending that the services provided by them are exempted by Mega Notification No.25/2012 dated 20.06.2012 as amended, as they are providing services to departments of state government and other government agencies.

50. In view of the above, I find that the services provided by the assessee falls under the category of taxable service prior to introduction of Negative List as well as post introduction of Negative List as the services provided by the assessee does not fall under category of negative list of services under the provisions of Section 66D of the Finance Act.

51. Further, the assessee vide their submissions stated that during the period under dispute, their entire contract income or contract receipt is in respect of services provided by way of Works Contract Services for construction of residential buildings and other construction of civil structures to Gujarat State Police Housing Corporation Ltd as an approved contractor. The said services is exempted from levy of whole of service tax leviable thereon under Sl. No. 12 of Notification No. 25/2012-ST dated 20-06-2012.

52. The assessee has submitted the copies of work orders, a number of invoices and copies of ledger accounts in support of their claim. I have gone through the copies of invoices and copies of ledger accounts furnished by the assessee and find that the assessee has provided the above mentioned services to the Gujarat State Police Housing Corporation Ltd. I have also gone through the Notification No. 25/2012-ST wherein I find that the assessee has rightly claimed the benefit of the said notification as they have provided the above referred services as envisaged in Notification No.25/2012 dated 20.06.2012 which are rightly provided to Gujarat State Police Housing Corporation Ltd being a Government agency as envisaged in the Finance Bill, 1994 and therefore the said services of provided to them by way of for construction of residential quarters and other buildings are exempted from the ambit of service tax by way of entry No.12(a) of exemption Notification No.25/2012 dated 20.06.2012 and accordingly the assessee is not liable to pay service tax on the amount credited in their account for providing these service to Gujarat State Police Housing Corporation Ltd .

53. The assessee has also relied upon the following case laws in their favour:

1. Shri S Kadirvel Vs CCE *& ST, Trichy 2018(6) TMI 926 -CESTAT , Chennai
2. M/s.Sima Engineering Constructions Vs CCE Trichy 2018 (5) TMI 405 - CESTAT Chennai
3. Khurana Engineering Ltd Vs.CCE, Ahmedabad 2011(21)STR 115 (Tri-Ahmd)
4. Shri Venketeshwara Eng.Corporation 2012 (28) STR 73 (Comr.Appeal)
5. Shri RD Contractor & Company Vs.Com , CE & ST, Anand
6. DH Patel Vs CCE & ST, Surat-1 2023 (4) TMI 920 CESTAT Ahmedabad
7. Shanti Construction VS.CCE & ST, Rajkot 2023 (7) TMI 1019
8. Ridhi Sidhi Construction Vs CCE & ST, Vadodara II 2023 (5) TMI 340 CESTAT Ahmedabad.
9. Ample Construction Company Vs CCE & ST, Rajkot 2023 (7) TMI 1021 - CESTAT, Ahmedabad

54. In this connection, I have gone through the case laws cited by the said assessee and find that most of the case laws are relevant in this matter also. They generally discuss about the taxability of the services provided to Government agencies like CPWD, Police Housing Corporation of Tamil Nadu, M/s.GSPHCL, Gujarat and are taken the view that the services provided to Govt. and other government sponsored agencies like GSPHCL are exempted from the ambit of service tax. The taxability of the services provided to M/s.Gujarat State Police Housing Corporation Limited has also been discussed and decided in recent decisions in the case of M/s.Ample construction Company Vs Commissioner of Central Excise & Service Tax, Rajkot 2023(7) TMI 1021 CESTAT, Ahmedabad and Sahnti Construction VS Commissioner of Central Excise & ST, Rajkot 2023 (7) TMI 1019 which I reproduce as under as these case laws are related to services provided to M/s.Gujarat State Police Housing Corporation Limited, the noticee in the instant case.

55. In this connection, I have gone through the decision of Hon'ble CESTAT, Ahmedabad in the case of M/s.Shanti Construction Vs Commissioner of Central Excise & ST, Rajkot, the Hon'ble CESAT vide Final Order No.11556-

11558/2023 dated 24.07.2023, after considering various other decisions and Circular No.80/10/2004-ST dated 10.09.2004, the matter concluded as follows

"The issue involved in the present case is whether the appellant is liable to pay service tax for construction of residential complex for Gujarat State Police Housing Corporation Limited

In view of the above, since the facts of the matter are similar to the decisions mentioned above, we are of the view that the service provided by the appellant are to establishments and organisations which are of non commercial or non industrial nature and therefore, the construction, renovation, repair work undertaken by them fall under the exclusion for definition of commercial or industrial construction service, hence we hold the appellants are not liable to pay any service tax on such activity." Accordingly the Hon'ble CESTAT allowed the appeal of the assessee.

56. I have also gone through the case law of M/s.Ample construction Company Vs Commissioner of Central Excise & Service Tax, Rajkot reported in 2023(7) TMI 1021 CESTAT, Ahmedabad and find that the issue of levy of service tax on the services of construction of residential complex for Gujarat State Police Housing Corporation was decided in favour of the assessee. The relevant portion is as under:

" The issue involved in the present cae is whether the appellant is liable to service tax on the service of construction of residentaila complex for Gujarat State Police Housing Corporation.

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- 2.
- 3.

4.we find that the issue is no longer res-integra as in the various judgements which bear identical facts,, this Tribunal has held that the construction of residential complex provided by the contractor to the State Police Housing Corporation is not liable to service tax.....

69. *From the above decision it can be seen that construction of resident complex for State Police Housing Corporation was held to be non taxable. Considering the above decision, demand in the present case is not sustainable. Accordingly the impugned order is set aside and the appeal is allowed."*

57. I further find that in the case of Ridhi Sidhi Construction Vs CCE & ST, Vadodara-II 2023 (5) TMI 340 – CESTAT Ahmedabad, the Hon'ble CESTAT held that *"most of the repair , renovation, construction work under taken by the appellant is primarily for Vadodara Municipal Seva Sadan, M.S.Univesrity and for police Department. These organisations are no way concerned with any commercial or industrial activity and therefore the activity undertaken by the appellant will fall under the exclusion clause of the definition of commercial or industrial construction service"*.

Similar view was taken by the Hon'ble CESTAT, Ahmedabad in the case DH Patel Vs.CCE & ST, Surat-I reported in 2023 (4) TMI 920 - CESTAT, Ahmedabad wherein it was held that

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4.4"we have carefully considered the submissions made by both the sides and perused the record. We find that lower authorities have contended that Gujarat State Police Housing Corporation Limited is not a Government of Gujarat organisation whereas the same is an independent company registered under the company's Act, therefore service provided to Gujarat State Police Housing Corporation Ltd is liable to service tax. We find that Gujarat State Police Housing Corporation Ltd is 100% owned by Govt.of Gujarat under the Ministry of home affairs therefore the same was held to be a government organisation invarious judgements"

58. On perusal of the above referred case laws, I find that these case laws are recently pronounced wherein it was concluded that the services provided to M/s.Gujarat State Police Housing Corporation Limited is are exempted from service tax and accordingly no service tax is required to be paid by the service providers for the services provided to the noticee.

59. It is also pertinent to mention here that the taxability of the building has been clarified by the CBIC vide Circular No.80/10/2004-ST dated 10.09.2004 wherein it was clarified that:

Construction services (commercial and industrial buildings or civil structures)

iv) 13.2 *The leviability of service tax would depend primarily upon whether the building or civil structure is "used, or to be used" for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. **Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.***

60. Accordingly, I find that the services provided to M/s.Gujarat State Police Housing Corporation Limited are not subject to service tax by considering the noticee as a Government authority as the Government of Gujarat is holding 100% share of the noticee firm.

61. In view of the above facts and findings, I find that the Income of Rs. 15,80,28,991/- received by the noticee, contract wise, from M/s Gujarat

State Police Housing Corporation Limited, being a government authority, during the period from 2010-11 to 2014-15 is not to be considered as Taxable Income for the purpose of levy of Service Tax under the category of "Work Contract Service" falling under Section 65(105)(zzzza) of the Finance Act, 1994 up to 30.06.2012 (pre negative list regime) and to be counted as "Service" in terms of Section 65B(44) read with Section 65D of the Finance Act, 1944 with effect from 01.07.2012 onwards (post negative list regime);

62. I further find that, as the income of Rs.15,80,28,991/- is not taxable, the Service Tax amounting to Rs.57,67,136/- (inclusive of Edu. Cess+HSEC) (Rupees Fifty Seven Lakhs Sixty Seven Thousand One Hundred Thirty Six only) demanded on the aforementioned value of Rs. 15,80,28,991/- received during the Year from 2010-11 to 2014-15 is also not recoverable from the notice and accordingly the demand of Rs.57,67,136/- is liable to be dropped.

63. The third point to be discussed is the appropriation of Rs.8,20,563/- paid by the notice vide challan dated 23.10.2015 against the confirmed demand, if any. In this connection, I have gone through the reply to SCN wherein it is claimed that they have paid Rs.2,40,265/-, interest of Rs.1,11,723/- and penalty of Rs.36,040/- (Total Rs.3,88,028/- vide challan No.02202822310201500307 dated 23.10.2015 and have also attached copy of the said challan. They stated that the original OIO has addressed the matter, however was silent on the appropriation of the said amount of Rs.3,88,028/-. In this regard, the Com(A) in the instant OIA, stated as under:

7.3 Another argument put forth by the appellant is that OIO is silent on the appropriation of Rs.8,20,563/- paid by them vide Challan dated 23.10.2015, against the demand confirmed. I have examined para-30 of the OIO, wherein appellant's above contention is mentioned as part of their defence reply filed before the adjudicating authority, however, the impugned order is silent on this contention, though this matter was before the adjudicating authority. Therefore, this aspect also needs to be re-examined.

64. In this connection, I have gone through the Para 30 of the OIO No.35/JC/MT/2020-21 dated 19.01.2021 and find that the said amount is mentioned as Rs.3,88,028/- only. The notice in their reply also claimed that they have paid Rs.3,88,028/- vide challan No. No.02202822310201500307 dated 23.10.2015, against the SCN issued, as a precautionary deposit. As they have no liability to pay service tax, they requested to refund the amount as the services provided to M/s.GSHPCL is not leviable to service tax as the service is exempted from payment of service tax. They have also relied upon the case law of CCE (A) Bangalore Vs KCVR Construction and M/s.NBCC Ltd Vs Commissioner of Service Tax reported in 2015 (5) TMI 454 - CESTAT, New Delhi.

65. In this connection, I have gone through the facts of this issue and find that the notice has paid an amount of Rs.3,88,028/- vide challan No. No.02202822310201500307 dated 23.10.2015 on issuance of SCN dated 14.10.2015. In this connection, I have gone through the Para 7(e) of the SCN herein it was stated that "*(f) M/s.Sorath builders vide letter dated 05.10.2015 submitted the sample copies of RA Bills issued to their clients and it is noticed that they are not charging the service tax separately, and also as stated by Shri Dineshkumar L Patel in his recorded statement on 21.09.2015, therefore service tax is worked out considering the taxable value inclusive of service tax and same is worked as it is cum duty tax liability*"

66. On perusal of this aspect of the SCN, I find that the amount of Rs.3,88,028/- paid by the assessee after issuance of SCN is not collected from their customer i.e.GSPHCL. I have also considered the service provided by the notice as exempted services and therefore they are not required to pay any service tax and therefore noticee is eligible for refund of Rs.3,88,028/- paid by them during the course adjudication proceedings. The assessee has also produced copies of challan wherein it is mentioned that the amount of Rs.2,40,265/- is paid against Works Contract Service, Rs.1,11,723/- against interest and Rs.36,040/- against penalty. Thus the total amount of Rs.3,88,028/- is liable to be refunded to be noticee as they have no liability to pay service tax alongwith interest or penalty in these services provided by them as discussed above.

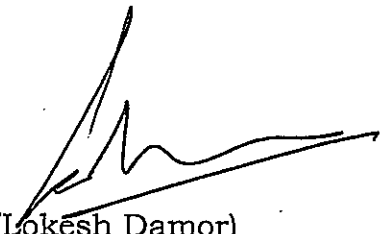
67. I further find that as there is no service tax is recoverable from the noticee, the amount of Rs.3,88,328/- paid by the noticee vide challan No No.02202822310201500307 dated 23.10.2015 is required to be refunded to the noticee as discussed above. I further find that, the demand itself is not sustainable the question of charging interest u/s.75 or imposing penalty u/s.77 & 78 of the Finance Bill, 1994 does not arise.

68. Accordingly, I pass the following orders:-

ORDER

- i) I hereby order to drop proceedings initiated for recovery of service tax of Rs.57,67,136/-along with interest and penalties against M/s.Sorath Builders vide SCN No.STC/04-46/OA/15-16 dated 14.10.2015.
- ii) I order to refund Rs.3,88,328/- paid by the noticee vide challan No No.02202822310201500307 dated 23.10.2015 in view of the discussion made herein above.

69. Accordingly the Show Cause Notice No.STC/4-46/OA/2015-16 dated 14.10.2015 is disposed off.



(Lokesh Damor)

Joint Commissioner
Central GST & Central Excise
Ahmedabad North.

F.No:STC/4-46/OA/2015-16

Dtd .12.12.2023.

BY R. P. A. D./HAND DELIVERY

To,
M/s Sorath Builders.
92, City Centre, Near Swastik Cross Road,
Navrangpura, Ahmedabad 380 009.

Copy to:-

- (1) The Commissioner, Central GST & Central Excise, Ahmedabad North.
- (2) The Deputy Commissioner, CGST & Central Excise, Div.-VII, Ahmedabad-North.
- (3) The Superintendent, Range-I, Div-VII, CGST Ahmedabad-North.
- ✓(4) The Supdt.(Systems)., CGST & C.E., Ahmedabad North for uploading on the website.
- (5) Guard File.