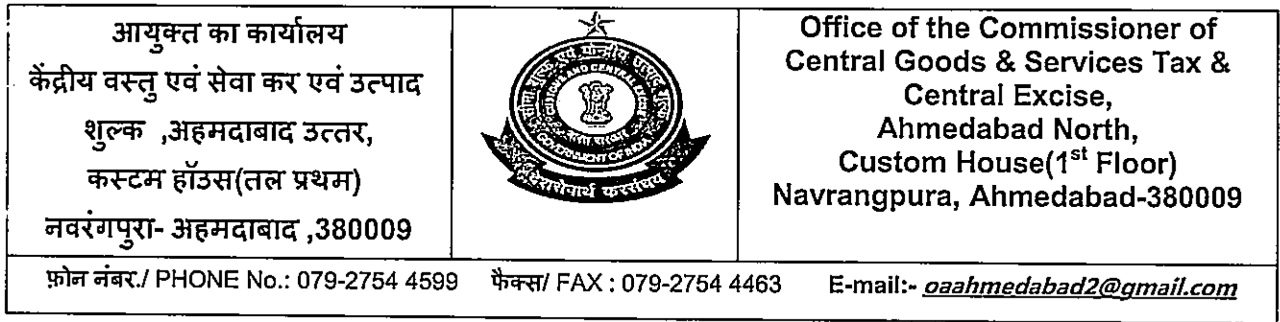
आयुक्त का कार्यालय
केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर,
कस्टम हॉउस(तल प्रथम)
नवरंगपुरा- अहमदाबाद ,380009

Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009

फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/4-22/O&A/12-13

आदेश की तारीख / Date of Order : 31.01.2020

जारी करने की तारीख / Date of Issue : 03.02.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / **Dr. BALBIR SINGH**

आयुक्त / **COMMISSIONER**

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–18-22/2019-20

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रंजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम

एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।(

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide following Show Cause Notices issued to M/s. Trio Elevators Co.(India) Ltd., 404, Shivam Complex,Near Bhuyangdev Cross Road, Ahmedabad.

Sr. No.	Show Cause Notice File No.	Date
01	STC/4-22/O&A/12-13	23.10.2012
02	STC/4-82/O&A/13-14	13.05.2014
03	STC/4-32/O&A/2015-16	16.10.2015
04	STC/04-45/O&A/16-17	07.03.2018
05	STC/15-09/OA/2019	05.04.2019

Brief Facts of the case:

M/s. Trio Elevators Co.(India) Ltd., 404, Shivam Complex, Near Bhuyangdev Cross Road, Ahmedabad, (hereinafter referred to as "the said assessee" for the sake of brevity) are providing the service under the categories of Maintenance and Repairing Services, Erection, Commissioning and Installation Services which are taxable services as defined under sub clauses (105) (zzg) and (zzd) of section 65 of the finance act,1994 and registered with Range-VI Service Tax, Division-II, Ahmedabad being alotted Service Tax Registration No. AACCT4923EST001 under section 69 of the Finance Act, 1994 (32 of 1994). The said assessee is also availing cenvat credit.

2. During the course of audit and verification of the records, it had been noticed that:

(i) the said assessee is providing taxable services for which they have got registered under the category of 'Erection, Commissioning & Installation Services' and also engaged in 'selling of parts and materials of lift'. The assessee is getting 'lift' manufactured/ fabricated as per the designs and specifications of the clients which are to be erected, installed and finally commissioned i.e lift is installed at the premises of clients/ customers along with supply of lift materials, which are being sold to the customers/clients of the assessee as per works contract entered with the buyer.

(ii) On verification of the sample invoices and contract related thereto, it had been noticed that the assessee is issuing separate bills for materials sold (on which VAT is paid) and separate bills relating to 'services charges' for erecting, commissioning and installing the lift'. They are paying service tax on the 'service charge portion' only by way of claiming benefit of notification no.12/2003- ST dated 20.06.2003. The value of material sold is shown separately in the invoice and 'service charge' is shown in a separate invoice to claim benefit of notification no.12/20003-ST dated 20.06.2003.

(iii) From the verification of sample copy of Works Contracts and invoices produced by the said assessee during the course of Audit, it has been noticed that the assessee has entered into indivisible/composite Works Contract with the prospective clients, which are termed as "Works Contract" and the said composite Works Contract is indivisible Work Contract. The said "Works Contract" further mentions that the lift will be supplied with materials and parts. Without supply of materials and parts(shown as sold), a particular lift cannot be erected, commissioned and/or installed.

(iv) A new lift cannot be purchased by any customer without availing services of erection, commissioning means 'service' and the material and/or parts form an integral part of the lift. It cannot be concluded that only services have been received in purchase of a new lift. Under one composite contract, either of the two cannot be separately provided i.e. along with " services", "materials" are essential as both go hand in hand. The said indivisible Work Contract made by the assessee with the customers show that the contract is for supply of lift and parts thereof for erection, installation/commissioning thereof at the site of their clients.

I. WORKS CONTRACT SERVICE:

3. Works Contract Services have been brought under the service tax net by the Finance Act 2007 with effect from 01-06-2007 vide notification no. 23/2007-ST, dated 22-05-2007. The works contract service has been defined in Finance Act 1994, under section 65(105) (zzzza), wherein it is defined that taxable service means ***"any service provided or to be provided to any person in relation to execution of a work contracts".***

3.1 Further, under **explanation**, under sub-clause "Works Contracts" means a contract wherein-

(i) transfer of property of 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 of structure,................,fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) ....
(c) ....
(d) ....
(e) ....

3.2 A contract of work i.e 'Works Contract' involves transfer of property and also element of service or work rendered. That is why it is called composite contracts. Under the new category of taxable services, service tax is levied on services involved in the execution of a 'Work Contract'. A contract which is treated as 'Works Contract' for the purpose of levy of VAT/ sales tax will also be treated as 'Works Contract' for the purpose of levy of service tax.
3.3 The board vide MOF instruction F. No. 334/1/2007-TRU dated 28-02-2007 has at para 6.4 clarified that:

"6.4 Service involved in the execution of a Works Contract, - [Section 65(105)(zzzza)]. – VAT/ Sales tax is leviable on transfer of property of goods involved in the execution of a works contract. The proposed taxable service is to levy service tax on services involved in the execution of 'Works Contracts'. It may be noted that under this service only the following work contract wherein transfer of property in goods involve in execution of such work contract is leviable to VAT / sales tax are covered namely,

i. *works contract for carrying out erection, commissioning or installations;*
ii. ....
iii. ....
iv. ....

6.4.1 ....

6.4.2 Taxable value under this service is that part of the value of the works contract which is relatable to service provided in the execution of a work contract. Such value is to be determined on actual basis based on the records maintained by the assessee. However it proposed to give an option to an assessee to opt for a composite scheme, the assessee is required to pay 2% of the total value of the works contract as service tax. Assessee opting for the composite scheme is not entitled to avail Cenvat credit of capital goods, inputs and input services required for use in the works contract. Valuation of works contract and details of the composite scheme will be notified separately."

3.4 The Works Contract (Composite Scheme for payment of Service Tax) Rules, 2007 introduced vide notification no.32/2007-ST dated 22.05.2007 effective from 01.06.2007 provided an **'option to'** the assessee to avail the benefit of composite scheme. The Rule 3 of the above referred Rules, 2007 read as;

3.(1) *Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two percent of the gross amount charged for the works contract.*

Explanation, - *For the purpose of this sub-rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract."*

9.4.1 The said Rules were amended w.e.f. 7.7.2009 and the explanation to the amended rule 3 read as;

Explanation, - *For the purpose of this sub-rule, gross amount charged for the works contract shall be the sum, -*

(a) including -

(i) the value of all the goods used in or in relation to the execution of works contract whether supplied under any other contract for a consideration or otherwise and

(ii) the value of all the services that are required to be provided for the execution of the works contract;

(b) excluding -

(i) the value added tax or sales tax as the case may be paid on transfer of property in goods involved and

(ii) the cost of machinery and tools used in the execution of the said work contract except for the charges for obtaining on hire

***Provided** that nothing contained in this explanation shall apply to the works contract where the execution under the said contract has commenced or where any payment except by way of credit or debit to any account has been made in relation to the said contract on or before the 7th day of July 2009.*

3.5 Further, **sub –rule (2) and 3 of Rule 3** of the Works Contract (Composite Scheme for payment of Service Tax) Rules, 2007, read as;

***(2)** The provider of taxable service shall not take cenvat credit of duties or cess paid on any inputs used in or in relation to the said works contract under the provisions of Cenvat Credit Rules, 2004;*

***(3)** The provider of taxable service who opt to pay service tax under these rules shall exercise such option in respect of works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.*

4. Section 65(a) of the Finance Act, 1994 provides the manner of determination of classification of taxable service. The determination of classification of taxable service shall be made according to the manner given in the provisions of Section 65(a) and tax shall be paid according to that category of taxable service.

5. In the present case, the activities or service provided by the assessee were classifiable under 'Works Contract Services' **only** after introduction of this new category i.e. Works Contract Service', and **there was no other head or category under which the said services were classifiable.** Before introduction of this new service, the activities were rightly covered under the category of 'Erection, commissioning or installation Service'. Therefore, continuing paying service tax under the old category i.e. 'Erection, commissioning or installation Service', after introduction of this new category i.e. Works Contract Service' w.e.f. 01.07.2007 was not legal and proper. With effect from 01.07,2007, it was mandatory for the assessee to classify their services under 'Works Contract Services' in accordance with the provisions of Section 65(a) of the Finance Act, 1994 and pay service tax accordingly.

6. It had been observed that said assessee has misclassified their **services under the category of 'Erection, Commissioning or Installation** Services', had vivisected the indivisible 'Composite Works Contract' and issued bills separately showing the amount of material sold and value of service separately, even after introduction of new category of 'Works Contract Services' and wrongly continued to pay service tax in accordance with section 67 of the Finance Act, 1994.

7. As per the Rule 3 of the Works Contract (Composite scheme for payment of Service Tax) Rules, 2007, the assessee has not opted to discharge service tax liability under 'Works Contract Service' and is therefore liable to pay service tax as specified in section 66 of the Finance Act, 1994 on the said work contract services falling under section 65(105)(zzzza) of the Finance Act, 1994. Therefore, the said assessee was liable to pay service tax @ specified in section 66 of the Finance Act, 1994 as detailed in Annexure 'A' attached to the Show Cause notice from 01.06.2007 onwards under 'Works Contract Service' falling under section 65(105)(zzzza) of the Finance Act, 1994. Thus, from the above, it appeared that the said assessee did not obtain Service tax registration under the category of Works Contract Services under section 65(105)(zzzza) of the Finance Act, 1994, had short paid the service tax to the tune of **14,35,41,624/-** for the period from 1.6.2007 to 2011-12.

8. The said assessee entered into a contract for two nos. of Electric Traction Elevator with M/s. Abhishek Corporation, Ahmedabad were taken up during investigation. The copy of letter regarding the technical specifications of the lift issued by the assessee to M/s. Abhishek Corporation, Ahmedabad and the price schedule for the above contract entered between the assessee and M/s. Abhishek Corporation, Ahmedabad, were verified.

9. From the verification of the above works contract, it had been noticed that the assessee had entered into **indivisible / composite work contract** with the prospective clients which are termed as' Works Contract' and the said composite work contract was indivisible work contract. The said 'Works Contract' further mentioned that the lift will be supplied with materials and

parts. Without supply of material and parts (shown as sold), a particular lift cannot be erected, commissioned and / or installed.

10. A new lift cannot be purchased by any customer without availing services of erection, commission which means 'service' and the material and / or parts form an integral part of the lift. It cannot be concluded that only services have been received in purchase of a new lift. Under one composite contract, either of the two cannot be separately provided i.e. along with 'services', **'material' are essential. Both go hand in hand. The said indivisible works contract made by the assessee with the customer shows that the contract is for supply of lift and parts thereof for erection, installation / commissioning thereof at clients' site.**

11. Statement of Sh. Arpit Butala, Chief Finance officer of the said assessee was recorded on 19.06.2012 wherein he gave his statement in interalia stated as under:

(i) that t*hey were having centralized registration for Erection, commission and installation service and Maintenance and repair;*

(ii) *that they were engaged in supply , erection, installation, and commissioning of elevators and repair or maintenance of the elevators;*

(iii) *that they receive inquiries from customers with detail requirements of the customers, give the quotation to the customers with technical specification and then after negotiation they get into contract with the customers. Then they procure parts from manufacturer as per specific requirement and technical specification of the contract. After procurement the parts are delivered at customer site and parts are installed by the contractor engaged by them for Erection, commission and installation of the elevator*

(iv) *Necessary civil work required for installation is also carried out by the contractor and contractor is raising two different invoices one for installation and one for civil work. After completion of erection lift licence is obtained by the customers from Govt. of Gujarat.*

(v) *The major parts are machine, controller, cabin, drive rail, ropes. They purchase parts from Alps Technology Pvt. Ltd. village Santej Taluka-Kalol ,Dist. Gandhinagar.*

(vi) *Regarding repair or maintenance service, they get into annual maintenance contract (AMC) with the customers for specific period. In AMC they look after routine maintenance and periodical check up and if consumable nut bolt are required then they provide the same under AMC contract.*

(vii) *However if there is major replacement of parts then they are charging separately for the same and they are not paying service tax on the same. As per the contract with M/s. Tej Complex Ahmedabad dated 06.11.2009 for design, manufacture, supply and installation of elevator, the technical specification given in the contract are load /kg. ,speed-mps, travel, stops/openings, floor marking, direction ,rise mts., over head, power supply, machine, control, operation, platform size, hoistway available, car enclosure, flooring, false ceiling, car door type, clear. Entrance size, landing doors, door operation, std. fixtures/signals, face plate finish and face plate shape. This contract was for design, supply and installation of elevator. The value of elevator was consolidated sum of Rs. 650000/- and payment terms were 30% advance with acceptance of proposal, 60% against material delivery at site and 10 % on completion of installation but before possession of elevator. He stated that they had paid service tax only on Rs. 88395/- that is on erection charges.*

(viii) *On being shown purchase invoices of elevator parts for the above elevator according to which they had purchased parts from M/s. Alps technology Pvt. Ltd. valued as Rs. 456134/-, sales invoice No. TECIL/NE/0451/10-11 dated 20.12.2010 and TECIL/NE/0452/10-11 dated 20.12.2010 issued to Tej Complex showing sales of passenger elevator valued at Rs. 552500/- and erection charges of Rs. 88395 plus service tax of Rs. 9905/- he stated that they had determined erection charges including service tax as 15% of the total contract value; that cost of civil work is included in the erection charges.*

(ix) *On being asked about condition No.10 "the contract shall be deemed to be an indivisible works contracts ", he stated that the contract involves supply of elevators and installation of elevator and service tax was paid on installation of elevator.*

(x) *On being shown ST-3 return for the period 2007-08 to 2009-10(Up to Sep.-09), he stated that the amount shown as received towards exempted service is the amount shown against material sold for which they had claimed the exemption of notification 12/2003-ST dated 20-06-2003 on which they had not paid service tax.*

(xi) *On being asked as to whether they had manufactured elevators from the parts purchased by them or delivered the parts at customer's site and erected and installed the elevator he stated that they procure parts and these parts are erected and installed at the customer site and then elevator comes into existence.*

(xii) *On being shown ST-3 return for the period 2007-08 to 2010-11 in respect of Maintenance or repair service he stated that the amount shown as received towards exempted service is the amount of parts shown sold and they had claimed notification 12/2003-ST dated 20-06-2003 and had not paid service tax. On being shown Notification No. 12/2003 he stated that the contract involved supply of elevators and installation of elevator and service tax was paid on installation of elevator.*

(xiii) *He further stated that he will produce income ledgers for the period 2007-08 to 2010-11, purchase invoices of inputs from manufactures and sales invoices of trading within a week.*

12. On verification of the contracts, records and other relevant documents and details given by Shri Arpit Butala in his statement, it appeared that the above contracts were composite and indivisible contracts which involved supply, erection, installation and commissioning of elevators.

13. The Works Contract (Composite Scheme for payment of Service Tax) Rules, 2007 introduced vide notification no.32/2007-ST dated 22.05.2007 effective from 01.06.2007 provided an 'option to' the assessee to avail the benefit of composite scheme.

14. Section 65(a) of the Finance Act, 1994 provides the manner of determination of classification of taxable service. The determination of classification of taxable service shall be made according to the manner given in the provisions of Section 65(a) and tax shall be paid according to that category of taxable service.

15. In the present case, the activities or service provided by the assessee were classifiable under 'Works Contract Services' only after introduction of this new category i.e. Works Contract Service', and there was no other head or category under which the said services were classifiable. Before introduction of this new service, the activities were rightly covered under the category of 'Erection, commissioning or installation Service'. Therefore, continuing paying service tax under the old category i.e. 'Erection, commissioning or installation Service', after introduction of this new category i.e. Works Contract Service' w.e.f. 01.07.2007 was not legal and proper. The assessee had no option but was mandatory on their part to classify their services under 'Works Contract Services° in accordance with the provisions of Section 65(a) of the Finance Act, 1994 and pay service tax accordingly.

16. It was alleged that said assessee has misclassified their services under the category of 'Erection, Commissioning or Installation Services', had vivisected the indivisible 'Composite Works Contract' and issued bills separately showing the amount of material sold and value of service separately, even after introduction of new category of 'Works Contract Services' and wrongly continued to pay service tax in accordance with section 67 of the Finance Act, 1994.

17. As per the Rule 3 of the Works Contract (Composite scheme for payment of Service Tax) Rules, 2007, the assessee has not opted to discharge service tax liability under 'Works Contract Service' and is therefore liable to pay service tax as specified in section 66 of the Finance Act, 1994 on the said work contract services falling under section 65(105)(zzzza) of the Finance Act, 1994. Therefore, the said assessee was liable to pay service tax@ specified in section 66 of the Finance Act, 1994 as detailed in Annexure 'A' attached to the Show Cause notice from 01.06.2007 onwards under 'Works Contract Service' falling under section 65(105)(zzzza) of the Finance Act, 1994. Thus, from the above, it appeared that the said assessee did not obtain Service tax registration under the category of Works Contract Services under section 65(105)(zzzza) of the Finance Act 1994, had short paid the service tax to the tune of 14,35,41,624/- for the period from 1.6.2007 to 2011-12

18. The said assessee is also providing Repair or Maintenance service. They get into annual maintenance contract (AMC) with the customers for specific period. In AMC, they look after routine maintenance and periodical check up and if consumables such as nuts, bolts etc. are required, then they provide the same under AMC contract. However for replacement of parts, they are charging separately for the same and they are not paying service tax on the same.

19 On verification of records it appeared that the repair or maintenance contracts were

composite and indivisible contracts which involved supply of parts and repairing or maintenance of elevators.

19.1. One of the example of various contracts is reproduced herewith. The said assessee has given an offer to the Chairman / Secretary of M/s. D.A.V International school, Ahmedabad dated 22.09.2010 wherein they have given an estimate for carrying out repairs, replacement /modernization work to keep the elevator installation safe and trouble free. The contract value was lumpsum 38500/-

19.2 The detail of work carried out was as under:

i). Carry out dismantling work of equipments and accessories at Pit & Basement;
ii). Carry out readjustment work of complete lift requirements;

iii). Carry out Rope shorting work as required;

iv). Carry out Cable shorting work as required;

v). Shifting of material & equipments of pit from basement level to Ground level.

19.3 It was thus evident that the contract was composite contract. However they had artificially bifurcated the composite contracts into supply and repair or maintenance. To evade the service tax, they have shown value of parts and repair or maintenance charges seperately. The orders from the clients were for composite contracts and the clients didn't give them any separate orders for supply. The document titled as 'supply and service' are nothing but a colourful devise to evade service tax as in reality, there is only one contract for repair or maintenance of elevators. A breach of promises of first contract is a breach of second contract and vice -versa.

19.4 The parts shown as traded to the recipients were never physically received by the recipients but were used by the said assessee for the repairing or maintenance of the elevators. Thus, the parts were never available to the service recipient to enable the recipient to sell it to others. At no point of time, the contracts were considered as one for supply and other for repair or maintenance. The entire activity was one which cannot be vivisected.

20. Definition of management maintenance or repair service:

Management, maintenance or repair service means any service provided by:

(i) any person under a contract or an agreement: or

(ii) A manufacture or any person authorized by him, in relation to.-

(a) Management of properties, whether immovable or not:

(b) Maintenance or repair of properties, whether immovable or
Not or:

(c) Maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle,

21. From the facts and circumstances as discussed in foregoing paras, it was established that the said assessee had been providing services under category of 'Management, Maintenance or Repair Service' and was also availing the benefit of Notification No 12/2003-ST in some cases. In cases where they had availed the benefit of Notification No 12/2003-ST, it was revealed that the same had been availed fraudulently by them. They have in all such cases violated the condition of the Notification in as much as the parts which they had shown as traded/sold had actually been consumed by them during the course of providing repair or maintenance service.

22. Further, Explanation I(iii) of section 67, prior to its substitution with effect from 18.04.2006, provided that the cost parts or other material, if any, sold to customer during the course of providing maintenance or repair service was not to be included in the value to taxable service. This exclusion of the cost of parts or other material has not been provided (i.e exclusion has been deleted from the list) under new section 67 read with Rule 6 of the Valuation Rules 2006 which is applicable from 19.04.2006. Consequently, the cost of such parts/ other material sold to customer during the course of providing maintenance or repair service is to be included in the value of taxable service with effect from 19.04.2006.

23. Notification No.12/2003 dated 20.06.2003 is reproduced herewith:

"In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials."

23.1 As per the above notification the.benefit of the exemption is available only when goods and materials are sold by the service provider to the recipient of service subject to documentary evidence of such' sale being available. In the present case the parts are consumed during the provision of service and are not available for sale. In the present case the parts are consumed during the provision of service and are not sold. Therefore, it appeared that the said assessee had wrongly availed the benefit of Notification No. 12/2003-ST for Management, Maintenance or Repairs service, accordingly the value of Parts and materials which have not been included for providing 'Management, Maintenance or Repair service' is required to be included in the taxable value.

24. The service tax liability under Management, maintenance and repair service has been worked out as Rs. 59,84,070/- as per Annexure-B attached to the show cause notice, dtd.23.10.2012.

25. Further, the said assessee had wrongly classified their service under the category of 'Erection, Commissioning and Installation service' and had bifurcated the value of "Material" and "Service" artificially as is evident from condition No. 10 of the contract which states that the contract shall be deemed to be an indivisible works contract'. The said fact has also been admitted by Shri Butala, Chief Finance Officer of the said assessee in his statement dated 19.6.2012. In view of this it appeared that their service is appropriately classifiable under Work Contract Service and accordingly liable to be taxed under section 65(105) (zzzza) of the Finance Act, 1994. The contracts entered by the said assessee for providing the said service revealed that the value of material and the value of service are not discernable. The said assessee did not provide the value of material and services portion as required under Rule 2A of The Service Tax (Determination of Value) Rules, 2006. Further it also appeared that they have not exercised option for Work Contract (Composition Scheme for payment of service tax) Rules, 2007 as required under Rule 3 of the said scheme. Therefore, it appeared that the value and rate as prescribed under Rule 2A of The Service Tax (Determination of Value) Rules, 2006 and Works Contract (Composition Scheme for payment of service tax) Rules, 2007 cannot be determined and accordingly value (inclusive of service value and material value) for the purpose of work contract service was required to be determined under section 67 of the Finance Act, 1994.

26. Section 67 of the Finance Act, 1994 provides that where service tax is chargeable on any taxable service with reference to its value then such value shall "in a case where the provision of service is for consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him. The adjective "gross" means without deduction, total as opposed to net. The gross amount charged would include besides the value of service provider's labour and skill, the cost of all input goods and services when service is dominant. In the present case gross amount charged by the said assessee from customers was inclusive of the value of materials and parts.

27. As per the provisions of Section 68 of Finance Act, 1994 read with Rule 6 of Service Tax Rule 1994 as amended, every person providing taxable service to any person liable to pay service tax at the rate prescribed in Section 66 to Central Government by the 5 of the month /quarter immediately following the calendar month / quarter in which the payments are received towards the value of taxable services (except for the month of March which is required to be paid on 31 March).

28. According to Section 70 of the Finance Act, 1994 every person liable to pay service tax is required to assess the tax himself due on the services provided by him and thereafter furnish a return to the jurisdictional Superintendent of Service tax by disclosing wholly & truly all materials facts in ST-3 returns. The said assessee had not disclosed full, true and correct information about the value of the service provided by them. Thus, it appeared that there was a

deliberate withholding of essential and material information from the department about service provided and value realized by them. It appeared that all these material information had been concealed from the department deliberately, consciously and purposefully to evade payment of service tax. Therefore, in this case all essential ingredients exist to invoke the extended period in terms of Section 73 (1) of Finance Act 1994 to demand the Service tax not paid.

29. From the above discussion it appeared that the parts and other materials are the integral part of the service and parts and materials used in the course of providing the service are to be treated as input used for providing the service and service tax is to be levied on the entire value, including the value of parts and materials.

30. As per Section 75 ibid every person liable to pay the tax in accordance with the provisions of Section 68, or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed is liable to pay simple interest (as such rate not below ten per cent and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by Notification in the Official Gazette) for the period by which such crediting of the tax or any part thereof is delayed.

31. It appeared that the assessee had not discharged their service tax liability correctly under the service categories of Works Contract Services and Repair or Maintenance services for the financial year 2007-2008 to 2011-2012 and, they have contravened the provisions of section 67 of the Finance Act 1994 in as much as that they failed to determine the correct value of taxable service provided by them, Section 68 of the Finance Act 1994 read with rule 6 of the Service Tax Rules 1994, in as much as that they failed to determine and pay the correct amount of service tax.

32. The Government had from the very beginning placed full trust on the service provider so far service tax· is concerned and accordingly measures like Self-assessments etc., based on mutual trust and confidence are in place. Further, a taxable service provider is not required to maintain any statutory or separate records under the provisions of Service Tax Rules as considerable amount of trust is placed on the service provider and private records maintained by him for normal business purposes are accepted, practically for all the purpose of Service tax. All these operate on the basis of honesty of the service provider; therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on the service provider, no matter how innocently. From the evidence, it appeared that the said service provider had not taken into account all the incomes received by them for rendering taxable services for the purpose of payment of service tax and thereby minimize their tax liabilities. The deliberate efforts to mis-declare the value of taxable service and not taking service tax registration & not paying the correct amount of service tax in utter disregard to the requirements of law and breach of trust deposed on them such outright act in defiance of law appears to have rendered them liable for penal action as per the provisions of Section 78 of Finance Act 1994 for suppression, concealment and furnishing inaccurate value of taxable service with intent to evade payment of service tax.

33. From the above paras it appeared that, the said assessee had contravened the provisions of:

(i) Section 65(a)(105) of the Finance Act,1994 by misclassifying their services under the category of Erection, Commissioning and Installation services instead of Works Contract Services.

(ii) Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 as amended, as per the proviso of Section 68, every person providing taxable services to any person is liable to pay service tax at the rate prescribed in Section 66 to Central Government by the 5" of month / quarter immediately following the calendar month I quarter in which the payments are received towards the value of taxable services (except for the month of March which is required to be paid on 31 March), however, they have failed to discharge the service tax liability correctly and thereby there is a non payment/short payment of service tax as mentioned in foregoing paras for the period as discussed in forgoing paras and failed to credit the service tax in Government account within the stipulated time limit;

(iii) Section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994, in as much as, they failed to apply for registration with the service tax department on

time rendering them liable for penalty under Section 77 of the Finance Act, 1994;

(iv) Section 70 of the Finance Act, 1994, as per the proviso of Section 70, every person liable to pay service tax is required to himself assess the tax due on the services provided by him and thereafter furnish a return to the jurisdictional Superintendent of Service Tax by disclosing wholly & truly all materials facts in ST-3 returns. Whereas the said assessee has not disclosed full, true and correct information about the value of the services provided by them. Thus, it appears that there is a deliberate withholding of essential and material information from the department about service provided and value realized by them. It appears that all these material information have been concealed from the department deliberately, consciously and purposefully suppressed the facts with an intent to evade payment of service tax. Therefore, in this case all essential ingredients exists to invoke the extended period in terms of Section 73 (1) of the Finance Act, 1994 to demand the service tax non paid / short paid.

34. All the above acts of contravention as discussed above, on the part of the service provider, appeared to have been committed by suppression of the facts in as much as the assessee contravened provisions of Section 68(1) and Section 69 of the Firiance Act, 1994; read with Rule 6(1) and Rule 4 of the Service Tax Rules, 1994 in as much as they have failed to obtained Service tax registration under the category of Works Contract Services and they failed to determine and pay the applicable service tax ,education cess and SHE Cess within the stipulated time period; Section 70(1) of the finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 and also not disclosed/intimated to the Service tax department about any material fact; they also contravened the provisions of Section 70(1) of the Finance Act, 1994 in as much as they have failed to assess the tax due correctly on the services provided by them and failed to furnish the return in correct manner.

35. Whereas all these act of contravention on the part of the said assessee appeared to have been committed deliberately by way of not declaring material facts to the department and not paying the correct service tax during the period of financial years 2007-2008 to 2011-12, suppressing the correct taxable amount in the ST.3 returns filed with the department during the period of the financial years 2007-2008 to 2011-12 and not paying service tax amount of Rs.149525694/- (Rs. 143541624/-+ Rs. 5984070/-) therefore the service Tax amounting to Rs. Rs. 149525694/- as detailed in the above paras which has not been paid by them is required to be demanded/recovered from them under the proviso to 73 (1) of the Finance act 1994 by invoking extended period of five years. Moreover, it also appears that the contraventions, omissions and commissions on the part of the assessee have been committed deliberately with an intention to evade the payment of Service Tax by willful suppression of nature and value of service provided by them. All these act of contravention appeared to constitute offence of nature as described in Section 68, 69, 70 of Finance Act 1994 read with Rule 6, 4 and 7 of Service Tax Rules, 1994 and and also rendered themselves liable for penal action under Section 76, 77 and 78 of the Finance Act,1994 as amended from time to. They are also liable to pay interest at the appropriate rates for the period from due date of payment of Service Tax till the date of actual payment as per the provisions of Section 75 of the Finance Act, 1994.

36. Therefore, **Show Cause Notice No. STC/4-22/O&A/12-13,23.10.2012,** was issued to the assessee asking them to show Cause as to why:

(i) the classification of "Erection, Commissioning and Installation Service" as defined under Section 65(39a) of the Act should not be revised and the services provided by the said assessee should not be classified under "Works Contract Service" as defined under Section 65(105)(zzzza) of the Act;

(ii) the valuation under Rule 2A of Service Tax (Determination of Value) Rules, 2006 should not be disallowed/rejected as no figures have been furnished by the party to enable quantification;

(iii) the benefit under Works Contract (Composition Scheme for payment of service tax) Rules, 2007 should not be disallowed/rejected as they have not exercised the option as per Rule 3 of Works Contract (Composition Scheme for payment of service tax) Rules, 2007;

(iv) in view of the facts given in (ii) & (iii) above, service tax amounting to Rs.

14,35,41,624/- short paid/not paid by them for the Financial years 2007-08 to 2011-12 under Works Contract Services by considering the value (inclusive of material portion and service portion) for the purpose of Works Contract Service under Section 67 of the Finance Act, 1994 should not be demanded and recovered from them under the proviso of Section 73(1) read with Section 68 of the Finance Act, 1994 invoking the larger period of five years as discussed herein above;

(v) Value of parts used by them for maintenance or repair should not be considered as taxable value under the category of maintenance or repair service as defined under section 65 of the Finance Act, 1994 as amended and service tax amounting to Rs 59,84,070/- under the category of Maintenance or repair service should not be demanded/recovered from them under proviso to Section 73 (1) of the Finance Act, 1994, invoking the larger period of five years as discussed herein above.

(vi) interest at the prescribed rate should not be charged in terms of the provisions of Section 75 of the Finance Act, 1994 as amended from time to time.

(vii) penalty under Section 76 of the Finance Act, 1994 should not be imposed on them in as much as they failed to pay service Tax as mentioned hereinabove.

(viii) penalty under Section 77 of the Finance Act, 1994 as amended should not be imposed on them as they failed to pay appropriate Service Tax and did not file correct Service Tax returns under the provisions of Section 70 of the Finance Act, 1994 and for not obtaining the service tax registration under Works Contract Services under Section 69 of the Finance Act,1994 read with Rule 4 of Service Tax Rules,1994.

(ix) Penalty under Section 78 of the Finance Act, 1994 as amended should not be imposed on them for suppressing and not disclosing the income from the said taxable service provided by them before the department and contravening the provisions of Section 68 of the Finance Act, 1994 with an intention to evade payment of service tax as mentioned above

37. The assessee has continued the same practice of artificially bifurcation of the contracts into supply and service portion for the subsequent periods also. Therefore the following Show Cause Notices were issued to the assessee for non payment of Service Tax on supply portion of the contracts for supply and erection of elevators and also providing Management, Maintenance and Repair Service. The Show Cause Notices issued to the assessee are as under:

Sr. No.	Show Cause Notice File No.	Date	Issued by	Period	Amt. of Service Tax (Rs)
01	STC/4-22/O&A/12-13	23.10.2012	The Commissioner, Service Tax, Ahmedabad	2007-08 to 2011-12	14,95,25,694/-
02	STC/4-82/O&A/13-14	13.05.2014	The Commissioner, Service Tax, Ahmedabad	01.04.2012 to 30.09.2013	10,12,10,547/-
03	STC/4-32/O&A/2015-16	16.10.2015	The Principal Commissioner, Service Tax, Ahmedabad	01.10.2013 to 31.03.2015	2,49,14,322/-
04	STC/04-45/O&A/16-17	07.03.2018	The Commissioner, CGST & CE, Ahmedabad-North	01.04.2015 to 31.03.2016	4,79,10,917/-
05	STC/15-09/OA/2019	05.04.2019	The Commissioner, CGST & CE, Ahmedabad-North	01.04.2016 to 30.06.2017	6,88,84,307/-

38. The Show Cause Notice no. STC/4-22/O&A/12-13,dated 23.10.2012, issued to the assessee, for the period 2007-08 to 2011-12, demanding 14,95,25,694/-, was adjudicated by the Commissioner, Service Tax, Ahmedabad, vide OIO no. AHM-SVTAX-000-COM-066-13-14, dtd. 28.01.2014. The assessee had preferred an appeal before CESTAT, Ahmedabad. CESTAT, Ahmedabad, vide its order No. A/11183/2014, dated 03.07.2014, has allowed the appeal filed by the assessee by way of remand to the adjudicating authority, without expressing any opinion on the merits of the case and have kept all the issues open for the adjudicating authority.

DEFENCE REPLY OF THE ASSESSEE:

39. The assessee has filed their written submission vide letter dated 22.2.2013. I do not reproduce the contents of the letter here as the same has been referred to in detail in OIO No. AHM-SVTAX-000-COM-066-13-14, dated 28.01.2014.

40. The assessee has filed their reply to the Show Cause dated 13.5.2014, on 21.7.2014, the gist of which is stated as under:

1. contract in addition to providing the Total Contract Value for the supply of elevator to the customer, also, as a condition of sale, provides the services of installation, erectioning and commissioning of the elevator at the customer's premises. The value of the aforesaid service rendered / to be rendered by TRIO is built into the Total Contract Value of the contract entered into with the customer. It may be noted that the installation, erectioning and commissioning of the elevators is an integral part of the contract for the supply of elevators, and the contract very clearly specifies the amount charged from the Customer as a part of the Service portion of the contract;

2. Upon finalization of the contract, and upon the initiation of the activity at the premises of the customer, TRIO procures the requisite materials, equipment and parts from the designated vendors and supplies the same to the premises of the respective customer. The aforesaid parts, equipment and materials, would need to be assembled at the premises of the customer, which would result in the erection of an elevator. Pursuant to the aforesaid, the elevator is installed at the said premises and is then tested, commissioned and delivered to the customer.

3. From the aforesaid sequence of events, the following is unambiguously clear: -
   - The contract involves supply of materials, equipment and parts.
   - In addition to the supply of materials, equipment and parts, which are assembled into an elevator (which is the actual goods supplied to the customer), TRIO, as a part of the contract is also required to install and commission the elevator.

4. In view of the above, they are paying,
   - applicable VAT on the supply of materials, equipment and parts which form a part of the Total Contract Value, and
   - applicable Service tax on the erection, installation and commissioning services which form a part of the Total Contract Value

5. They have submitted the sample copies of VAT collection details, for the respective contracts

6. An important aspect which needs appreciation and understanding, and which goes to the root of the present controversy, is the fact that any contract entered into by them is executed in certain specific stages, and the payments are also received on the basis of percentage of completion of work. TRIO executes a large number of contracts annually, which contracts in turn may have one or more jobs (i.e. the number of elevators to be supplied and installed), and each of the jobs are at different stages of completion, spread over different financial years. In view thereof, to ensure that TRIO collects and pays VAT on the basis of the actual value (along with the added profit margin) of materials, parts and equipment supplied in relation to a particular job, and to ensure that the changes or fluctuations in the supply side of the Contract is neutralised, TRIO engages in an annual review of all the jobs and the value of the materials, parts and equipment supplied therein. The aforesaid exercise is undertaken on a contract-wise and job-wise basis and is purely based on actual data available with TRIO. The aforesaid exercise, has been conducted over several years, and has yielded that about 85% of the Total Contract Value is towards the supply of materials, parts and equipment used in the erection, commissioning and installation of the elevators. The balance, in terms of the applicable law, is considered as the Service portion in the Contract and applicable Service tax is paid thereon.

7. They have submitted a statement certifying the aforesaid, for the period 2008-09 to

2011-12, obtained pursuant to an independent study by a Chartered Accountant.

8. A similar exercise conducted for the period April 2012 to March 2013 has yielded that about 89% of the Total Contract Value, of the contracts completed by TRIO, is recovered towards the supply of materials, parts and equipment used in the erection, commissioning and installation of elevators.

9. They have submitted a copy of the excel sheet enlisting all the jobs closed during along with the details of the actual material supplied in relation to a particular contract / job, the period under dispute, along with the details of the actual material supplied in relation to a particular contract / job.

10. For the period 01.04.2012 to 30.06.2012,they have paid applicable Service tax on the Service portion of the Contract Value, by classifying the services as being for the "Erection, Commissioning and Installation" in accordance with Section 65(39a) of the Act. The Service Tax Returns filed by TRIO for the relevant period clearly show the aforesaid, and the same has never been disputed by the Service tax authorities.

11. For the period 01.07.2012 to 31.3.2013 and 01.04.2013 to 30.09.2013, in terms of the applicability of the Negative List of Services, has paid Service tax on the "Service portion of the contract". The aforesaid methodology is in line with the statutory provisions relevant for a "Works Contract" as defined in Section 65B(4) of the Act, and "Works Contract Service" in accordance with Section 66E of the Act, computed in accordance with Rule 2A(i) of the Service Tax (Determination of Value) Rules, 2006. The payment of the aforesaid Service tax has never been disputed by the Service tax authorities, until the issuance of the present SCN.

12. TRIO also enters into Repair Contracts with its Customers. These contracts are typically contracts wherein the Customer specifically requests for a replacement or repair of a major part or equipment of the elevator. Given the fact that the repair or replacement, involves expertise, as a condition of the contract itself, TRIO also provides the service for the installation of such part. Even in such contracts, TRIO pays VAT on the amount of material or part supplied as a part of the Repair Contract, and on which TRIO pays the applicable VAT. The balance (arrived at after deducting the amount for supply of material, on which VAT is paid, from the total value of Repair Contract), TRIO pays the applicable Service tax.

13. Contracts - 01-04.2012 to 30.6.2012

The present SCN alleges that TRIO has incorrectly paid applicable Service tax under the category "Erection, Commissioning and Installation" or "Repair Maintenance", as the case may be, on the service portion and has erroneously availed the benefit of Notification 12/2003-ST dated 20.06.2003 ***("Notification").*** The SCN further proceeds to disallow the benefit of the aforesaid Notification and proceeds to levy tax on the entire contract value, treating the same as a Service. In this regard, the following are the submissions:-

14. It may be noted that TRIO has been paying applicable Service tax under the classification "Erection, Commissioning and Installation" or "Repair Maintenance", as the case may be, since September 2006;

15. The classification of "Works Contract Service" was introduced only with effect from 01.06.2007, and prior to the introduction of the said "Works Contract Service", given the actual facts of operation, TRIO, availing the benefit of the aforesaid Notification (while complying with the conditions therein), has paid the applicable Service tax on the service portion of the Contract, i.e. the Total Contract Value deducted by the value of materials, equipment and parts supplied in the Contract. The aforesaid practice has been continued by TRIO, even after the introduction of "Works Contract Service". The aforesaid benefit of the Notification has been claimed based on actual documentary proof of the payment of VAT on the materials, equipment and parts supplied by them.

16. As a matter of fact, the practice adopted by TRIO was in consonance with the decision of the Hon'ble Supreme Court in the case of ***Kone Elevators (India) Ltd. V. Commissioner reported in 2005 (140) STC 22 (S.C.)*** and ***State of Andhra Pradesh v/s Kone Elevators (India) Ltd reported in (2005) 140 STC 22*** wherein it was inter ajia

held that the activity of the nature done by TRIO, was not a "Works Contract". Inspite of the aforesaid, TRIO had been consistently paying the Service tax on the Service portion of the Contract, and had refrained from classifying the service as a "Works Contract Service". It is submitted that TRIO cannot be penalised for ensuring a fine balance in the payment of VAT as well as Service tax;

17. It is also submitted that the mere introduction of a "Works Contract Service" could have never coerced and mandatorily made TRIO liable to pay Service tax under the aforesaid classification. If the contention in the SCN are to be accepted, then **the Notification ought to have been amended to exclude its applicability to "Erection, Commissioning and Installation" or "Repair Maintenance" service.** Clearly, that is not the case. Therefore, inasmuch as TRIO has adhered to and followed the conditions prescribed in the Notification, the benefit of the said Notification cannot be denied. Denial of the benefits, in the present case, would tantamount to reading a condition into the Notification, something which, in accordance with settled judicial precedents, is clearly not permissible in law;

18. Assuming that the contracts entered into by TRIO are "Works Contract", even in such instance, Rule 2A (i) of the Service Tax (Determination of Value) Rules, 2006 (as it then was) is amply clear. While determining the service portion in the works contract, the said Rule provides for a deduction for the amount on which VAT has been paid in relation to the materials, equipment and parts supplied as a part of the Contract, therefore, even for a moment, conceding to the arguments in the SCN, the methodology adopted by TRIO and the amounts paid as Service tax, are in consonance with the applicable law. The default, if any, of TRIO can only be attributed to the fact that service should have been classified as "Works Contract Service" post 01.06.2007. As is evident, the entire exercise, whether upon classification as "Works Contract Service" or otherwise will only lead to a revenue neutral situation, with no impact whatsoever to the Government exchequer;

19. Further, the error in classification, if any, cannot be attributed solely to TRIO. Conflicting positions in law, including the law laid down by the Hon'ble Supreme Court in the case of ***Kone (supra)*** and the plethora of decisions on similar issues, would have led to a precarious situation where any decision or classification adopted by TRIO could be challenged based on subsequent decisions of various Courts. Under such circumstances, TRIO has sought to tread the balance finely, by ensuring appropriate Service tax as well as VAT is paid on the actual amounts of Service and material involved, and TRIO cannot therefore be penalised for such bona fide actions.

20. The present SCN alleges that TRIO has incorrectly paid applicable Service tax under the category "Erection, Commissioning and Installation" or "Repair Maintenance", as the case may be, on the service portion and has erroneously availed the benefit of the Notification. The SCN further proceeds to consider the services rendered by TRIO as "Service" in terms of Section 65B and made taxable under Section 66B read with Section 661) of the Finance Act, 1994, and proposes to tax the entire Contract as being a Service. A comparison of the contentions in the SCN, for the period 01.04.2012 to 30.06.2012 and 01.07.2012 onwards, highlights the complete fallacy of the SCN and the completely contrasting stands being adopted in the SCN to suit the Revenue's contention. While the SCN for the period prior to 01.07.2012 seeks to consider the contracts entered into by TRIO with the customers as "Works Contract" (thereby implied treating the service portion as a "Works Contract Service") is, for the period post 01.07.2012, seeking to adopt a completely contrary position by treating the Contracts entered into by TRIO as "Service" thereby treating the entire Contract Value liable to Service tax. Further, the aforesaid contention in the SCN is also contrary to the law laid down by the Hon'ble Supreme Court in the case of ***Kone Elevatdr India (P.) Ltd. V. State of Tamil Nadu** reported in **[2014] 45 taxmann.com 150 (SC),*** wherein it has been inter alia held that no Service tax can be recovered on the materials used in-the execution of the Contract on which VAT / Sales tax has been paid;

21. Without prejudice to the aforesaid, it is submitted that with the introduction of the Negative List, there remains no issue qua classification of Services. In view of the aforesaid, TRIO has been paying Service tax on the Service portion of the Contract, by

classifying the same as a "Service", the value of which is arrived at by deducting the amount of materials, equipment and parts supplied in the contract on which VAT has been paid from the Total Contract Value.

22. The aforesaid methodology in also in consonance with the newly introduced law relating to Negative List, inasmuch as the definition of the term "Service" as defined in Section 65B(44) of the Act, inter alia specifically excludes from its ambit, the activity which constitutes a transfer of title in goods or immovable property, by way of sale, gift or any other manner, or a deemed sale as defined in Article 366(29A) of the Constitution of India. It is now settled law laid down by a plethora of decisions that in composite contracts involving sale and service, there is a "deemed sale" which occurs in relation to the supply of materials, equipment and parts, and therefore the same ought to be excluded from the value of Service on which Service tax is payable;

23. The aforesaid methodology adopted by TRIO is also in consonance with the applicable law laid down in Section 66E(h) of the Act read with Section 65B(54) of the Act read with Rule 2A(i) of the Service Tax (Determination of Value) Rules, 2006 as have been amended. It is further submitted that the adoption of the aforesaid methodology is based on the actual data of VAT payment, supported by documentary evidence, and in view of the applicable law cannot be denied;

24. Without prejudice to the aforesaid, it is submitted that even after the introduction of the Negative List, there is no change in the legal position as far as the present issue is concerned. Therefore, the circulars etc. issued after 1.7.2012 also can be used to support this view. They referred to para 2.6.4 of the Revised Education Guide on Taxation of Services dated 20.06.2012 issued by the CBEC which provides clarification on the above services.

25. The contention raised in the SCN with regard to Management Maintenance and Repair Service, they submitted that it directly contradicts the law, which is amply clear to exclude the element of transfer of property in goods or deemed sales, from the definition of the word "Service" per se. Further, a reading of the entire law and the notification, clarifications and explanations issued on issue, clearly show that the contention sought to be adopted in the SCN is wholly illegal and grossly untenable;

26. The AMC entered into by TRIO with the customers, do not include within its ambit the supply of parts of equipment. The AMC only includes a normal servicing of the elevators for which no which no parts are supplied. It is only in the instance where the customer requires a replacement of a part, that the part is independently sold to the Customer on which applicable VAT is collected and paid;

27. It may be noted that the supply of parts is not included as a condition of the contract, and is not supplied as a part of the contract. It is an independent sale, and therefore the value of such parts, which have no co-relation to the AMC cannot be added to the value of the Service. Reliance is also placed on the decision in the case of ***Commissioner Of C. Ex., Versus Technical Associates reported at 2011 (24) S.T.R. 567 (Tri. - Del.)*** wherein it was held that the service of transportation of faulty transformers and the service of repair of such faulty transformer are distinct services. The present case is directly covered by this decision. It is submitted that the facts in the present case are far better than that involved in the above referred case;

28. Further, adding the value of the parts to the value of the Service shall tantamount to collecting Service tax on supply of materials in which transfer of property occurs, which is contrary to settled law laid down by the Hon'ble Supreme Court in a plethora of cases.

29. TRIO has placed reliance on Para 6.8 of the Revised Education Guide on Taxation of Services dated 20.06.2012 issued by the CBEC.

30. They have also relied upon the decision of the Hon'ble Larger Bench in the case of ***CCE Vs BSBK Pvt. Ltd - 2010 (18) STR 555 (Tri.-LB.***

31. Therefore, in law, the value of material supplied cannot be included in the value of service. Accordingly, TRIO has correctly calculated the value of materials and labour portion and discharged service tax on actual value of labour portion. Merely because the contract entered into by TRIO with its customers is of a composite nature does not mean

that the actual and correct value of material and service cannot be separately ascertained by TRIO. The method of valuation for discharge of Service tax as adopted by TRIO is absolutely correct, fair and reasonable.

32. It is submitted that each of the activities carried on by TRIO are distinct and independent. Merely because the activities take place as a continuous chain of events does not alter the fact that each of these activities are separate activities. When the legislature chose to levy tax from different dates on the service of works contract and erection, commissioning and installation service, there is no basis for levying service tax on these activities under one category.

33. TRIO submits that no Service tax can be demanded on material portion under any taxable head of Finance Act, 1994. They submitted that Service tax and Sales tax are mutually exclusive levies. Hence, Service tax cannot be levied on the value of the goods supplied by the service provider to the service receiver during the course of provision of such services. Therefore, TRIO cannot be held liable to pay Service tax on the said material portion supplied by TRIO during the course of provision of the service. The aforesaid is also evident from the definition of the term "Service" as defined in Section 65B(44) of the Act;

34. In this regard, TRIO has relied on HonTtle Supreme Court judgment in the case of ***Godfrey Phillips India Ltd. Vs. State of UP*** reported at ***2005 (139) STC 537*** and ***M/s Bharat Sanchar Nigam Limited V/s Union of India 2006 (145) STC 91 (SC).***

35. *The Quantification of demand is incorrect in as much as that the SCN has demanded service tax on the entire amounts received by TRIO under the contract. The amount so received by TRIO includes consideration for material supplied as well as for services rendered. It is submitted that no service tax can be demanded on the consideration pertaining to supply of material.*

36. The consideration which TRIO have received is inclusive of the service tax payable. In the case of excise duty also, it has been held that the amount received should be taken as cum-duty price and the value should be derived there from, by excluding the duty alleged to be payable, as required under Section 4(4)(d)(ii) of the Central Excise Act, 1944.

37. In support of this submission, TRIO relied on the judgments in the case of ***Sri Chakra Tyres 1999 (108) ELT 361 & CCE vs. Maruti Udyog Limited 2002 (49) RLT 1 (SC.***

38. The entire exercise is revenue neutral in as much as The mere change in classification of Service would not alter the quantum of Service tax payable by TRIO. TRIO has correctly paid the Service tax after excluding the amount of materials on which VAT has been paid. A mere alteration in the classification will not generate any additional revenues to the Government exchequer. Further, any service tax paid would have been available as credit to the customers immediately. Thus, the entire transaction is revenue neutral.

39. In view of the submissions hereinabove, since TRIO has rightly computed and paid the Service tax, there arises no question of payment of any penalty or interest.

40. In view of the submissions hereinabove, the SCN and the consequent demand ought to be set aside as being bad in law. It is a settled law, that, whenever the demand of duty is set aside, consequently the imposition of the penalty has also to be set aside.

41. It is also settled law that no penalty can be levied where there is an interpretational issue / ambiguity in the statute. They relied on the following judgments :

(i) Fibre Foils Ltd. Vs. Commissioner of Central Excise, Mumbai - IV 2005 (190) E.L.T. 352 (Tri.- Mumbai).

(ii) AEON'S Construction Products Ltd. Vs. Commissioner of C.Ex., Chennai 2005 (180) E.L.T. 209 (Tri. Chennai).

(iii) Smitha Shetty Vs CCE reported in ***2004,***

(iv) CCE Vs Sunitha Shetty **reported in** 2004 (174) ELT 313

RECORDS OF PERSONAL HEARING:

41. Shri Parth Contractor, Advocate, Shri Yagnadutt Brahmkhatri, CFO, had appeared before the adjudicating authority on 20.01.2016, wherein, they submitted that as per CESTAT Remand Order dated 09.07.2014, the verification of contract, invoice and payment of VAT/sales Tax are to be done. Party undertook to give detailed chart showing agreement, payment of Service Tax, VAT etc, in 15 days time and get the same verified by the office. They submitted the said records vide their letter dated 08.02.2016. They appeared before the adjudicating authority on 16.11.2016 and submitted that they had paid VAT and Service Tax on actual basis and submitted the documents for the period 2007-08 to 2014-15, which needs to be verified as per CESTAT order. They reiterated the points mentioned in their reply and requested to drop the case proceedings.

42. Further, on 11.4.2018, Shri Manish R. Bhatt, Senior Advocate appeared for personal hearing on behalf of the assessee. He reiterated the submissions made in the defence rely dated 21.7.2014 read with the subsequent letter dated 08.02.2016 and affidavit dated 16.06.2016.He emphasised that as clarified in the Chartered Accountant's Certificate, the material component is in excess of 85 %.

43. Further personal hearing for all the five Show Cause Notices was held on 27.01.2020, wherein Shri Kriyang S Patel, Director, Shri Ashok D Naik, Legal Advisor and Shri Kamlesh M Patel, Finance Manager appeared before me. They reiterated the facts made in all their earlier written submissions. They submitted a detailed report issued by M/s P.D. Modh & Associates, Cost Accountant certifying actual cost of material supplied and value of services provided in respect of Works Contract Service for the period from 2007-08 to June-2017. They also submitted a certificate issued by Chartered Accountant, with respect to Management, Maintenance and Repair Service.They also submitted C.A certificate and summary regarding availment of input services to establish that they have not availed Cenvat Credit on inputs.

DISCUSSION & FINDINGS

A: Show Cause Notice No. STC/4-22/O&A/12-13, 23.10.2012, which is now under denovo Adjudication.

PERIOD from 2007-08 to 2011-12, for the amount of Rs. 14,95,25,694/-

44. First of all, I take up the above SCN dated 23.10.2012 for discussion.

45. I have carefully gone through the records of the case, written submissions made by the said assessee in their defence reply to the show cause notice as well as the submissions made during the course of personal hearings and the records/ documents produced by them. I have also perused the Verification Report, prepared by the jurisdictional Division office, as per directions of CESTAT, vide its order dated 03/07/2014.

46. The Show Cause Notice No. STC/4-22/O&A/12-13, 23.10.2012, issued to the assessee for the period from 2007-08 to 2011-12, for the amount of Rs. 14,95,25,694/- was adjudicated vide OIO no. AHM-SVTAX-000-COM-066-13-14, dated 28.01.2014.

46.1. Vide the above OIO, the adjudicating authority had:

(i) Ordered that the services provided by the assessee are appropriately classifiable under the taxable category of "Works Contract Service" defined under Section 65 (105) (zzzza) of the Finance Act, 1994:

(ii) Confirmed the demand of service tax of **Rs. 14,35,41,624/-** (Rupees Fourteen Crore Thirty Five Lakh Forty One Thousand Six Hundred Twenty Four only), (including Education Cess and Secondary and Higher Education Cess) as detailed in Annexure-A to the show cause notice under the category of "Works Contract Services" under Section 73(2) of the Finance Act, 1994 and ordered to recover the same from the said assessee; as the valuation adopted by the assessee is neither in accordance with Rule 2A of the Service Tax (Determination of Value)Rules, 2006 nor have they opted for the works contract (Composition Scheme for payment of service tax) Rules, 2007.

(iii) Ordered to consider total amount received/charged by the assessee as taxable value for providing maintenance or repair service and confirm the demand of service tax of

Rs. 59,84,070/- (Rupees Fifty Nine Lakh Eighty Four Thousand and Seventy only), (including Education Cess and Secondary and Higher Education Cess) as detailed in Annexure-B to the show cause notice under the category of "Maintenance or Repair Services" under Section 73(2) of the Finance Act, 1994 and ordered to recover the same from the said assessee;

(iv) Ordered to recover interest on the above confirmed demand of **Rs. 14,95,25,694/-** [**Rs. 14,35,41,624/-** + **Rs. 59,84,070/-**] (Rupees Fourteen crore Ninety Five lakhs Twenty Five thousand Six hundred and Ninety Four only) at the prescribed rate from the said assessee under Section 75 of the Finance Act, 1994;

(v) Imposed penalty of Rs.200/- (Rupees Two hundred only) per day for the period during which failure to pay the tax continued, or at the rate of 2% of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax upon the said assessee under Section 76 of the Finance Act, 1994, for the period from 1.4.2007 to 9.5.2008; provided further that the amount of penalty payable in terms of this section shall not exceed the service tax payable by the said assessee for the period upto 9.5.2008.

(vi) Imposed penalty of **Rs. 14,95,25,694/-** [**Rs. 14,35,41,624/-** + **Rs. 59,84,070/-**] (Rupees Forteen Crore Ninety Five Lakh Twenty Five Thousand Six Hundred and Ninety Four only)on the said assessee under section 78 of the Finance Act, 1994;

(vii) Imposed penalty under section 77(1)(a) on the assessee who shall be liable to pay a penalty of ten thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance as required under section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994.

APPEAL BEFORE CESTAT:

47. The assessee had filed an appeal before CESTAT, against the impugned OIO primarily on the grounds that the VAT/Sales Tax liability has been discharged on the cost of materials on actual value basis, and not on approximate 15 % as held by the adjudicating authority; that the appellant has paid VAT liability always on the actual valuation of the material sold; that the details of material sold is available in the certified segmental working data derived from their audited statements, which was also produced before the adjudicating authority;

48. The assessee had also put forth before CESTAT that the observations made by the adjudicating authority; that the contracts entered into by the appellant with the service recipients are composite contracts and cannot be vivisected; are not correct and not as per the submissions made by the appellant.

49. CESTAT, vide its order No. A/11183/2014,dated 03/07/2014, in this matter, has observed as under:

"As per Rule 2 A(ii) of the Service Tax (Determination of Value Rules, 2006, the actual value of transfer of property in goods involved in execution of works contract is not to be taken into consideration while discharging Service Tax liability under the Works Contract Services. It is the claim of the appellant that VAT/Sales Tax was paid on the actual material value of the material sold, as per audit account furnished to the adjudicating authority and on examination of the records, it seems to be so. However, this matter whether VAT./Sales Tax has been paid on the actual materials sold to the service recipient is required to be gone into detail by the adjudicating authority. Matter is therefore, required to be remanded back to the adjudicating authority for de-novo consideration."

49.1 CESTAT has also made it clear that they have not expressed any opinion on the merits of the case and all issues have been kept open for adjudicating authority.

50. I find that the issues to be decided in this case are:-

i) Whether the services provided by the said assessee are appropriately classifiable under the category of "Works Contract service".

ii) Whether out of the total contract value, the deduction of material value derived by the assessee on percentage basis is allowable as per Notification No. 12/2003-ST, dtd. 20.06.2003 or otherwise.

iii) Whether the bifurcation of value into service portion and material portion, done by the assessee in the invoices is admissible as per Rule 2A of the Service Tax (Determination of Value)Rules, 2006 and Notification 12/2003-ST, dated 20.6.2003 or otherwise.

iv) Whether the deduction of material value from the composite AMC contract from the gross amount charged is permissible under 'Management, maintenance or repair service'.

WORKS CONTRACT SERVICE:

51. First of all, it is imperative to examine whether the services provided by assessee are classifiable under Works Contract Service or otherwise. The facts of the case are that the assessee is engaged in design, manufacture, supply and installation of elevators as well as in repair or maintenance of elevators for which they enter in to contract with various parties. These contracts are composite contracts wherein the service and material portion is not discernible on actual basis and lumpsum price is agreed upon. They have classified their service under Erection, Commissioning and Installation Service; and Management, Maintenance & Repair Services. Out of the total value, they pay service tax on Erection and Installation Charges which is self determined by them as a percentage[15%] of the total contract value and on the remaining value[85%], they claim benefit of Notification No. 12/2003-ST dt. 20.06.2003.

52. The main charge in the SCN is that the said assessee has artificially bifurcated the composite contract into supply and service portion and they have mis-classified their service under the category of 'Erection, Commissioning & Installation' instead of the works contract service. They have also paid the service tax by wrongly availing the benefit of Notification No. 12/2003-ST dated 20.06.2003. The SCN alleges that the contracts executed by the assessee are composite in nature and there is no independent sale of goods and thus the contracts are indivisible in nature.

53. The defence made by the assessee is, interalia, mainly on the following counts:

i) Question of classification into 'works contract service' cannot be raised by the department *[as they had already been paying Service Tax on Erection, Commissioning and Installation Charges]*

ii) Supply, erection, installation and commissioning of lift is a sale simplicitor and not works contract as held by the Hon'ble Supreme Court in the case of Kone Elevators (2005) 140 STC 22.

iii) Even if the services provided by them are in the nature of 'works contract service', they have correctly paid the service tax in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006.

iv) No service tax can be demanded on the material portion under any taxable head of the Finance Act, 1994 and the benefit of Notification No. 12/2003-ST dated 20.6.2003 is available to them.

v) When two Notifications which are mutually exclusive, co-exist, the assessee has the option to choose any one of them.

vi) Benefit of Cum-tax value as per Section 67(2) of the Finance Act, 1994 should be given.

vii) The situation is revenue neutral.

viii) Extended period of limitation cannot be invoked

54. Definition of Works Contract service contained in section 65(105)(zzzza) of the Act, is reproduced as under :

> *"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, equipments or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain lying 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 staircase 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"

55. I find from the definition of Works Contract Service under section 65(105)(zzzza) of the Finance Act, 1994, that following conditions are required to be satisfied in order to bring particular service within its ambit:

a) service shall be provided to any person, by any other person

b) service shall be in relation to execution of a works contract

c) it should be a contract where transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods

d) **erection, commissioning or installation** of plant, machinery, equipments or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain lying 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 staircase or elevators.

55.1. The term 'person' is not defined in the Finance Act, 1994. The definition under section 3 of the General Clauses Act, 1897 is an inclusive definition which reads as *"person shall include any company or association or body of individuals, whether incorporated or not"*. M/s Trio certainly is a 'person' within the above definition of the General Clauses Act, 1897. In view of this the first condition at a) above stands fulfilled that the service shall be provided to any other person who are customers like M/s Shukan Orchid Infrastructure, M/s Abhishek Corporation etc. in the present case by any other person who is 'M/s Trio' in the present case. I place reliance on the judgment of Tata Consultancy Services v/s Union of India reported at 2006(2) STR 386(Kar) wherein it is held that tax being paid on the service provided, the Act made no distinction between different categories of service providers, be they individuals, partnership concerns or incorporated companies and making any such classification would create and perpetuate anomalies. This clearly implies that the term 'person' has not been given a restrictive meaning.

55.2. The second condition is that service shall be in relation to execution of a works contract. The assessee along with their written submission have submitted copy of a contract between M/s Trio and M/s Shukan Orchid Infrastructure. I observe that the main heading of the price variation clause reads as 'IEEMA PRICE VARIATION CLAUSE FOR ELEVATOR WORKS CONTRACT'. Condition No.14 of the illustrative contract between M/s Trio and M/s Shukan Orchid Infrastructure also reads as 'this contract being an indivisible works contract'. Condition No. 18 of the said contract also reads as 'the equipments and materials involved in the execution of this works contract. Since, the contracts are indivisible in nature where there is no separation of the material portion and service portion on actual basis, the second condition that service shall be in relation to execution of works contract is fulfilled.

55.3 The third condition is that the transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods. It is the submission of the assessee that they had discharged VAT on 85% value which has been accepted by the VAT department.

Therefore, the condition with regard to leviability of Sales tax on the transfer of property in goods involved in the execution of such contract is also satisfied.

55.4 The fourth condition that the service should be the service of erection, commissioning or installation of lift and escalator is also satisfied.

56. I find that Shri Arpit Butala, authorized representative and Chief Financial Officer of the said assessee have filed an affidavit dated 17.10.2013 stating that they had entered into contracts with its customers for lumpsum price wherein as mentioned the service portion is 15% of the contract value and material portion is 85% of the contract value. He cited and submitted copy of a contract between M/s Trio and M/s Shukan Orchid Infrastructure and affirmed that terms and condition of the contract with all other customers are similar to the cited contract and the tax treatment is also same. In the said affidavit, he further submitted that they had entered into contracts with their customers **for annual maintenance of elevators for a lumpsum price**. He cited and submitted copy of a contract between M/s Trio and M/s Swagat Rain Forest and affirmed that terms and condition of the contract with all other customers are similar to the cited contract and the tax treatment is also same.

57. I accept the said affidavit and apply the terms and conditions of the cited contracts to other contracts.

58. I have seen the illustrative contracts submitted by the assessee and also examined the contract in the show cause notice entered into between the assessee and M/s Abhishek Corporation, Ahmedabad. In the said contract, the assessee offers to design, manufacture, supply and install the elevators for a consolidated sum of Rs. 8,01,000/- per elevator. The notes indicate that the above price includes taxes and installation charges and cost of civil works involved in installation of elevators.

59. From the contracts it can be seen that the rates/quotation for design, manufacture, supply and installation of elevators are composite in nature and are works contract only. All the contracts have fixed price defined in monetary values inclusive of all types of taxes and installation charges. The contract has a fixed monetary value towards the whole of the works which inter alia includes the value towards the supplies of various goods and materials, consumables etc.

60. It is seen that the ultimate purpose of contracts executed by the assessee was to design, manufacture and install the elevators, which is taxable as contract under works contract service. The basic materials used for completion of elevator were various parts of elevators. The supply of goods including parts of elevator is inextricable and essentially linked to the creation of completed facilities i.e. manufacture of elevator, complete in every detail and thus it is integral part of works contract services as defined under section 65 (105) of the Finance Act, 1994 provided by the assessee. All the contracts entered into by the assessee were indivisible and turnkey in nature and all of them involve design, supply, fabrication, installation, testing and commissioning of elevator in a composite manner.

61. In terms of above contract, they had to undertake the entire activity on a turnkey basis and the intention between the parties is in respect of the project as a whole i.e. the parties are not concerned with the various activities individually that a project comprises of. At no point of time was the contract separately one for supply and the other for erection.

62. I find Works Contract Services have been brought under the service tax net by the Finance Act 2007 with effect from 01-06-2007 vide notification no. 23/2007-ST, dated 22.05.2007. The works contract service has been defined in Finance Act 1994, under section 65(105) (zzzza), wherein it is defined that taxable service means ***"any service provided or to be provided to any person in relation to execution of a work contracts".***

63. The board vide MOF instruction F. No. 334/1/2007-TRU dated 28-02-2007 has at para 6.4 clarified that:

"6.4 Service involved in the execution of a Works Contract, - [Section 65(105)(zzzza)]. – VAT/ Sales tax is leviable on transfer of property of goods involved in the execution of a works contract. The proposed taxable service is to levy service tax on services involved in the execution of 'Works Contracts'. It may be noted that under this service only the following work contract wherein transfer of property in goods involve in execution of such work contract is leviable to VAT / sales tax are covered namely,

v. *works contract for carrying out erection, commissioning or installations;*
vi. ....
vii. ....

64. Section 65(a) of the Finance Act, 1994 provides the manner of determination of classification of taxable service. The determination of classification of taxable service shall be made according to the manner given in the provisions of Section 65(a) and tax shall be paid according to that category of taxable service.

65. In the present case, the activities or service provided by the assessee were classifiable under 'Works Contract Services' **only** after introduction of this new category i.e. Works Contract Service', and there was no other head or category under which the said services were classifiable. Before introduction of this new service, the activities were rightly covered under the category of 'Erection, commissioning or installation Service'. The aforesaid factual and legal position make it abundantly clear that classification of service under '*works contract service*' or '*erection, commissioning or installation service*' cannot be left to the choice, or likes or dislikes of the assessee nor could it be done as per their whims and fancies. Thus, if a particular service has been rendered by the said assessee pursuant to a works contract executed with the service recipient and if such service involved transfer of materials or property, then the same would be invariably classified as '*works contract service'.*

66. Therefore, payment of service tax under the old category i.e. 'Erection, commissioning or installation Service', by the assessee, even after introduction of this new category of service i.e. Works Contract Service' w.e.f. 01.07.2007, was not legal and proper. With effect from 01.07,2007, it was mandatory for the assessee to classify their services under 'Works Contract Services' in accordance with the provisions of Section 65(a) of the Finance Act, 1994 and pay service tax accordingly.

67. The assessee has relied on the judgment passed by the Hon'ble Supreme Court in the case of Kone Elevators (2005) 140 STC 22., wherein it has held that Supply, erection, installation and commissioning of lift is a sale simplicitor and not works contract. However **Hon'ble Supreme Court, in the case of M/S. Kone Elevator India Pvt. Ltd.** vs. State of Tamil Nadu and Ors. (Writ Petition (C) No. 232 OF 2005) **vide its order dated 6.5.2014** has overruled the decision of the three-Judge bench in the case of State of A.P. v. Kone Elevators (India) Ltd, reported at (2005) 3 SCC 389 and **has explained the distinction between contract for sale of goods and works contract.** Vide this Order, the Apex Court has decided that supply and installation of Lifts is a Works Contract.

67.1. Honourable SC held that that four concepts have emerged from various SC judgments. They are (i) the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services; (ii) the concept of "dominant nature test" or, for that matter, the "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable; (iii) the term "works contract" as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and (iv) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract.

68. In view of the above, I hold that the services of supply and erection of elevators, provided the assessee is to be classified under Works Contract Service,with effect from 1.6.2007.

VALUATION OF WORKS CONTRACT SERVICE:

69. Having decided that the services rendered by the assessee are classifiable under Works Contract Service, I hereby take up the valuation of the said services provided by the assessee. I take up the issue as to whether out of the total contract value, the deduction of material value derived by the assessee on percentage basis is allowable as per Notification No. 12/2003-ST; whether the bifurcation of value charged by the assessee in the invoices into service portion and material portion is admissible as per Rule 2A of the Service Tax (Determination of Value)Rules,

2006 or the said bifurcation is an artificial one in violation of the said Rule/Notification. I also take up valuation of the services provided by the assessee, taking into consideration the fact that VAT has been paid on the materials used during the course of providing the service, as directed by CESTAT's Order dated 3.7.2014

PERIOD 2007-08 TO 2011-12

70. The above facts and legal provisions make it clear that the services rendered by the said assessee are of the type of "works contract services", for which during the relevant period from 2007-08 to 2011-12, the assessee had three optional routes for discharging service tax liability,

(i) Rule 2A of the Service Tax(Determination of Value) Rules;2006,
(ii) Works Contract (Composition Scheme) Rules, 2007,
(iii) Notification No. 12/2003.-ST,dated 20.06.2003.

66. All the aforesaid provisions, i.e. Rule 2A of Valuation Rules, Notification No. 12/2003-ST, Notification No. 12/2003-ST, dtd. 20.06.2003 as well as Works Contract Composition Scheme Rules, provide **a common condition that no Cenvat credit would be available for the duty paid on the inputs used for providing the taxable services.**

OPTION 1: Notification no. 12/2003-ST,dated 20.06.2003.

71. During this period, the assessee is claiming the benefit of Notification no. 12/2003-ST,dated 20.06.2003.

"Notification No. 12/2003-ST dated 20-6-2003,states as under:

'Valuation (Service Tax) — Goods and materials sold by service provider to recipient of service — Value thereof, exempted.

In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby ***exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service,*** *from the service tax leviable thereon under Section 66 of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials.*

2. This notification shall come into force on the 1st day of July, 2003 (Notification No. 12/2003-ST dated 20-6-2003).'"

72. Vide **Notification 12/2004-ST, dated 10.09.2004, conditions for availing the benefit of the 12/2003-ST, have been inserted** as under:

Provided that the said exemption shall apply only in such cases where---

(a) No credit of duty paid on such goods and material sold, has been taken under the provisions of the Cenvat Credit Rules,2004; or

(b) Where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.

73. Further, Para 24 of the Circular No. 80/10/2004-ST, dated 17.09.2004, clarifications regarding restriction on availment of Credits and exemptions towards goods sold, in cases where abatement are allowed ,have been given as under:

24.1 In cases of specified services, like tour operators, rent-a-cab, mandap-keeper providing catering services, erection, commissioning and installation etc., abatements are allowed to neutralize the cost of materials/goods supplied or used during the course of provision of service. These abatements were allowed when cross credit of excise duty and service tax was not available. Service tax like Cenvat is basically a value added tax which is operated through credit mechanism. It is being provided that in all such cases, the abatement would be conditional, subject to non-availment of input goods and capital goods credit under the new Cenvat Credit Rule, 2004 and also non availment of benefit

under notification no 12/2003-ST. (refer notification No. 12/04-ST, dated 10.09.2004) The credit of input services would, however, be available.

24.2 Exemption no. 12/2003-ST provides that the value of goods and materials sold by the service provider during the course of providing service shall remain excluded from value of taxable service subject to production of documentary proof of value of such sale. It is being provided that benefit of abatement would not be available to any service provider availing this concession. Also, this concession would be subject to condition that either no CENVAT credit has been availed on such goods or if already availed, it is reversed prior to the sale of such goods. (refer notification No. 12/04-ST, dated 10.09.2004)

74. Further, vide Para 2.9.1 of Circular No. 59/8/2003, dated 20.6.2003, clarification on exemption to value of goods and materials sold by the service provider has been given as under:

2.9.1 In case of authorized service stations, maintenance or repair services, commissioning and installation services and photography services it has been provided in the law that the cost of goods and material shall not form part of the value to be subjected to service tax, ***if evidence (like sale invoice/bill) shows that these goods were sold.***

75. Further, Board's Clarification vide letter No. 233/2/2003-CS.4, dated 7.4.2004, addressed to Punjab Colour Lab Association. has clarified as under:

"I am directed to refer to your representation forwarded to Finance Minister vide letter dated 11-3-2003 and state that in terms of Notification No. 12/2003-ST dated 20-6-2003, the exemption in respect of input material consumed/sold by the service provider to the service recipient while providing the taxable service is available. However, the exemption is available only if the service provider maintains the records showing the material consumed/sold while providing the taxable service. The value of such material should also be indicated on the bill/invoice issued in respect of the taxable service provided."

(emphasis supplied)

76. *Notification No. 12/03-S.T. issued under Section 93(1) of the Finance Act, 1994, is a general exemption, which exempts a part of the total value of the taxable service provided, from Service tax to the extent of the service tax on the value of the goods and materials sold by the service provider to the recipient of service, subject to conditions that –*

(i) there is documentary proof specifically indicating the value of the said goods and materials.

(ii) No credit of duty paid on such goods and materials sold has been taken under the provision of Cenvat Credit Rules, 2004, and

(iii) When such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.

OPTION 2: RULE 2A of Service Tax (Determination of Value)Rules,2006.

77. *'Works contract services', during the relevant period,* was governed Rule 2A of the Service Tax (Determination of Value) Rules, 2006 [*hereinafter referred as 'Valuation Rules' for brevity]*; which is reproduced as under:

"2A. Determination of value of services involved in the execution of a works contract. –(1) Subject to the provisions of Section 67, the value of taxable service in relation to services involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in sub-clause (zzzza) of clause 105 of Section 65 of the Act, shall be determined by the service provider in the following manner:-

(i) *Value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.*

Explanation. –For the purpose of this rule, -

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

(b) *vale of works contract shall include,-*

(i) *labour charges for execution of the works;*

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

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

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

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

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

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

(viii) *profit earned by the service provider relatable to supply of labour and services;*

(i) *Where Value Added Tax or sales tax, as the case may be, has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then such value adopted for the purpose of payment of Value Added Tax or sales tax, as the case may be, shall be taken as the value of transfer of property in goods involved in the execution of the said works contract for determining the value of works contract service under clause (i)."*

77.1 As per the above provisions, an assessee providing works contract services can pay service tax on the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution thereof, and where VAT/Sales tax has been paid on transfer of property, then the value adopted for such payment of VAT/SalesTax is to be considered for deduction towards value of property transferred.

OPTION 3: Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 [*hereinafter referred as 'Composition Rules' for brevity*];

78. Similarly, the said Composition Rules provided an option to the assessee to discharge service tax liability by paying an amount of equivalent to 4% of the gross amount charged for the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Finance Act,1994, as amended. The term '*gross amount*' included the value of all goods used in or in relation to the execution of works contract, whether supplied under any other contract for a consideration or otherwise, and the value of all services that are required to be provided for execution of the works contract, however, subject to the condition that the service provider shall not take Cenvat credit of duties or cess paid on any inputs used in or in relation to the said works contract.

78.1 Above all, sub-rule (3) of the Service Tax Composition rules specifically provide that the service provider **who opts for the said rules should exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised should be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.** These provisions of the said rules make it abundantly clear that the said assessee cannot exercise their option to avail such benefits at this stage, and therefore, the availment of benefit of Composition rules is not admissible to the assessee.

79. Prior to 01.06.2007, services of the type specified under sub-clauses (a) to (e) of the aforesaid explanation-(ii) to section 65(105)(zzzza) were individually classified under different categories, e.g. Erection, Commissioning or Installation Service, Commercial or Industrial Construction Service, Construction of Complex Service, etc. The constitutional provisions of

taxability under works contract service for the period before and after 01.06.2007 has been examined in detail by the Larger Bench of Hon'ble Tribunal *in re Larson & Toubro Ltd. – 2015-TIOL-527-CESTAT-DEL-LB*. It is, thus, a settled principle of law that the aforesaid type of services (*Erection, Commissioning or Installation Service*), albeit form part of a composite works contract, would be leviable to service tax under the respective clauses of section 65(105) even for the period prior to 01.06.2007. After levy of service tax on '*works contract services*' by virtue of section 65(105)(zzzza), if such services are executed in pursuance of a works contract and if it involves transfer of property in goods which is leviable to VAT/sales Tax, then such services would merit specific classification under the said section 65(105)(zzzza), irrespective of individual classifications elsewhere in section 65(105). This is evident from Para 6.4 of Board's Circular Letter DOF No. 334/1/2007-TRU dated 28.02.2007 which states as follows:

> *"6.4. VAT/sales tax is leviable on transfer of property in goods involved in the execution of a works contract. The proposed taxable service is to levy service tax on services involved in the execution of a works contract. It may be noted that under this service only the following works contracts wherein transfer of property in goods involved in execution of such works contract is leviable to VAT/sales tax, are covered, namely:-*
>
> *(i) works contract for carrying out erection, commissioning or installation*
> *(ii) works contract for commercial or industrial construction*
> *(iii) works contract for construction of complex*
> *(iv) works contract for turnkey projects including Engineering Procurement and Construction or Commissioning (EPC) projects.*
>
> *6.4.1 Works contract in respect of specified infrastructure projects namely roads, airports, railways, transport terminals, bridges, tunnels and dams are specifically excluded from the scope of the levy."*

80. Board has issued two circulars No. 96/7/2007-ST dated 23.08.2007 and No. 128/10/2010-ST dated 24.08.2010 wherein it has been broadly stated that wherever works is involved, it would be a works contract, however, composition scheme under works contract could not be availed if a person had paid service tax under the individual category (*e.g. erection, commissioning and installation service)*The principles of classification as provided under section 65A as it stood during the period prior to 01.07.2012 also requires that where for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected under the sub-clause which provides the most specific description, which if the service was rendered in pursuance of a works contract and if transfer of property of material is involved, is indisputably the '*works contract service'.*

81. I find that the ratio of the decision of Hon'ble Tribunal in respect of SPL Developers (P) Ltd. – 2015 (39) STR 455 (Tri.Bang) is squarely applicable in this case, which states that: "*after introduction of 'works contract' as an independent and distinct taxable service with effect from 1-6-2007 any service provided which involve rendition of service such as those amounting to erection, commissioning or installation of plant, machinery, equipments or structure; construction of a new building or a civil structure or a part thereof; construction of a new residential complex or a part thereof and other enumerated activities falling within the defined ambit of works contract under Section 65(105)(zzzza) of the Act would necessarily have to be classified as a works contract service irrespective of whether these services answer the description of or were earlier classifiable as other pre-existing taxable services.*" I also place reliance on the case laws of *ABL Infrastructure Pvt. Ltd. – 2015 (38) STR 1185 (Tri.Mum)* to support my view.

82. Similarly, clause (i) of rule 2A(1) of the said Valuation Rules as it stood during the disputed period clearly specifies that the value of works contract service for the purpose of the said rule shall be equivalent to the gross amount charged for the works contract less the value of transfer of property of goods involved in the execution of the said works contract, sans the element of VAT/sales tax involved therein. Further, clause (ii) of rule 2A(1) states that if VAT/ST has been paid on the actual value of goods, then such value adopted for payment of VAT/ST is to be considered as the value for deduction under clause (i). **It is pertinent to note that although rule 2A of the said Valuation Rules was substituted w.e.f. 01.07.2012 vide Notification No. 24/2012-ST dated 06.06.2012, the provisions of the substituted rule 2A and the erstwhile rule 2A(1) remain *pari materia* except for renumbering of earlier clause**

(ii) as sub-clause (c) in the new rules. Explanation-2 given under the new rule 2(A) provides that: "*for removal of doubts, it is clarified that the service provider shall not take Cenvat credit of duties or cess paid on any inputs used in or in relation to the said works contract.*" Further, similar restrictions for availment of Cenvat credit on inputs also exist in the said Composition Rules as well as in the Notifications No. 12/2003 and No. 01/2006 which are the other options available under the law for levy of service tax on the same taxable service.

83. The above facts and legal provisions make it clear that the services rendered by the said assessee, which are in dispute under the present proceedings are of the type of "*works contract services*", for which they have three optional routes for discharging service tax liability, i.e.: (i) Rule 2A of the Valuation Rules; (ii) Composition Rules; or (iii) Notification No. 12/2003. While availment of Composition Rules is not a question which could be examined at this stage for the reasons discussed in the foregoing paras, all these three optional routes provide for non-availment of Cenvat credit on inputs or input services as explained above.

84. I find that, sub-rule (3) of the Service Tax Composition rules specifically provides that the service provider who opts for the said rules should exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised should be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract. Since the assessee has not opted for the Composition scheme before payment of Service Tax,the benefit of Composition rules is not admissible to the assessee.Thus , the assessee has only two options to pay Service Tax under Works Contract Service, viz Rule 2 A of Determination of Value Rules or under Notification 12/2003. Under both these options, the value of materials on which VAT has been paid is not to be included in the assessable value for payment of Service Tax, subject to the condition that there is no availment of Cenvat Credit on the inputs and there is documentary proof specifically indicating the value of the said goods and materials.

85. The bone of contention in the entire issue is the allegation in the SCN that the assessee had artificially bifurcated the value of the contracts into two parts, viz. (i) service portion, which is 15% of the contract value and (ii) material portion, which is 85% of the contract value; and the issue to be decided now is whether the **evidences brought out by the assessee to establish that the value declared by them towards supply portion, is the actual value of materials used or consumed by them during the execution of the subject works contract**, on which they have reportedly paid VAT or sales tax.

86. One of the main arguments raised by the said assessee, in this regard, is that they have already paid VAT or sales tax on the materials supplied to their clients and hence service cannot be demanded on the value of such materials. I must say that it is nobody's case that service tax would be leviable on the goods which are sold/deemed sold by an assessee on payment of appropriate VAT/sales tax, as the case may be. In fact, service tax statute contains abundant precaution to exclude the value of goods,which are subjected to '*sale*' or '*deemed sale*' and payable to VAT or sales tax, from levy of service tax.

87. One of the main arguments raised by the said assessee, in this regard, is that they have already paid VAT or sales tax on the materials supplied to their clients and hence service cannot be demanded on the value of such materials. I reiterate that it is nobody's case that service tax would *per se* be leviable on the goods which are sold by an assessee on payment of appropriate VAT/Sales Tax. In fact, service tax statute contains abundant precaution to exclude the value of goods which are subjected to '*sale*' or '*deemed sale*' and payable to VAT or sales tax, from levy of service tax. In other words, if an assessee has effected 'sale' or 'deemed sale' of any goods or property during the course of provision of taxable services, he has to go through the legal provisions specified in the statute to exclude the value of such goods or property on which appropriate VAT or sales tax has been paid. Accordingly, he has to opt for any of the routes as provided under rule 2A of the said Valuation Rules, Composition Rules or Notification No. 12/2003, as the case may be. However the **assessee has to prove about the veracity and legitimacy of the actual value of goods which are excluded from the '*gross amount*' towards the value of goods so sold**.

88. In the present case, no separate invoices have been issued by the assessee, for the transfer of property or sale of goods on which VAT has been paid. No details regarding separate amount for the value of goods and separate amounts for the value of service have been shown in the invoices. The assessee has themselves chosen to pay VAT on lumpsum 85 % of the billing amount, which was not acceptable to the department and therefore, demands were raised against the assessee. Transfer of property involved in the execution of a works contract as specified under the said Valuation Rules, Works Contract Composition Rules or the aforesaid notifications, is not to be understood as normal sale of goods. Such transfer of property has been termed as "*deemed sale*" and made liable for payment of VAT/sales tax by way of specific Constitutional provisions. In the instant case, inputs which are used during the execution of works contract are allegedly not sold to the service recipients, but are consumed as a part of the works contract service. In other words, it was alleged that consumption of such inputs is a part of executing works contract. After the works contract is executed, there remains no separate identity on the goods in the form which it has been originally sold/deemed sold to the customers of the said assessee.

89. I find that the said assessee has been vehemently trying to establish that they have paid VAT or sales tax on the goods which were utilized by them during the course of providing taxable services, and hence service tax cannot be charged on the same. They have cited several case laws and circulars issued by CBEC to thrust their point. In this regard, the facts and evidences as well as the legal provisions as discussed in the foregoing paras would suggest that mere payment of VAT or sales tax would not by *ipso facto* provide exemption to the said assessee from service tax on the value of materials used in the rendition of taxable service. On the other hand, eligibility or otherwise for the exemption routes provided under rule 2A of Valuation Rules, Composition Rules or Notification 12/2003 would be the determining factor for exclusion of the value of materials from the 'gross amount' charged towards taxable services.

90. The assessee in their written submission have themselves mentioned that as per Rule 2A(i) the assessee can pay service tax on the labour portion after reducing the actual value of goods transferred from the gross amount charged. Thus, it is apparent that there is a clear understanding on the part of the assessee that only actual value of goods is deductible to arrive at the taxable value of the service portion,which they have not done. On the contrary, instead of arriving at the actual value,it was alleged that they have artificially bifurcated the contract value into material and service portion in the ratio of 85% and 15% respectively. This bifurcation is also not disputed by the assessee. However, they have contended that they have paid VAT on 85% value of the contracts, which has been accepted by the VAT department and therefore on the remaining 15%,service portion, they have appropriately paid service tax.

91. Supreme Court in the case of M/s. Larson & Toubro Ltd., in its judgment reported at 2005 (39) STR 913 (S.C.), has held that:

> ***Works contract - Indivisible works contracts - Liability to Service Tax - Parliament can only tax service element and States can only tax transfer of property in goods - These two elements have to be completely segregated - If some element of transfer of property in goods remains when Service Tax is levied, it would be unconstitutional.*** *[para 16]*
>
> ***Service Tax (Determination of Value) Rules, 2006 - Rule 2A - It bifurcates composite indivisible works contract - No element attributable to property in goods is transferred pursuant to such contract, enters into computation of Service Tax - This complies with constitutional requirements.*** *[para 26]*
>
> ***Taxation - Constitutional scheme - Taxation powers of Centre and States are mutually exclusive - There is no concurrent power of taxation, and entries are to be found only in lists I and II - Hence, if taxing statute transgresses into prohibited exclusive field, it is liable to be struck down.*** *[para 16]*

16. At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite

indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in *Bharat Sanchar Nigam Limited* v. *Union of India*, (2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.), as follows :-

> "No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in *Larsen & Toubro* v. *Union of India* [(1993) 1 SCC 364] : (SCC p. 395, para 47) :-
>
> "The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods."
>
> For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in *Gujarat Ambuja Cements Ltd.* v. *Union of India* [(2005) 4 SCC 214], SCC at p. 228, para 23 :-
>
> "This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field." (at paras 88 and 89)

26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second *Gannon Dunkerley* case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second *Gannon Dunkerley* case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

92. I hereby rely on the above judgment of the Hon'ble Supreme Court, above, wherein it has been held that in case of composite indivisible works contract, no element attributable to property in goods is transferred pursuant to such contract, enters into computation of Service Tax.

93. Further, from the above discussion, it is evident that statute stipulates that no Service tax can be recovered on the materials used in-the execution of the Contract on which VAT / Sales tax has been paid. CESTAT, vide its order No. A/11183/2014,dated 03/07/2014, in this matter,

has observed as under:

"As per Rule 2 A(ii) of the Service Tax (Determination of Value Rules, 2006, the actual value of transfer of property in goods involved in execution of works contract is not to be taken into consideration while discharging Service Tax liability under the Works Contract Services. It is the claim of the appellant that VAT/Sales Tax was paid on the actual material value of the material sold, as per audit account furnished to the adjudicating authority and on examination of the records, it seems to be so. However, this matter whether VAT./Sales Tax has been paid on the actual materials sold to the service recipient is required to be gone into detail by the adjudicating authority. Matter is therefore, required to be remanded back to the adjudicating authority for de-novo consideration."

94. In view of the above, I hereby examine the documentary proof produced by the assessee to establish their contention that VAT has been paid on the value of the said goods and materials and that the material portion of the Works Contracts actually amounts to 85 % of the contract value. I have examined the copies of the VAT returns and the detailed charts showing the collection and payments of VAT during the relevant period. I find that applicable VAT has been paid on the materials, equipment and parts,which form an integral part of the total contract value. I find that the assessee has undertaken an exercise to ensure that the assessee collects and pays VAT on the basis of the actual value of materials, parts and equipment supplied in relation of a particular job, and to ensure that the changes of fluctuations in the supply side of the contract are neutralized. For this, the assessee engages in an annual review of all the jobs and the value of the materials, parts and equipment supplied therein. The aforesaid exercise is undertaken on a contract-wise and job-wise basis and is purely based on actual data available with the assessee.The aforesaid exercise has been conducted over several years, and has yielded that about 85% of the Total Contract Value is towards the supply of materials; parts and equipment used in the erectioning, commissioning and installation of the elevators. The balance, in terms of the applicable law, is considered as the Service portion in the Contract and applicable Service tax is paid thereon. **A statement certifying the aforesaid, for the period 2008-09 to 2011-12, obtained pursuant to an independent study by M/s. Kantilal Patel & Co., dated 23.1.2012, Chartered Accountant has been produced by the assessee.**

95. Further, vide their letter dated 27.01.2020, the assessee has submitted a detailed report issued by M/s. P.D. Modh & Associates, Cost Accoutants, certifying the actual cost of materials supplied and the value of service provided in their contracts. Vide this Certificate, the Cost Accountants have interalia certified as under:

(1) All contracts for supply and erection of elevators, enetered into with its customers, by TRIO, have the following two disctinct elements for which separate pricing is provided in the contract itself:

a. Supply
b.Service

(2) In each of the contract entered int by TRIO with its customer, it is clearly specified that for every Rs. 100/- worth of the contract, Rs. 15/- shall be collected towards the service rendered for erectioning and commissioning of the elevators. The balance Rs. 85/- are specifically charged towards the supply of materials.They have also verified the purchase costs for TRIO for purchasing such materials which are in turn supplied to the customer in relation to the respective contract.

(3) On such Rs. 15/- specifically charged for rendering the service, TRIO collects and pays applicable service tax and duly discloses the value of such service rendered to the customer, in its Tax invoice, along with applicable Service Tax and Cess collected.

(4) For the supply of material, TRIO specifically provides the value of the material so supplied in relation to the contract and collects and pays applicable VAT in relation to the same. The details of the VAT collected along with the value on which it is collected is duly specified in the Tax Invoice which TRIO issues to its customers.

(5) Collection and payment of VAT and/or Service Taz, is may be applicable, is on 'ACTUAL BASIS' and TRIO has not availed of the benefit of abatement as provided under VAT law or under the Service Tax law.

(6) All amount of VAT collected by TRIO from its customers, in relation to the materials supplied, is duly paid and deposited with the Government exchequer, in accordance with the applicable laws.

(7) All amount of Service Tax collected by TRIO from its customers, in relation to the service rendered, is duly paid and deposited with the Government exchequer, in accordance with the applicable laws.

96. CESTAT, Bangalore, in the case of M/s. Empee Sugar & Chemicals, reported in 2007 (7) STR (Tri. Bang), has held as under:

> **Refund - Unjust enrichment - Education cess - Proof of non-passing of duty to buyer –Chartered Accountant's Certificate about same has evidentiary value - It is acceptable as he cannot give incorrect/false certificate since that would have penal consequences - Section 11B of Central Excise Act, 1944.** *[para 4]*
>
> *4. I am of the considered opinion that the Commissioner (A) is justified in arriving at the above conclusion in holding that the Cess has not been passed on to the buyer. The Chartered Accountant cannot give an incorrect or false certificate, as such issuance of certificate will have penal consequences. It has evidential value and it has to be accepted. There is no merit in this appeal and the same is rejected.*

97. CESTAT,Chennai, in the case of M/s. Saralee Household & Bodycare (I) P. Ltd., reported in 2007 (5) STR 381 (Tri. Chennai), has held as under:

> **Refund - Unjust enrichment - Price increase evidenced by commercial invoices - Excise duty paid by assessee kept as "receivable from Govt. or current assets" in their books of accounts, as shown by Chartered Accountants Certificates and books of account - Authenticity of documentary evidence adduced by assessee, not rebutted - Presumption of unjust enrichment under Section 12B of Central Excise Act, 1944 successfully rebuted by assessee - Section 11B ibid.** *[paras 4, 5]*

98. CESTAT, AZU, Mumbai, in the case of M/s. Pride Foramer, reported in 2008 (12) S.T.R. 657 (Tri. - Mumbai), has held as under:

> *Refund claim - Unjust enrichment - Invocation of - Amount deposited pursuant to High Court order while case pending adjudication - Doctrine of unjust enrichment invocable while considering the refund claim of such security deposit - Section 27 of Customs Act, 1962. [2005 (181) E.L.T. 328 (S.C.) relied on]. [para 8]*
>
> *Refund claim - Unjust enrichment - Bar of - Burden of amount deposited whether passed on - Certificate from ONGC to whom impugned rig supplied not produced - Balance sheet showing that such amount paid by appellants was borne by them not filed before lower authorities - However, balance sheet showing an amount of Rs. 10 crores as Customs duty recoverable, Chartered Accountant's certificate certifying that such amount not passed on to ONGC produced and statement made by Advocate that no reimbursement of Rs. 10 crores from ONGC has been received - Appellants established that burden of impugned amount not passed on - Impugned order set aside - Original authority directed to withdraw the amount from Consumer Welfare Fund and refund the same to the appellants - Section 27 of Customs Act, 1962. [para 12]*
>
> *Appeal allowed.*

99. The valuation of Works Contract Service, as discussed in the foregoing paras, provide for a deduction of the amount on which VAT has been paid in relation to the materials, equipment and parts supplied as a part of the contract. The scrutiny of the VAT returns and invoices submitted by the assessee, clearly show that VAT has been been

paid on the materials used in providing the Works Contract Service. A Chartered Accountant and a Cost Accountant have certified that the manner of arriving at the value of materials in the contract service and have certified that it amounts to 85 % of the contract value. The Certificates issued by the Chartered Accountant and the Cost Accountant are authentic documents given by professionals. These certificates cannot be wrong as penal action can be taken against these professionals, in case it is found that they have issued false certificates. Further, in many cases, as cited above, CESTAT, has held that such certificates are authentic and have been looked upon as evidence. From the records of the case also, I find no reason to rebut the claim of the C.A and the Cost Accountant. Therefore, I accept the above Certificates produced by the assessee.Further, from the records of the case, I also observe that the assessee has not availed Cenvat Credit on inputs and the same is also certified by the Chartered Accountant. In such a scenario, the methodology of bifurcation of the value of contract into service portion and material portion, adopted by the assessee is in consonance with the applicable law. Even though the assessee, has paid Service Tax under Notification 12/2003, dated 26.6.2003, when they ought to have paid the Service Tax under Rule 2 A(i) of the Service Tax Determination Rules, 2006, as amended,the entire exercise, is a revenue neutral situation, with no impact whatsoever to the Government exchequer, in as much as the assessee has appropriately paid Service Tax on the service portions of the Works Contract. The assessee has submitted sufficient proof to substantiate their claim that VAT has been paid on the materials consumed during the course of the execution of the Works Contract and that the supply portion of the contract amounts to 85% of the contract value. I, therefore hold that the demand of Service Tax amounting to **Rs.14,35,41,624/-** towards non payment of Service tax on the supply portion of the contract value is not sustainable.

MANAGEMENT, MAINTENANCE OR REPAIR SERVICE:

100. Definition of management maintenance or repair service:

Management, maintenance or repair service means any service provided by:

(i) *any person under a contract or an agreement: or*

(ii) *A manufacture or any person authorized by him, in relation to.-*

(a) Management of properties, whether immovable or not:

(b) Maintenance or repair of properties, whether immovable or Not or:

(c) Maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle,

101. From the facts and circumstances as discussed in foregoing paras, it was established that the said assessee had been providing services under category of 'Management, Maintenance or Repair Service' and was also availing the benefit of Notification No 12/2003-ST in some cases. In cases where they had availed the benefit of Notification No 12/2003-ST, it was revealed that the same had been availed fraudulently by them. They have in all such cases violated the condition of the Notification in as much as the parts which they had shown as traded/sold had actually been consumed by them during the course of providing repair or maintenance service.

102. Further, Explanation I(iii) of section 67, prior to its substitution with effect from 18.04.2006, provided that the cost parts or other material, if any, sold to customer during the course of providing maintenance or repair service was not to be included in the value to taxable service. This exclusion of the cost of parts or other material has not been provided (i.e exclusion has been deleted from the list) under new section 67 read with Rule 6 of the Valuation Rules 2006 which is applicable from 19.04.2006. Consequently, the cost of such parts/ other material sold to customer during the course of providing maintenance or repair service is to be included in the value of taxable service with effect from 19.04.2006. Therefore, a demand of Rs. 59,84,070/- under the category of 'Management, maintenance or repair service', was raised vide SCN dated, against the assessee.

103. It is observed that the assessee has supplied parts/components to their customers in pursuance of annual maintenance contracts. The annual maintenance contracts are for

maintenance and there is no separate charge for goods and materials consumed in the process of AMC. The customers have not envisaged any purchase of goods. They have only obtained a contract for AMC and have no liability whatsoever towards materials and goods consumed. In absence of any such liability there cannot be any sale involved. The client entered a contract for AMC which is all inclusive. There may or may not be any consumption of parts/components. The service receiver pays a fixed amount to the service provider.

104. The said assessee is also providing Repair or Maintenance service. They get into annual maintenance contract (AMC) with the customers for specific period. In AMC, they look after routine maintenance and periodical cheek up and if consumables such as nut, bolts are required then they provide the same under AMC contract. However for replacement of parts, they are charging separately for the same and they are not paying service tax on the same.

105. On verification of records it appeared that the repair or maintenance contracts were composite and indivisible contracts which involved supply of parts and repairing or maintenance of elevators. I find from the records of the case that the assessee had entered into two types of Maintenance and Repair contracts viz. (i) Repair Contracts (ii) Annual Maintenance Contracts.

(I) Repair Contracts

105.1. These contracts are typically contracts wherein the Customer specifically requests for a replacement or repair of a major part or equipment of the elevator. Given the fact that the repair or replacement, involves expertise, as a condition of the contract itself, the assessee also provided the service for the installation of such parts. From the VAT returns and invoices submitted by the assessee, I find that the assessee had paid VAT on the amount of materials or parts supplied as a part of the Repair Contract. The assessee had deducted the amount for supply of materials (cost of materials,parts), on which VAT had been paid, from the total value of Repair Contract, and on the remaining value, the assessee has paid the applicable Service tax, as per Notification No. 12/2003-ST., dated 26.3.2003.

(II) Annual Maintenance Contracts

105.2 The assessee had also provides repair and maintenance services qua the elevators, to its customers, and have consequently and independently entered into Annual Maintenance Contracts with the customers. Sample copies of such AMCs were submitted by the assessee. The assessee had paid Service tax on the full value of the Annual Maintenance Contracts, and classified such service as "Maintenance or repair Service". The aforesaid AMCs do not include parts or equipment, except certain consumable items whose quantification is not possible, and which form a part of the AMC Value. However, in the event where the part of an elevator is required to be replaced, the same was sold to the Customer independently, on which VAT is collected and paid. The assessee has produced proof of payment of Service Tax and copies of invoices and VAT returns to substantiate their claim.

106. I rely on the judgment passed by the Hon'ble Supreme Court of India, in the case of Wipro GE Medical Systems Pvt. Ltd., reported in 2012 (28) S.T.R. J44 (S.C.), wherein it was held that:

> *The Appellate Tribunal in its impugned order had held that spare parts used in the course of maintenance service under Annual Maintenance Contract are to be considered as sold. Sale tax was paid on materials representing 70% of value and Service Tax was not leviable simultaneously on such portion. Demand beyond 30% of total value of contract was held not sustainable.*

107. I also rely on the decision of CESTAT, Chennai, in the case of M/s. PLA Tyre Works, reported in 2008 (9) STR. 20 (Tri.-Chennai.), wherein it was held as under:

> *Stay/Dispensation of pre-deposit - Management, maintenance or repair service - Appellants rendering 'repairs and maintenance service' to customers of MRF Ltd. on behalf of said company (qua) franchisees during period of dispute (16-6-2005 to 31-3-2006) - Cost of materials, supplied by franchiser, not included in value of service by assessee - Appellants not taken credit under Cenvat Credit Rules hence prima facie benefit of exemption Notification No. 12/2003-S.T. available - Waiver of pre-deposit and stay of recovery granted - Section 35F of Central Excise Act, 1944 as applicable to*

Service tax vide Section 83 of Finance Act, 1994. [paras 1, 2]

108. The admissibility of exclusion of value of materials used in the execution of services rendered under Works Contract Service has been discussed in the foregoing paras. I hold that the analogy with regard to the availing of benefit of Notification No. 12/2003-ST, 20.6.2003, with respect to Works Contract Service, applies to the services of Management, Maintenance and Repair Service as well. The admissibility of exclusion of value of goods on which VAT has been paid, has been discussed elaborately in the foregoing paras. The methodology of bifurcation of the contracts pertaining to Management, Maintenance and Repair Service, into supply and service portions, adopted by the assessee is in consonance with the applicable laws.

109. I, therefore hold that the demand of Service Tax amounting to Rs.59,84,070/-, towards non inclusion of cost of materials in the assessable value of services rendered under the category of Management, Maintenance and Repair Service, is not sustainable, in as much as the assessee has submitted sufficient proof to substantiate their claim that VAT has been paid on the materials consumed during the course of the execution of such contracts.

110. Therefore, I hold that the assessee has appropriately paid Service Tax on the services rendered by them under Works Contract Service and Management, Maintenance and Repair Service, during the period 2007-08 to 2011-12.Therefore, I drop the demand of Rs.14,95,25,694/- raised vide SCN No.STC/4-22/O&A/12-13, dated 23.10.2012.

111. I now take up the following Show Cause Notices issued to the assessee, for subsequent period from 01.04.2012 to 30.6.2017, for non payment of Service Tax on supply portion of the contract value.

Sr. No.	Show Cause Notice File No.	Date	Period	Total Amt. of Service Tax demanded (Rs)	DEMAND OF S.TAX ON WCS (Rs)	DEMAND OF S.TAX ON MMR (Rs)
01	STC/4-82/O&A/ 13-14	13.05.2014	01.04.2012 to 30.09.2013	10,12,10,547/-	9,56,93,460/-	55,17,087/-
02	STC/4-32/O&A/ 2015-16	16.10.2015	01.10.2013 to 31.03.2015	2,49,14,322/-		
03	STC/04-45/O&A/ 16-17	07.03.2018	01.04.2015 to 31.03.2016	4,79,10,917/-	4,48,08,910/-	31,02,007/-
04	STC/15-09/OA/2019	05.04.2019	01.04.2016 to 30.06.2017	6,88,84,307/-	5,95,35,855/-	93,48,452/-

B: PERIOD FROM 2012-13 TO 30.09.2013:

SHOW CAUSE NOTICE NO. STC/4-82/O&A/13-14, DATED 13.05.2014

112. It was alleged in the Show Cause Notice that the assessee was wrongly availing benefit of Notification No.12/2003-ST dated 20.06.2003 and they have not paid service tax on supply portion but paid Service Tax only on the service portion of the contract. Therefore benefit of Notification No. 12/2003 was also denied in the earlier Show Cause Notice No. STC/4-22/O&A/12-13, dated 23.10.2012.

113. Though the said notification No. 12/2003 was already rescinded vide Notification No. 34/2012-ST dated 20.06.2012, the assessee had continued the practice of non-payment of service tax on supply portion of their works contracts.

114. During the **period from 2012-13 to 30.06.2012**, the assessee has continued the same practice as discussed above and have not classified the services provided by them under "Works Contract Service" as defined under Section 65 (105)(zzzza) of the Finance Act,1994,; and not paid Service Tax on the Supply portion of the services rendered towards supply and erection of elevators. It was also alleged that the assessee had not paid Service Tax appropriately under the category of "Management Maintenance and Repair Service also during this period.

115. **For the period 01.07.2012 to 30.09.2013**. However after introduction of the Negative List w.e.f 01.07.2012, there is no service wise classification. The activity carried out by the assessee falls under the purview of "Service" as defined under Section 66B and made taxable

in terms of Section 66B read with Section 66D of Finance Act, 1994, as the same is neither covered by negative list nor by any exemption notification.

116. The benefit of Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007, is not admissible to the assessee as they have not exercised the option as per Rule 3 of the said Rules. Therefore, the applicable service tax of **Rs.9,56,93,460/-** towards Works contract Service and Service Tax amounting to **Rs.55,17,087/- towards** "Management Maintenance and Repair Service" **was demanded** for the period 2011-12 to 30.9.2013, under Show Cause Notice No.STC/4-82/O&A/13-14, dated 13.5.2014.

C: PERIOD FROM 01.10.2013 TO 31.03.2015

SHOW CAUSE NOTICE NO. STC/4-32/O&A/15-16, DATED 16.10.2015

117 . The Service Tax (Determination of Value) Rules, 2006 states as under:

"2A. *Determination of value of service portion in the execution of a works contract.-*

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

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

118. However, in the instant case, it appeared that the assessee had taken 15% value of the Contract for the purpose of payment of Service Tax in both cases of installation of new elevators and repair of existing elevators, which is not on actual basis and cannot be taken as proper value for the discharge of Service Tax liability as the same appeared to have been arrived at on the basis of an imaginary or hypothetical calculation. Further the contracted value appeared to have been artificially bifurcated into material portion and the Service Portion.

119. Accordingly, Service Tax on providing the services of the works contract, during this period was demanded as per sub rule 2A(ii) of The Service Tax (Determination of Value) Rules,2006, as amended,which is reproduced as under:

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

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

(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; *or*

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

*Service tax shall be payable on **seventy percent** of the total amount charged for the works contracts"*

120. During the period from 01.10.2013 to 2014-15, the assessee has continued the same practice as discussed in the above paras and failed to pay the applicable service tax of **Rs. 2,49,14,322/-**, which was demanded vide SCN no. **STC/4-32/O&A/15-16, DATED 16.10.2015,** was made recoverable under Section 73(1) of Finance Act, 1994, read with Rule 2 A(ii) of the Service Tax (Determination of Value) Rules, 2006.

D: PERIOD : FINANCIAL YEAR 2015-16:

SHOW CAUSE NOTICE NO. STC/4-45/O&A/16-17, DATED 07.03.2018

121. During the financial year 2015-16 also, the assessee has continued the same practice as discussed in the above paras and failed to pay the applicable service tax of **Rs.4,79,10,917/-**, which was demanded vide **STC/4-45/O&A/16-17,dated 07.03.2018 and was made recoverable** under Section 73(1) of Finance Act, 1994, read with Rule 2 A(ii) of the Service Tax (Determination of Value) Rules, 2006.

E: PERIOD : APRIL 2016 TO 30.6.2017:

SHOW CAUSE NOTICE NO. STC/15-09/OA/2019, DATED 05.04.2019

122. During the period from April 2016 to 30.6.2017, the assessee had continued the same practice as discussed in the above paras and failed to pay the applicable service tax of **Rs.6,88,84,307/-, which was demanded** vide **STC/15-09/OA/2019, dated 5.4.2019 and was made recoverable** which is recoverable under Section 73(1) of Finance Act, 1994, read with Rule 2 A(ii) of the Service Tax (Determination of Value) Rules, 2006.

123. Further, it has been also been alleged in the SCN dated 5.4.2019, that there is a difference amounting to Rs.24,52,50,169/-, as per the details provided by the assessee for the F.Y. 2016-17 and the Revenue from operations as per audited balance sheet for the F.Y. 2016-17. From these details, it appeared that there was non payment of Service Tax also for the period from 01.04.2016 to 30.06.2017, as detailed in the Annexures A and B to the Show Cause Notice dated 5.4.2019.

124. Vide their letter dated 23.12.2019, the assessee has justified the difference in the data provided by the Company and the Revenue from operations shown in the Balance Sheet. Firstly they have denied the allegation made in the SCN. They have stated that the aforesaid allegations stem out from an incorrect understanding of the accounting principles, as mandated in the Accounting Standard-7, prescribed by the ICAI, which are required to be adhered to by the Company.They have contended that Accounting as per the Accounting Standards and disclosure for the purposes of Service Tax, are two completely different and mutually exclusive concepts governed by different laws. Service Tax is required to be computed on the value of the service rendered during the particular year, which is determined in accordance with the Service Tax (Determnation of Value of Service) Rules, 2006, which has no co-relation to the Accounting Standard-7 which is required to be adhered to for the purpose of Accounting. They have relied on the judgment dated 6.4.2018, passed by the Hon'ble Madras High Court in the case of M/s. Firm Foundation and Housing P. Ltd. v/s. Principal Commission (W.P. No. 21799/17 and W.P. No. 22810/17), Vide the Order dated 6.4.2018,reported in 2018 (16) G.S.T.L. 209 (Mad.),the Hon'ble Court held as under:

> *Point of Taxation - Determination of - Petitioner enters into agreements with customers for construction of apartments - Petitioner not raises invoices as and when a particular landmark is reached - Accrual of the consideration stage-wise occasioned automatically upon completion of the stage of construction set out in the agreement itself - However, petitioner confirms receipt of lump sum advances corresponding to several initial landmarks in the contract, even prior to achievement of such landmarks - Entire sum received thus becomes taxable upon receipt as per provisions of Rule 3(b) of Point of Taxation Rules, 2011 - Reporting of income in profit and loss account being irrelevant for the purposes of determination of Service Tax payable, basis of the impugned assessment erroneous - Matter remitted to respondent to be re-done de novo strictly in accordance with the provisions of Rule 3 of Point of Taxation Rules, 2011. [paras 19, 20, 22, 24, 25, 34]*
>
> *Accounting Standards and Point of Taxation Rules, 2011 - Difference between - Accounting Standards (AS-7) addresses 'how much' of transaction over the term of contract whereas Rule 3 of Point of Taxation Rules, 2011 addresses 'when' in relation to rendition of service for computing taxability under Finance Act, 1994. [para 16]*

124.1 Relying on the above judgment passed by the Hon'ble High Court of Madras, I accept the contention of the assessee, regarding the difference in the data provided by the Company and the Revenue from operations shown in the Balance Sheet.

VALUATION UNDER SCNs DATED 13.5.2014,16.10.2015,07.03.2018 AND 5.4.2019:

125. Further, the admissibility of exclusion of value of materials used in the execution of services rendered under Works Contract Service and Management Maintenance and Repair Service has been discussed in the foregoing paras with respect to the Show Cause Notice dated 23.10.2012. I hold that the analogy with regard to the availing of benefit of Notification No. 12/2003-ST, 20.6.2003, applies to the period till the said Notification was rescinded vide Notification No. 34/2012-ST dated 20.06.2012.

126. The Service Tax (Determination of Value) Rules, 2006 states as under;

"2A. Determination of value of service portion in the execution of a works contract.-

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

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

***Explanation** – For the purposes of this clause,-*

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

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

(i) labour charges for execution of the works;

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

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

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

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

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

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

(viii) profit earned by the service provider relatable to supply of labour and services;

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

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

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

(D) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -

***(iii) maintenance or repair or reconditioning or restoration or servicing of any goods;** or*

(iv) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

*Service tax shall be payable on **seventy percent** of the total amount charged for the works contracts"*

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

(a) "original works" means-

(i) all new constructions;

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

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

(b) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any; and

(ii) the value added tax or sales tax, if any, levied thereon:

Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Explanation 2.–*For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.".*

127. However, in the instant case, at the time of issuance of the periodical Show Cause Notices, it appeared that the assessee had taken 15% value of the Contract for the purpose of payment of Service Tax in both cases of installation of new elevators and repair of existing elevators, but not on actual basis. Therefore, it was purported that the same was not the proper value for the discharge of Service Tax liability as the same appeared to have been arrived at by an imaginary or hypothetical calculation.

128. Accordingly, it was alleged in the said Show Cause Notices that determination of valuation of the Service portion in execution of the works contract in the instant case needed to be done as per sub rule 2A(ii) of the Service Tax (Determination of Value) Rules,2006 ibid, as above.

Rule 2A (i) of the Service Tax (Determination of Value) Rules, 2006, stipulates as under:

> *Value of Service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.*

129. The demand was raised in the above Show Cause Notices, under Rule 2A(ii) of the above rules, as appropriate proof of the value of property in goods transferred in the execution of the said works contract was not provided at the relevant time. vis-à-vis (i) the amount charged for such goods or services, if any; and (ii) the value added tax or sales tax.

130. The payment of VAT on the materials used in the execution of such contracts have been dealt with in detail in the preceding paras. There is substantial proof that the value of *Service portion in the execution of a works contract arrived at by the assesssee is equal to the gross amount charged for the works contract after deducting the value of materials on which VAT has been paid.The bifurcation of the contracts into supply portion and service portion is not hypothetical or artificial as there is enough evidence in the form of the VAT returns, the invoices, Certificates issued by Chartered Accountant and Cost Accountant etc. to validate the claim of the assessee that 85% of the contract value pertains to Supply portion and 15 % of the contract value pertains to service portion.* The analogy of the discussion with regard to the Show Cause Notice no. dated 23.10.2012, applies to the Show Cause Noitce issued for the subsequent period also. Therefore, I hold that the assessee has paid Service Tax appropriately and therefore the demands raised under the Show Cause Notices dated 23.10.2012,13.05.2014,16.10.2015,7.3.2018 and 5.4.2019, are not sustainable.

131. I hold that the services of supply and erection of elevators provided by the assessee should be classified under Works Contract Service with effect from 1.6.2007.I also reiterate that mere change in classification of Service has not altered the quantum of Service tax payable by the assessee. They have correctly and lawfully paid Service tax after excluding the amount of materials on which VAT has been paid. This is a revenue neutral exercise, with no loss to the exchequer.

INTEREST AND PENALTY:

132. I find that under the Show Cause Notices discussed above, interest at the prescribed rate has been proposed to be charged on the Service tax amount demanded,Penalty is also proposed to be imposed on the assessee under Section 76,Section 77 and Section 78 of the Finance Act, 1994.

133. I find that the assessee had appropriately paid Service Tax during the relevant period of the Show Cause Notices, even though they had not classified the service of supply and erection of elevators appropriately under Works Contract Service. However, the change is classification has not resulted in the Service Tax payable as discussed in the preceding paras. There is no loss of Government Revenue. Further, I find that the assessee has filed ST-3 returns and never defaulted in the payment of Service Tax.There was no suppression on the part of the assessee. The action of the assessee of not including the value of materials on which VAT has been paid, to the assessable value was not intended to deliberately evade payment of Service Tax, but was in consonance with the law applicable at the relevant period.I hold that no offence has been committed by the assessee and therefore no penal action is liable on the assessee under Section 76,77 and 78 of the Finance Act, 1994..

134. It is a settled law, that, whenever the demand of duty is set aside, imposition of the interest and penalty is not warranted. I also rely on the following judgments for non imposition of penalty on the assessee.

135. The Hon'ble Supremre Court on India, in its judgment in the case of M/s. H.M.M.Ltd., reported in 1995 (76) E.L.T. 497 (S.C.),has held as under:

> *Demand - Limitation for extended period not invokable unless show cause notice puts assessee to notice specifically as to which of the various commissions or omissions stated in the proviso to Section 11A(1) of Central Excises & Salt Act, 1944 had been committed.*
>
> *[para 2]*
>
> *Demand - Limitation for extended period - Non-declaration of waste/ by-product in classification list - Inference of intention to evade payment of duty not drawable automatically - Show cause notice must contain an averment to that effect pointing out specifically as to which of the various commissions or omissions stated in the proviso to Section 11A(1) of Central Excises & Salt Act, 1944 had been committed by assessee and adjudicating authority must specifically deal with assessee's contention in rebuttal thereof.*
>
> *[para 2]*
>
> *Penalty not imposable unless Department is able to sustain its demand show cause notice which was under challenge on the ground of limitation - Rules 9(2) and 173Q of Central Excise Rules, 1944.*

136. The Hon'ble High Court of Judicature at Allahabad, in its judgment in the case of M/s. Coolade Beverages Ltd., reported in 2004 (172) ELT 451 (All.), has held as under:

> *Penalty - Duty when found to be not imposable, question of imposing penalty not arises - Rule 173Q of erstwhile Central Excise Rules, 1944 - Rule 25 of Central Excise Rules, 2002. - Once it is found that no duty is imposable then the question of imposing penalty does not arise. The Tribunal has clearly found in its order that the department has not been able to prove that the bottles sold during the relevant years were out of stock of glass bottles or which Modvat credit was taken. If Modvat credit is not taken on these bottles then of course it is open to the assessee to sell the bottles in the market and there can be no restriction on the same. Thus the order of Tribunal is contradictory. No penalty could be imposed on the assessee as the demand of duty itself has been dropped. [(1987) 167 ITR 880; (1987) 168 ITR 846; 1998 (104) E.L.T. 8 (All.); 1995 (76) E.L.T. 497 (S.C.) relied on]. [paras 6, 7, 8]*

137. The Hon'ble High Court of Judicature at Allahabad, in its judgment in the case of M/s. H, Guru Investment (North India) P. Ltd., reported in 1998 (104) ELT 8 (All) has held as under:

> *Penalty - Demand Notice and Notice imposing penalty issued to petitioner - Tribunal cancelled the demand notice on the ground of same being time barred but kept the amount of penalty to be paid - Penalty not leviable when demand of duty itself is set*

aside - Article 226 of Constitution of India - Section 11A of Central Excise Act, 1944 - Rule 173Q of Central Excise Rules, 1944.

138. CESTAT, WZU,Mumbai, in its decision in the case of M/s. Fibre Foils Ltd., reported in 2005 (190) ELT 352 (Tri. Mum.), has held as under:

Penalty - Interpretation of statutes - No penalty imposable, dispute being bona fide about the interpretation of law - Rule 25 of Central Excise Rules, 2002. [para 7]

139. CESTAT, Chennai, in its judgment in the case of M/s. Aeon's Construction Products Ltd., reported in 2005 (180) ELT. 209 (Tri. Chennai.), has held as under:

Penalty - Imposition of - Exemption notification applied bona fide by assessee as per their interpretation and understanding without mens rea - HELD : No penalty imposable under Rule 173Q of erstwhile Central Excise Rules, 1944 - Rule 25 of Central Excise Rules, 2002. [para 8]

8. We have not found any evidence on record indicating that the appellants contravened any of the provisions of the Central Excise Rules, 1944 with intent to evade payment of duty. The non-payment of duty was on account of the fact that the assessee interpreted and understood the Notifications in the way they did in a bona fide manner without any mens rea. Hence no penalty is warranted under Rule 173Q either.

140. From the discussion in the preceding paras, I conclude that the services of supply and erection of elevators provided by the assessee should be appropriately classified under the category of Works Contract Service with effect from 1.6.2007. The value of the supply of materials used in the execution of the contracts, on which VAT has been paid, need not be added to the assessable value for payment of Service Tax, subject to the stipulated conditions. The practice followed by the assessee is well within the ambit of law. The assessee has provided appropriate proof of payment of VAT on the materials used in the execution of the contracts and non availment of Cenvat Credit on the inputs used in such contracts.

141. The Notification No. 12/2003 was rescinded vide Notification No. 34/2012-ST dated 20.06.2012, therefore for the subsequent period, I hold that the Service Tax should be paid under Rule 2 A(i) of the Service Tax (Determnation of Value) Rules, 2006. The assessee has appropriately paid Service Tax on the services provided under contracts of Management, Maintenance and Repair Service.

142. I conclude that the demands raised against the assessee, under the Show Cause Notices dated 23.10.2012,13.05.2014,16.10.2015,7.3.2018 and 5.4.2019, are not sustainable. Therefore I drop the demands raised against the said SCNs.

143. Since the demand of Service Tax is dropped, consequently, the question of payment of interest under Section 75 of the Finance Act, 1994 does not arise and therefore I hold that no interest is payable by the assessee. For this, I also rely of the decisions of the Tribunals and the judgment passed by various Courts, as cited above.

144. In view of the above discussion, I pass the following order:

ORDER

(i) I order that the services provided by the assessee are appropriately classifiable under the taxable category of 'Works contract service' defined under Section 65(105)(zzzza) of the Finance Act, 1994, with effect from 1.6.2007 till 1.7.2012, after which the services are classified under declared services under Section 66 E of the Finance Act, 1994, as amended, as per Notification No. 19/2012-S.Tax, dated 5.6.2012.

(ii) I hold that the Service Tax is to be paid Rule 2 (A) (i) of the Service Tax (Determination of Value)Rules, 2006, as amended, after Notification No. 12/2003 was rescinded vide Notification No. 34/2012-ST dated 20.06.2012.

(iii) I drop the proceedings initiated against the assessee under the following Show Cause Notices.

Sr. No.	Show Cause Notice File No.	Date	Period	Total Amt. of Service Tax demanded (Rs)
01	STC/4-22/O&A/12-13	23.10.2012	2007-08 to 2011-12	14,95,25,694/-
02	STC/4-82/O&A/13-14	13.05.2014	01.04.2012 to 30.09.2013	10,12,10,547/-
03	STC/4-32/O&A/2015-16	16.10.2015	01.10.2013 to 31.03.2015	2,49,14,322/-
04	STC/04-45/O&A/16-17	07.03.2018	01.04.2015 to 31.03.2016	4,79,10,917/-
05	STC/15-09/OA/2019	05.04.2019	01.04.2016 to 30.06.2017	6,88,84,307/-
Total				**39,24,45,787/-**

(iv) I drop the demand of **Rs. 39,24,45,787/-**, initiated under the above Show Cause Notices.

(v) Since the demand of Service Tax is dropped, consequently, there question of payment of interest under Section 75 of the Finance Act, 1994 does not arise and therefore I hold that no interest is payable.

(iv) I do not impose penalty under Section 76, 77 and 78 of the Finance Act, 1994.

(v) The Show Cause Notices issued to the assessee as per point (iii) above, are hereby disposed off vide this order.

(Dr. Balbir Singh)
Commissioner,
C.G.S.T,
Ahmedabad,North

F.No.STC/4-22/O&A/12-13 Date: 31.01.2020

By R.P.A.D.

To

M/s. Trio Elevators Co.(India) Ltd.,
404, Shivam Complex,
Near Bhuyangdev Cross Road, Ahmedabad

Copy to :

1. The Principal Chief Commissioner, C.G.S.T, Ahmedabad Zone, Ahmedabad.
2. The Assistant Commissioner, CGST, Division-VII, Ahmedabad.
3. The Superintendent, Range-III, Division-VII, CGST, Ahmedabad-North.
4. Guard file.