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/15-32/O&A/17

आदेश की तारीख़ / Date of Order : .05.2020

जारी करने की तारीख़ / Date of Issue : .05.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–02/2020-21

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 रजिस्ट्रार ,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 हैंखिल चार प्रतियों में दा , 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 Show-Cause-Notice **F.No.STC/15-32/OA/2017** dated **03.11.2017** issued to **M/s Dresser-Rand India Private Limited,** Plot No. 187, Phase-I, GIDC Estate, Naroda, Ahmedabad.

BRIEF FACTS OF THE CASE:

M/s. Dresser-Rand India Private Limited, Plot No. 187, Phase - I, GIDC Estate, Naroda, Ahmedabad (herein after referred to as 'the said assessee') is engaged in the manufacture of Gas Compressor and Parts, falling under Chapter 84 of the Central Excise Tariff Act, 1985. They are holding Service Tax Registration No. AAACD9897PST001 (till 30.06.2017) and the present GST Registration No. is 24AAACD9897P1ZR. The said assessee was availing Cenvat Credit of inputs and input services under Cenvat Credit Rules, 2004 (here after referred as CCR 2004) in terms of provisions of erstwhile Central Excise Act 1944 and the Rules framed thereunder.

2. Audit of records maintained by the said assessee was carried out by the officers of CERA. The assessee was having Centralized Service Tax registration. During test check of Balance Sheet, P&L A/c. Ledger A/c., ST-3 returns & Service tax payment records of M/s. Dresser-Rand India Pvt. Ltd., Naroda, Ahmedabad,, falling under the jurisdiction of AR-V of Div-I (Naroda) under Central GST Commissionerate, Ahmedabad North for the period from 2012-13 to 2016-17, by these officers, it was noticed that the assessee provided Maintenance or Repairs service and Consulting Engineering service to domestic service receiver as well as foreign service receiver (Export of Service) and also paid service tax thereon. However, from the reconciliation of gross taxable value as per ST-3 returns and revenue from above services provided as per the P&L account, it was noticed that there was difference between the two figures. This shows that the assessee had not fully discharged its service tax liability as a service provider. This resulted in short payment of service tax to the extent of Rs. 34,13,09,753/- (including Cess, SBC & KKC) as detailed in the table below.
M or R means - Maintenance and Repairs
CES means - Consulting and Engineering services

Statement showing short payment of Service tax						
Year	Service provided		Gross value as per ST-3	Gross Value as per P & L A/c.	Difference of Value	Short payment of S.Tax (incl. Cess)
2012-13	Mor R		227521058	516356527	288835469	35700064
	CES		105673434	683428078	577754644	71410474
2013-14	Mor R		260120360	300713137	40592777	5017267
	CES		256199976	500677374	244477398	30217406
2014-15	Mor R		314773842	597999248	283225406	35006660
	CES		260182336	643453177	383270841	47372276
2015-16	M or R	Apr-May-15, @12.36%	48943521	103827949	54884428	6783715
		June-14th Nov-15, @14%	119989406	313639825	193650419	27111059
		15th Nov-Mar-16. @14.5%	126682543	290290153	163607610	23723103
	CES	Apr-May-15, @ 12.36%	38097938	117212330	79114392	9778539
		June-14th Nov-15, @14%	68027086	322748512	254721426	35661000
		15th Nov-Mar-16,@14.5%	149885980	243183843	93297863	13528190
	TOTAL					341309753

3. As per CERA Audit observation, "Taxable services notified under Section 68(2) of the Finance Act, 1994, the service tax shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66 of the Finance Act, 1994, and all the provisions of Chapter-V shall apply to such person as if he is the person liable for paying the service tax."

3.1 *The relevant portions of Finance Act, 1994 reads as follows:-*

Section-66 *Charge of service tax - There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g,) (h), (i), (j),(k), (h), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (2), (za), (zb), (zc), (zh), (zi), (2j), (zk),(zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (z2g), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg,) (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc), 2[(zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), 3[(zzzzj), (zzzzk), (zzzzl), 4[(zzzzm), (zzzzn), (zzzzo), (zzzzp),(zzzzq) (zzzzr) (zzzzs) (zzzzt) 5[,(zzzzu), (zzzzv) (zzzzv) and (zzzzw)] of clause (105) of section 65 and collected in such manner as may be prescribed.]*

Section-66A. *- Charge of service tax on services received from outside India, 8" - (1) Where any service specified in clause (105) of section 65 is,- is,- (a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and (b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of*

residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India; and accordingly all the provisions of this Chapter shall apply:

***Provided** that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:*

***Provided** further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.*

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

***Explanation 1.-** A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country. **Explanation** 2.--Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.]*

***Section-68** - Payment of service tax.- (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 12[66B] in such manner and within such period as may be prescribed.*

(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable service as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.

4. From the records it appeared that the said service provider had not taken into account properly the assessable value while discharging Service Tax for all the incomes received by them for rendering taxable services for the purpose of payment of service tax and thereby it appeared that they had not fulfilled their tax liabilities properly. It also appeared that they had not produced enough evidence to substantiate their claim of having paid the service tax appropriately. Thus it appeared that they had deliberately not made efforts to assess the correct value thus leading to short payment of correct amount of service tax. Such outright contravention in defiance of law appeared to have rendered them liable for penal action as per the provisions of Section 78 of the Finance Act, 1994, for non-payment of appropriate amount of Service Tax against the value of total taxable service and for suppression or concealment of taxable service with intent to evade payment of Service Tax.

5 The said assessee had contravened the provisions of the sections *ibid* by following the modus operandi as discussed in the para 02 above. The said assessee suppressed the facts regarding short payment which came to the notice of department only after the CERA Audit. In the era of self assessment, reliance is placed on the assessee and it is expected that they follow all the rules and regulations applicable at the relevant time. However in the instant case, it appeared that the assessee had not calculated the taxable value as per the provisions of Section 68 of the Finance Act, 1994 as amended and thereby had made short payment of service tax though they had provided the services and had also received the payment for the same.

5.1 In view of the above it appeared that the assessee had intentionally short paid the Service Tax amounting to Rs. 34,13,09,753/- (including Cess, SBC & KKC) on the two services as mentioned above and which appeared to be recoverable from the said assessee in terms of the provision of Section 73(1) of the Finance Act, 1994, along with interest as per the provision of Section 75 of the Finance Act, 1994 (as per rates applicable). It also appeared that the above act of the assessee had rendered them liable to penalty as per the provision of Section 78(1) of the Finance Act, 1994.

6. Therefore, a Show Cause Notice was issued to M/s. Dresser-Rand India Private Limited, wherein they were called upon show cause as to why:-

1. Service Tax amounting to Rs. 34,13,09,753/- (Rupees Thirty Four Crore Thirteen Lakh Nine Thousand Seven Hundred and Fifty Three Only)(including Cess, SBC & KKC} short paid by the said assessee should not be recovered from them in terms of the provisions of the Section 73(1) of the Finance Act, 1994.

2. Interest at prescribed rates should not be charged and recovered from them in terms of Section 75 of the Finance Act, 1994;
3. Penalty should not be charged on them in terms of Section 78(1) of the Finance Act, 1994.

7. Defence Reply

The assessee vide letter dated 22.02.2018 has filed the written submission to the SCN wherein they interalia submitted as under:

1. BACKGROUND AND FACTS:

1.1 The noticee is *inter a/ia* engaged in the manufacture of Gas Compressor and Parts falling under Chapter 84 of the Central Excise Tariff Act, 1985 ('Tariff Act') and provision of various output services. Further, the noticee is also engaged in export of services through its SEZ as well as its DTA operations.

1.2 In order to undertake the aforesaid activities, the noticee has established various units in the State of Maharashtra and Gujarat. The details of the said units along with the various Indirect tax registrations taken for the said units are tabulated below:

Sr.no.	Location	Key activities carried out	Indirect tax registrations
1.	Factory in Ahmedabad	Manufacture of goods as stated above	Registered under the Central Excise Act, 1944
2.	Special Economic Zone Unit ('SEZ') unit in Pune	Design service other than interior decoration and fashion designing, (i.e. Consulting Engineering Services	Registered under single Service tax registration no. AAACD9897PSD002 ('Single Registration')
3.*	Office in Ahmedabad	Maintenance & Repair services, Consulting engineer service, sale of goods outside India	Registered under centralised Service tax registration no. AAACD9897PST001 (Centralised Registration)
4.*	Repair centre in Baroda		
5.	Corporate office in Mumbai	Undertaking corporate functions	

**Collectively referred as DTA unit.*

1.3. From the above mentioned table, it is evident that provision of services by the noticee is undertaken from its DTA unit as well as SEZ unit. Further, the corporate office of the noticee undertakes common corporate functions such as finance, business administration, etc.

1.4. As mentioned in the aforesaid table, the noticee had separate Service tax registration for its DTA unit and SEZ Unit under the erstwhile regime and accordingly has a separate GST registration under the current regime as well. Under the erstwhile regime, as the noticee had separate Service tax registrations, the ST-3 returns were also separately filed for all the three units. However, as the noticee follows a centralized accounting system, the noticee prepares consolidated financials for all the three units wherein the revenue of all the three units is clubbed together. Further, as the DTA Unit and the SEZ Unit are the major revenue generating Units of the noticee, the major portion of revenue captured in the financials comprises of these two units only.

1.5. Further, for providing the aforesaid services i.e. Maintenance and Repair Services, Consulting Engineering Services etc, the noticee enters into a contract with its customers. In terms of the said agreements, the noticee raises invoices for providing the aforesaid services as and when the same are provided by the noticee to the customers. However, the payment against the said invoices are subject to the various contingencies:

- **Performance Guarantee:** The noticee provides performance guarantee to the Customers. Accordingly, if the equipment installed by the noticee does not function properly after completion of the installation process, then the Customer has been granted the rights to deduct an amount which is either fixed in the agreement or is decided between the parties on case to case basis from the amount payable under the Agreement to the noticee.
- **Liquidated Damages ('LD'):** In case the noticee fails to mobilize and deploy the required manpower/equipment or fails to commence the operations within the period specified under the Agreement, then the noticee may extend the said time unconditionally for payment of LO.

A sample copy of the agreement was attached herewith and marked as **Exhibit-A.**

1.6. In light of the aforesaid contingencies, as there is a possibility that the consideration receivable under the Agreement can be reduced subsequently (i.e. post issuance of invoices), the noticee has to mandatorily follow the principles laid down in the Accounting Standard 9 issued by the Institute of Chartered Accountants of India ('AS-9') for the revenue recognition of such contracts to credit of P&L *A/c.* By virtue of the said accounting standard, the noticee restricts the recording of revenue in its books of accounts to the extent there is a certainty of receiving the same. The amount which might get deducted by Customers on account of the above explained contingencies is not immediately recognised as revenue in P&L *A/c* and recognition of the same as

revenue is deferred till the time there is reasonable certainty that ultimate collection of such amount would be made. In other words, assuming the noticee has raised the Invoice of Rs. 1,000/- in a particular month for providing the aforesaid services to the Customers, of which recovery of say 10% amount is uncertain on account of probable deductions that may be made by the Customer in future. Then in such cases, the noticee would recognise revenue of only Rs. 900/- in its books of account (i.e. 90% of the invoice amount) and the remaining Rs. 100/- (i.e. 10% of the invoice amount) would be recognised as revenue only upon obtaining reasonable certainty over recoverability of the same.

1.7. The said outstanding amount of Rs. 100/- may or may not be paid to the noticee depending upon the end result of the agreement which might take years. In case the noticee receives the said outstanding amount or gets reasonable certainty that the said amount would be realised, the same is shown as revenue in books of accounts of the noticee in the F.Y during which the said amount or certainty is received by the noticee.

1.8 However, the aforesaid internal process of accounting does not affect the payment of Service tax on the invoice value. The Service tax is paid by the noticee on the entire invoice value in the same month in which invoice is issued in terms of the Point of Taxation Rules, 2011. Accordingly, the entire invoice value is adequately disclosed in the ST-3 returns pertaining to the month in which the invoice is issued.

1.9. In light of the above, while the entire amount of invoice for provision of taxable services is shown in the ST-3 return pertaining to the same month in which invoice is issued, the same is recognised as revenue over a period of time as explained above.

EA Audits in past

1.10. EA Audit was conducted on premises of the noticee was conducted in April- May 2014 covering the period from January 2012 to January 2014. The Audit Report dated 25.06.2014 issued in respect of the same was attached herewith and marked as **Exhibit-8.** It is pertinent to note that all the relevant details of payment of taxes by the noticee were provided in the course of the said audit, and the Audit Report issued in consideration of the same has not raised any objections qua payment of Service tax on output services of the noticee.

1.11. Further, another EA Audit on premises of the noticee was also conducted in January - April 2015 covering the period from February 2014 to January 2015. The Audit Report dated 13.05.2015 issued in respect of the same is attached herewith and marked as **Exhibit-C.** It may be noted that this Audit Report also did not raise any objections as regards payment of Service tax on output services of the noticee.

CERA Audit

1.12. In October 2017, an audit on premises of the noticee was conducted by the Central Excise Revenue Audit ('CERA') authorities covering the period from 1 April 2012 to 31 March 2017.

The information / documents required by the authorities were duly provided by the noticee in the course of visit of the audit party.

1.13. In addition to the same, certain information / documents were required by the audit party which were not readily available with the noticee. Consequently, a short extension of 15 days for submission of such information / documents was sought by the noticee vide its letter dated 16.10.2017. A copy of the said letter of the noticee was attached herewith and marked as **Exhibit-D.**

1.14. However, in disregard of the same, letter no. AR-V/CERA-AUDIT/2017-18 dated 17.10.2017 was issued by the audit party conveying the audit objections ('Audit Objections'). It may be noted that the said letter conveying audit objections was issued pending submission of various relevant information / documents by the noticee (for which a short extension of 15 days was sought by the noticee). A copy of the Audit Objections of the authorities was attached herewith and marked as **Exhibit-E.**

1.15. Point no. 3 of the Audit Objection observed that that there was a difference between the gross taxable value as per ST-3 returns of the DTA Unit and the revenue pertaining to the aforesaid services as provided in the P&L A/c . Only on this basis, the audit party formed conclusion that the noticee had not fully discharged its Service tax liability as a service provider.

1.16. A detailed reply to the audit objections along with relevant documentary evidences and supporting was filed by the noticee on 02.11.2017 ('reply to audit objections'). A copy of the said reply is attached herewith and marked as **Exhibit-F.** The noticee's reply to the Audit Objection point no. 3 explained that the revenue as per ST-3 returns of the DTA unit did not match with the financial statements on account of non-consideration of revenue of SEZ unit (included in its respective Service tax returns) and impact of revenue recognition as per AS-9. A reconciliation statement explaining the above, copies of financial statements and Auditor's report in Form no. 56F format (under the Income

Tax Act, 1961) were provided with the reply to audit objections.

1.17. However, in complete disregard of the detailed submissions made by the noticee, the present SCN was issued on 03.11.2017 raising demand of tax as per point no. 3 of the Audit Objection (as regards payment of Service tax on output services). The detailed response to the said point of the Audit Objection furnished by the noticee along with the corresponding documentary evidences were grossly ignored by the notice issuing authority, which went ahead with issuance of the present SCN immediately after submission of reply to audit objections, reducing such reply filed by the noticee to a mere futile formality. A copy of the SCN is attached herewith and marked as **Exhibit-G.**

1.18. Thereafter, directly the present SCN has been wherein the noticee is asked to show cause on various allegations raised therein.

ALLEGATIONS IN THE SCN

2.1 Vide the captioned SCN, it has been alleged that:

- From the reconciliation of gross taxable value as per ST-3 returns and revenue from above services provided as per the P&L account, it was noticed that there was difference between the two figures. This shows that the noticee had not fully discharged its Service tax liability as a service provider.
- The noticee has not taken into account the correct assessable value while discharging Service tax for all the incomes received by them for rendering taxable services for the purpose of payment of Service tax and thereby had not fulfilled their tax liabilities properly.
- The noticee has not produced enough evidence to substantiate their claim of having paid the Service tax appropriately.
- The noticee has deliberately not made efforts to assess the correct value and such outright contravention in defiance of law had rendered them liable to penal action for non payment of appropriate amount of Service tax and for suppression or concealment of taxable services with intent to evade payment of Service tax.
- The noticee suppressed the fact regarding the short payment which came to the notice of the Department only after CERA Audit.

DEMAND UNDER THE SCN

3.1. In view of the allegations set out hereinabove, the noticee has been asked to show cause as to why:

i. Service tax amounting to Rs.34,13,09,753- short paid by the noticee should not be recovered from the noticee in terms of provisions of Section 73(1) of the Finance Act, 1994 ('Act');

ii. Interest at prescribed rate should not be charged and recovered from them in terms of Section 75 of the Act;

iii. Penalty should not be charged on them in terms of Section 78(1) of the Act.

SUBMISSIONS OF THE NOTICEE

4.1. At the outset, the noticee denied the entirety of the allegations in the captioned SCN. The said SCN has neither appreciated the true factual position in the present case, nor taken into consideration the correct position in law on the various issues.

4.2. It is submitted that the captioned SCN is illegal, unsustainable and bad in law, and is required to be withdrawn/ dropped on the following grounds, each of which are in the alternative and without prejudice to each other.

Preliminary Objections

THE SCN IS BAD IN LAW AS IT HAS BEEN ISSUED WITHOUT EVEN CONSIDERING THE SUBMISSIONS MADE BY THE NOTICEE

4.3 At the outset, it is submitted that the Department has completely erred in directly issuing the captioned SCN without even considering the submissions made by the noticee in response to the audit objections made by the Department.

4.4 Ideally, the Audit team should have considered the submissions made by the noticee in response to its Audit Objections and should have revised its Audit objections based on the same. It is submitted that even if the Audit team was not satisfied with the submissions made by the noticee, then the Audit Team could have very well given an opportunity to the noticee to explain the submissions made by the noticee.

4.5. In this regard, it is submitted that in term of para 6.15 of the **'Central Excise and Service tax Audit Manual, 2015'** released by CBEC, the Audit team should discuss its objections with the taxpayer and on satisfactory explanation being given by the taxpayer, the Audit report should be revised. The relevant extract of the said manual is as under:

6. 15 Apprising the assessee/taxpayer of irregularities noticed and ascertaining his view point ***It is important that the auditor discusses all the objections with the assessee/taxpayer before preparing draft audit report. The assessee/taxpayer should had the opportunity to know the objections and to offer clarifications with supporting documents.*** *This process will resolve potential disputes at an early stage*

and avoid unnecessary litigation.

6. 16 The ultimate aim of conducting an audit is to increase the level of tax compliance of assessee/taxpayer. Therefore, no audit can be considered to be complete unless the auditor has made all efforts to ensure maximum recovery of short levy before leaving the premises of the assessee/taxpayer. ***As the Audit system adopts a transparent methodology, it is necessary that all the audit objections noticed by the Audit Group are conveyed to the assessee/taxpayer with a view to ascertain his point of view before preparing the Draft Audit Report.***

Accordingly, the audit objections should be intimated in writing to the assessee/taxpayer, clearly stating that the same is not in the nature of any show cause notice and is only a part of participative and fact-finding audit scheme under which even the preliminary and tentative audit observations are being shared with the assessee/taxpayer for ascertaining his point of view.

Where satisfactory explanation or evidence is submitted to the auditor, the findings should be revised as necessary after approval of Deputy/ Assistant Commissioner. However, if a response from the assessee/taxpayer is not forthcoming, draft audit paras should be prepared on the basis of available records after citing the lack of cooperation on part of the tax payer, in the Audit Report.

(Emphasis Supplied)

4.6. In light of the aforesaid, it is submitted that it is the responsibility of the Audit team to discuss its objections with the taxpayer and if the taxpayer is able to provide a satisfactory evidence or explanation then the Audit Report should be revised. Thus, the said Manual makes it mandatory for the Audit Team to discuss the Audit Objections with the taxpayer, in other words, giving an opportunity to the taxpayer to provide clarifications on the objections raised by them. Further, the said Manual also clearly provides that the Audit Team should modify the Audit Report if the explanations or evidence provided by the noticee are satisfactory. However, in the present case, the Audit team has not made any modifications in the Audit Report on the basis of the written submissions made by the noticee. Thereby, the Audit team has clearly violated the guidelines laid down under the Manual by not considering the submissions made by the noticee.

4.7. It is submitted that mere issuance of Audit Objections is not the end of responsibilities of the Audit Team and mere acceptance of the written submissions would not suffice the purpose if the Audit Team does not even go through the same and make necessary modifications in its Audit Report based on the same. Therefore, the Audit Team has grossly erred in not acting in accordance with the guidelines laid down in the Manual.

4.8. In addition to the above, it is also submitted that the response to the Audit Objections was submitted by the noticee on 02.11.2017 and the SCN was issued on 03.11.2017 which clearly evidences the fact that the Department has clearly not considered the said submissions before issuing the SCN. Moreover, if the Department had considered the said submissions made by the noticee then a mention of the same should had been made in the SCN. However, the SCN does not even mention about the noticee submitting any response to the Audit Objection. Accordingly, it is submitted that the captioned SCN has been clearly issued without even considering the facts of the present case.

4.9. Accordingly, it is submitted that the said actions of the Department are blatantly incorrect and therefore the proceedings initiated by the captioned SCN are liable to be dropped on this ground alone.

II. THE SCN IS ALSO AGAINST THE PRINCIPLES OF NATURAL JUSTICE

4.10. It is submitted that the Department by directly issuing the captioned SCN has also violated the principles of natural justice as the Audit team has not given opportunity of being heard to the noticee post submissions made on 02.11.2017 to explain the said submissions. Further, gross non-consideration of the reply to audit objections filed by the noticee effectively reduced the said reply of the noticee into a mere procedure lacking any effective opportunity of being heard

4.11. Ideally, the Audit team should have considered the submissions made by the noticee in response to its Audit Objections and should have given an opportunity to the noticee to explain the same.

4.12. In this regard, reliance is placed on the para 6.15 of the **'Central Excise and Service tax Audit Manual, 2015'** released by CBEC, wherein it has been clearly specified that the Audit team should discuss its objections with the taxpayer. It is submitted that the said objections would not merely mean issuing the Audit Objections and acknowledging the submissions made by the noticee, the said discussion would mean a constructive discussion wherein the Audit Team would make an *effort* to understand the clarifications of the noticee and would take a reasoned action by taking into consideration the said

discussions.

4.13. Thus, in the present case, the noticee has not been given the opportunity to explain the written submissions made on 02.11.2017. Thereby, the Audit team has clearly violated the guidelines laid down under the Manual by not by not giving any opportunity to the noticee to explain the said submissions.

4.14 The proceedings culminating into issuance of the present SCN are completely unilateral proceedings undertaken by the Department with the pre-determined objective of issuance of the SCN. The reply to audit objections submitted by the noticee as well as their explanations provided in the course of the audit had been grossly ignored by the Department in this process. Such a modus operandi of the Department is in gross violation of the principle of justice, which pre-supposes that everyone should be given at least an opportunity (which would mean only an effective opportunity) to present their views before any action is initiated against them.

4.15. It is submitted that the principle of *audi alteram partem*, as enshrined in Articles 14 and 21 of the Constitution of India, requires that a person against whom an order is required to be passed or whose rights are likely to be affected adversely must first be granted an opportunity to present his case by way of a written submission and should be granted a reasonable opportunity of being heard and present documents/ evidence.

4.16. Accordingly, it is submitted that the captioned SCN issued by the Department to the noticee are bad in law as the same are against the principles of natural justice.

4.17. In support of the above, noticee would like to rely on decision of Hon'ble Supreme Court in various cases including ***Assistant Collector of Central Excise, Calcutta vs. National Tobacco Co. of India Ltd. [1978 (2) E.L. T. (J416) S.C.J*** *and* ***Asstt. Commr. Commercial Tax Department vs. Shukla & Brothers [2010 (254) E.L. T. 6 (S.C.)],*** wherein it was held that fair and adequate opportunity of being heard is quintessential to ensure compliance with the principles of natural justice.

4.18. Hence, it is submitted that not giving an opportunity to the noticee to present its case is a gross violation of principles of nature justice and the SCN being issued without following the principles of nature justice is blatantly incorrect and proceedings initiated by the said SCN are liable to be set aside on this ground alone.

Submissions on merits of the case

III. THE DEMAND TO THE EXTENT ATTRIBUTABLE TO THE SEZ UNIT DESERVES TO BE DROPPED.

4.19. It is submitted that the Department has completely erred in reconciling the ST-3 returns filed by the noticee for the DTA Unit with the consolidated financials of the noticee which is prepared for all the three units. The noticee submits that as mentioned above, the financials are prepared by the noticee for all the three units and accordingly, the figures appearing in the financials will never match with the ST-3 returns of the DTA Unit.

4.20. It is submitted that the Audit was conducted on the DTA Unit and accordingly, the comparison of the ST-3 returns of the DTA Unit with the financials had to be restricted to only the DTA unit. However, in the captioned SCN, the demand is being raised by comparing the ST-3 returns of the DTA Unit to the financials which *inter alia* contains the revenue of the SEZ Unit on which no Service tax is liable to be paid as the services provided by SEZ unit are exported outside India and the same is reflected in the ST-3 return of the SEZ Unit. Accordingly, the demand to the extent it is attributable to the SEZ Unit should be dropped forthwith.

4.21. In the present case, the Department has raised the demand on two services, namely, Maintenance & Repair Services / Operations & Maintenance Services ('M&R Services') and Consulting Engineering Services ('CE Services'). It is submitted that the M&R services are only provided by the DTA Unit whereas the CE Services are provided by both the DTA Unit as well as the SEZ Unit. However, while recording in books of accounts, some of the revenue of DTA unit of the noticee pertaining to M&R Services has been inadvertently mentioned / grouped under the head of CE Services. Accordingly, the revenue earned by the noticee from the CE Services to the extent attributable to the SEZ Unit is bound to be set dropped forthwith. The total revenue attributable to the SEZ Unit which is bound to be dropped is tabulated below:

F.Y	Service Provided	Revenue attributable to SEZ Unit
2012-13	CES	47,16,18,428
2013-14	CES	68,34,28,078
2014-15	CES	64,34,53, 177
2015-16	CES	68,31,44,685
		2,48, 16,44,368

4.22. Thus, out of the total revenue mentioned in the P&L *A/cc* for the F .Y. 2012-13 to 2015-16, total amounting to Rs. 2,48,16,44,368/- pertains to the SEZ Unit. Hence, the demand

on the differential amount to the extent of revenue attributable to the SEZ Unit deserves to be dropped on this count alone.

No Service tax can be demanded on the revenue amounting to Rs. 2,48,16,44,3681- as the same pertains to SEZ Unit which is beyond the jurisdiction of the Commissioner of GST, Ahmedabad

4.23. In this regard, it is further submitted that the said revenue is earned by the noticee in its SEZ Unit which is located in Pune and assessment of the said Unit does not fall within the jurisdiction of the Commissioner of GST, Ahmedabad. The said fact is evident from the ST-3 returns filed by the noticee for its SEZ Unit wherein it has been clearly mentioned that the SEZ Unit falls under the jurisdiction of Pune-I New Commissionerate. The copies of the ST-3 returns filed by the SEZ Unit for the F.Y. 2012-2013 to 2015-16 are collectively attached herewith and marked as **Exhibit-H.** Further, the said fact is also evident from the Invoices raised by the SEZ Unit of the noticee which clearly evidences the fact that the SEZ Unit is located in Pune and is not undertaking any operations in the Ahmedabad jurisdiction. Sample copies of the Invoices raised by the SEZ Unit are attached herewith and marked as **Exhibit-I.**

4.24 At this juncture, the notice submitted that the revenue shown by the noticee in the ST-3 returns of the SEZ Unit are inadvertently mentioned on a higher side. The details with respect to the incremental revenue shown in the ST-3 return of the SEZ Unit is as under:

Year	Data as per ST-3 return of SEZ unit	Data of services of SEZ unit as per financials	Difference	Reason for difference
2012-13	471618423	471618428	-5	-
2013- 14	692180272	683428078	8752194	Debit notes raised for reimbursement of expenses (e.g. hotel accomodation,conveyance expenses, etc. incurred by the employees) were erroneously disclosed in ST-3 return while the same were knocked
2014- 15	644971026	643453177	1517849	Debit notes raised for reimbursement of expenses (e. g. hotel accommodation, conveyance expense, etc. incurred by the employees) were erroneously disclosed in ST-3 return while the same were knocked off against the actual expenses in the books of accounts#
2015-16	677040153	683144685	6104532	Reimbursement of expenses of Rs. 63,19,318/- (e. g. hotel accommodation, conveyance expense, etc. incurred by the employees) recovered via debit notes were erroneously disclosed in ST-3 return while the same were knocked off against the actual expenses in the books of accounts. Debit notes amounting to Rs. 1,24,23,850/- raised for PDE (Project development engineer) included in value of services as per books of accounts were erroneously missed in ST-3 return$
TOTAL	**2,48,58,09,874**	**2,48,16,44,368**	**41,65,506**	

*A tabular summary of such debit notes along with copies of sample debit notes are attached herewith and collectively marked as **Exhibit-J**

A tabular summary of such debit notes along with copies of sample debit notes are attached herewith and collectively marked as **Exhibit-K**

$ A tabular summary of such debit notes along with copies of sample debit notes are attached herewith and collectively marked as **Exhibit-L**

4.25. With respect to the aforesaid discrepancies in the revenue of SEZ Unit as mentioned in ST-3 returns and as mentioned in the P&L A/c, it is submitted that the revenue shown in the P&L A/c is the correct revenue and the same is evident from the fact that the same matches with the revenue shown in the Form 56F filed by the noticee for the SEZ Unit before the Income tax Authorities. The copies of the said Form 56F for the F.Y 2012-13 to 2015-16 are collectively attached herewith as **Exhibit-M.**

4.26. Hence, it is submitted that the aforesaid revenue amounting to Rs. 2,48,16,44,368/- being the correct revenue attributable to the SEZ Unit of the noticee is required to deducted from the total revenue considered in the SCN and accordingly, the demand to this extent deserves to be dropped on this ground alone.

IV. No TAX IS LEVIABLE ON THE DIFFERENTIAL REVENUE ATTRIBUTABLE TO THE DTA UNIT

Difference in revenue amounting to Rs. 2,08,14,093- pertains to the DTA Unit and the same is on account of guidelines laid down under AS-9 for Revenue Recognition.

4.27. As mentioned above in para 1.5, the noticee is mandated by the Companies Act to follow the principles of revenue recognition laid down under the AS-9 to record the revenue earned by the noticee in its books of accounts. As per the said standards, the revenue recognition at the time of raising any claim is required to be postponed to the extent its collection is uncertain due to the existence of certain uncertainties.

4.28. The relevant extract of para 9 of the AS 9 is reproduced below for ease of reference:

9. *Effect of Uncertainties on Revenue Recognition*

9. 1 Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of the service it would not be unreasonable to expect ultimate collection.

9.2 ***Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g., for escalation of price, export incentives, interest etc., revenue recognition is postponed to the extent of uncertainty involved.*** *In such cases, it may be appropriate to recognise revenue only when it is reasonably certain that the ultimate collection will be made. Where there is no uncertainty as to ultimate collection, revenue is recognised at the time of sale or rendering of service even though payments are made by instalments.*

9.3 When the uncertainty relating to collectability arises subsequent to the time of sale or the rendering of the service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded.

9.4 An essential criterion for the recognition of revenue is that the consideration receivable for the sale of goods, the rendering of services or from the use by others of enterprise resources is reasonably determinable. ***When such consideration is not determinable within reasonable limits, the recognition of revenue is postponed.***

9.5 When recognition of revenue is postponed due to the effect of uncertainties, it is considered as revenue of the period in which it is properly recognised.

4.29. It is submitted that the noticee followed the aforesaid procedure laid down under AS-9 to recognize the revenue earned by it. In the present case, as submitted above in para 1.4, as the total consideration receivable from the customer under the agreement is subject to the contingencies specified under the said agreement, the revenue of the noticee is also not determinable at the time of sale. Therefore, in accordance with the aforesaid standards, the noticee recognizes only the amount which is determinable at the time of raising of invoice and the amount which is subject to the contingencies laid down under the agreement is not recognized by the noticee in books of account at the time of sale of goods. Accordingly, the year wise revenue mentioned in the books of accounts and the revenue mentioned in the respective ST-3 returns would not tally. It is submitted that it is this difference which is pointed out by the Department in the SCN and Service tax is being demanded on the same.

4.30. In this regard, reliance is placed upon the following judicial precedents wherein it has been held that treatment of any transaction in books of accounts for Income tax purpose does not govern the taxability under the Indirect Tax:

- **Commissioner Of Central Excise Ingersoll Rand (India) Ltd. [2014 (300)E.L.T 347 (Guj.):** In this case, the Hon'ble Gujarat High Court has held that the reduction of value of inputs for income-tax purposes cannot be equated with writing off of physical stock under Excise Act. The relevant extract of the said judgment is as under:

  7. We are of the opinion that the reduction of the value of such spares (inputs) for income-tax purpose, cannot be equated with writing off of the physical stock. The ***accounts maintained by the manufacturer for the income-tax purpose stand on an entirely different footing and would had to follow the accounting standards prescribed under the law. If under such accounting principles, the assessee is entitled to diminish the value of a certain stock held over a period longer than the specified period, the same has no correlation with the availability of physical stock insofar as the manufacturing activity is concerned.***

- **3i Infotech Ltd. v. Commissioner of Service Tax, Mumbai-II [2017 (51) S.T.R. 305 (Tri. - Mumbai)]** : In this case, the Hon'ble Tribunal held that the accounting treatment of a transaction cannot be relied upon to conclude whether any Service

has been provided of not. The relevant extract of the same is reproduced below:

The impugned order has overlooked the requirements of accounting standards which mandates that financials of the branch are to be included in the financials of the corporate entity that has established the branch. ***Such inclusions owing to accounting standards do not suffice to conclude that services were rendered by foreign service providers to the Indian headquarters.***

4.31. .From perusal of the aforesaid judgments, it is clear that the accounting treatment done under the books of accounts for the Income-tax purposes has no correlation to treatment under the tax. In light of the aforesaid, it is submitted that the Department has completely erred in demanding tax on the aforesaid differential amount. It is submitted that the said difference is solely on account of the AS-9 recording and the noticee is mandated by law to follow the standards laid down in AS-9 for recording its revenue in the books of accounts. It is submitted that the noticee cannot be punished for following the law of the land. Accordingly, the demand raised by the Department with respect to the said differential amount is completely incorrect and the same deserves to be dropped on this ground alone.

4.32. The computation of the aforesaid differential amount of Rs. 2,08,14,093/- is as under:

F.Y.	Amount of difference		
	Export Transaction	Domestic Transaction	Grand TOTAL
2012-2013	0	-3422409	-3422409
2013-2014	-91,189	1,27,380	36,191
2014-2015	2,62,04,617		2,30;43,070
2015-2016	1,19,917	10,37,324	11,57,241
TDTAl	**2,62,33,345**		**2,08,14,093**

4.33. It is submitted that from bare perusal of the aforesaid table, it is clear that the net difference of Rs. 2,08,14,093/- in the revenue shown in the P&L A/c. and the revenue shown in ST-3 returns is on account of the AS-9 impact and accordingly, the demand to this extent deserves to be dropped on this ground alone.

4.34. Further, it is submitted that the net amount of Rs. 54,19,252/- pertaining to the domestic transactions undertaken by the noticee has not been recognized in books of accounts on account of the AS-9 principles and the same will be recognized as and when the said revenue is received by the noticee. However, Service tax on the same has been adequately paid by the noticee as the time of raising the respective invoices. Accordingly, no tax can be demanded on the said amount also.

4.35. With respect to the revenue pertaining to the export transaction, detailed submissions had been made as under:

Revenue amounting to Rs. 2,62,33,345/- is on account of exports undertaken by the noticee from its DTA Unit.

4.36. In any case, it is submitted that the revenue amounting to Rs. 2,62,33,345 pertains to export of services undertaken by the noticee from its DTA Unit. It is submitted that no tax is leviable on the said export of services by virtue of Section 66B of the Act read with Rule 6A of the ST Rules. Accordingly, no tax can be demanded by the Department in the SCN to the extent of the revenue attributable to the export of services undertaken by noticee from its DTA Unit.

4.37. Further, it is submitted that there is no dispute in the present case that the services provided by the noticee from the DTA Unit do not qualify as 'Export of Service' and therefore, no tax can be demanded on the said services.

4.38. In light of the aforesaid, it is submitted that the Department in the SCN has completely erred in demanding tax from the noticee to the extent of revenue amounting to Rs. 2,62,33,345/- as the same pertains to export of services undertaken by noticee from its DTA unit. Hence, the demand to this extent is liable to be dropped on this ground alone.

SUMMARY OF THE DEMAND RAISED IN THE SCN BY THE DEPARTMENT

4.39. In light of the aforesaid submissions, it is submitted that the entire demand raised in the present SCN is erroneous and is bound to be dropped forthwith. At this juncture, the noticee would like to summarise the aforesaid submissions as under:

4.40. At the outset, with respect to F.Y. 2012-2013, it is submitted that the Department has wrongly used amount of revenue as per books pertaining to F.Y. 2013-14. Further, in respect of F. Y. 2013-14, the SCN has erroneously used amount of revenue as per

books pertaining to F.Y. 2012-13. Accordingly, in respect of demand raised for F. Y. 2012-13 and 2013-14, value of service as per books of accounts had been interchanged. The said mistake in the SCN (not impacting the computation of total demand) has been corrected in the working presented below.

4.41. Further, it is submitted that the entire demand liable to be paid by the noticee with respect to the DTA Unit for the F.Y. 2012-2013 to F.Y. 2015-2016 has been adequately paid by the noticee. The differences pointed out by the Department in the SCN are on account of the fact that the Department has considered the revenue of SEZ Unit also and the remaining difference is on account of AS-9 Impact. It is also submitted that a major portion of the differential revenue pertains to the export transactions of the noticee and no tax can be demanded on the same. Hence, the entire demand raised in the SCN for the F.Y. 2012-2013 to 2015-2016 is unwarranted and deserves to be dropped forthwith.

4.42. In light of the aforesaid, a summary of the demand raised in the SCN evidencing the fact that no tax can be demanded from the noticee is as under:

Year	Services	Gross Value as per P&L A/c	Value attributable to SEZ unit(supported by the ST-3 and/or Form 56 F)	Value attributable to DTA unit [3-4]	Gross value as per ST-3 of DTA unit	Difference in values of services due to AS-9 impact			Net difference [3-4-6-9]
						Export	Domestic	Net Amount [3-4-6]/[7+8]	
	2	3	4	5	6	7	8	9	10
2012-13	M&R	22,75,21,058	-	22,75,21,058	22,75,21,058	-	-	-	-
	CES	57,38,69,453	47,16,18,428	10,22,51,025	10,56,73,434	-	-34,22,409	-34,22,409	-
2013-14	M&R	26,01 ,20,360	-	26,01 ,20,360	26,01 ,20,360	-	-	-	-
	CES	93,96,64,245	68,34,28,078	25,62,36, 167	25,61,99,976	-91,189	1,27,380	36,191	-
2014-15	M&R	31,47,73,842	-	31,47,73,842	31,47,73,842	-	-	-	-
	CES	92,66,78,583	64,34,53, 177	28,32,25,406	26,01 ,82,336	2,62,04,617	-31,61,547	2,30,43,070	-
2015-16	M&R	30,19,17,140	-	30,19,17,140	30,19,17,140	-	-	-	-
	CES	1,08,89,85,472	68,31,44,685	40,58,40,787	40,46,83,546	1,19,917	10,37,324	11,57,241	-
			2,48,16,44,368	2, 15,18,85,785	2,13,10,71,692	2,62,33,345	-54,19,252	2,08, 14,093	-

4.43. From the perusal of the aforesaid table and year-wise summary statement, it is clear that there is no difference in the revenue shown as per ST-3 returns and the P&L A/c. and accordingly, no tax can be demanded from the noticee.

4.44. Hence, it is submitted that the proceedings initiated by the Department in the present SCN are bad in law and the same is liable to be dropped forthwith.

VI. DEMAND IS BARRED BY LIMITATION

4.45. In the present case, the SCN has been issued on 03.11.2017, and the demand has been raised for the F.Y. 2012-12 to 2016-17 by invoking the extended period of limitation of 5 years.

4.46. The noticee submits that the extended period of limitation of 5 years under the proviso to Section 73(1) of the Act can only be invoked where the escapement of tax has been occasioned by the suppression, omission or failure to disclose wholly or truly all material facts required for verification of assessment by the assessee or when the assessee had an intention to evade the payment of tax.

4.47. In terms of the provision, the extended period of five years can only be invoked where there is suppression of facts. In this regard, reliance is also placed upon the CBEC Circular No. 1053/02/2017-CX dated 10.03.2017 wherein also it has been clearly stated that extended period of limitation can be invoked by the Department only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The relevant extract of the said Circular is as under:

*"**3.2 Ingredients for extended period:** Extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that these ingredients are present in a given case is on revenue and these ingredients need to be clearly brought out in the Show Cause Notice alongwith evidence thereof The active element of intent to evade duty by action or inaction needs to be present for invoking extended period.*

3.3 The Apex Court's in the case of Mis Cosmic Dye chemical Vs Collector of Gen. Excise, Bombay [1995 (75) E.L. T. 721 (S.C.), has laid the law on the subject very

clearly. The same is reproduced below for ease of reference. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set 7 of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11 A. Misstatement or suppression of fact must be wilful.

3.4 Extended period in disputed areas of interpretation: *There are cases where either no duty was being levied or there was a short levy on any excisable goods on the belief that they were not excisable or were chargeable to lower rate of duty, as the case may be. Both trade and field formations of revenue may had operated under such understanding. Thus, the general practice of assessment can be said to be non-payment of duty or payment at lower rate, as the case may be. In such situations, Board may issue circular clarifying that the general practice of assessment was erroneous and instructing field formations to correct the practice of assessment. Consequent upon such circular, issue of demand notice for extended period of time would be incorrect as it cannot be said that the assessee was intentionally not paying the duty.*

4.48. In light of the above, it is submitted that the extended period of limitation can be invoked only when there is suppression of facts. However, the Department in the present case has issued the present SCN without complying with the instructions laid down in the aforesaid Circular. In this regard, it is submitted that the aforesaid Circular is binding on the Department in terms of the settled position upheld by the Apex Court in a series of decisions including **Commissioner of Central Excise, Bolpur vs. Ratan Melting and Wire Industries [2008 (231) EL T 22 (SC)], Kalyani Packaging Industry vs. Union of India (UOI) [2004 (168) ELT 145 (SC)]** and **Collector of Central Excise, Vadodra vs. Dhiren Chemical Industries [2002 (139) ELT 3 (SC)].**In the present case, it is submitted that the Department ought to had followed the instructions laid down in the Circular before issuing the present SCN. Accordingly, the present SCN being contrary to the well settled position of law is bad in law and deserves to be dropped.

4.49. In any case, it is submitted that it is a settled position that suppression occurs when facts which an assessee knew he had to disclose were consciously not disclosed to evade the payment of tax.

4.50. In this regard it is submitted that the proviso to Section 73 of the Act is in *pari materia* to Section 11A of the Central Excise Act, 1944. Reliance in this regard, is placed on the decision of the Hon'ble Tribunal in **Mahakoshal Beverages Pvt. Ltd. vs. Commissioner of Central Excise, Belgaum [2007 (6) STR 148],** wherein it has inter alia been held that

"The proviso to Section 73 of the Act was *promulgated by Finance Act 2004 but adding proviso to Section 73 of the Central Excise Act, which is pari materia to Section 11 A of Central Excise Act."*

4.51. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in **Pahwa Chemicals Private Limited vs. Commissioner of C. Ex., Delhi [2005 (189) E.L.T. 257 (S.C.)],** wherein it has been inter alia held that:

"It is settled law that mere failure to declare does not amount to willful mis-declaration or willful suppression. There must be some *positive act on the part of the party to establish either willful mis-declaration or willful suppression."*

4.52. Reliance may also be placed on the judgment of the Hon'ble Supreme Court, in **Anand NishiKawa Co. Ltd. vs. Commissioner of Central Excise Appeal, Meerut [2005 (188) E.L.T. 149 (SC)]** wherein it was held that 'suppression of facts' can had only one meaning that correct information was not deliberately disclosed to evade payment of duty, when facts were know to both the parties, omission by one to do what he might had done not that he must had done would not render it suppression. Mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression.

4.53. It is submitted that there is no suppression on the part of the noticee. The noticee was acting *bonafide* to adopt the procedure laid down by the AS-9 and to not make payments on the export transactions.

4.54. Additionally, it is clear that not only has the noticee submitted all the statutory returns periodically and with accuracy but has cooperated completely during the investigation and provided all necessary information. All requisite details for the impugned period were provided to the Department. Hence, there is no basis for alleging suppression, and issuing the SCN in 2017 is grossly erroneous, when the Department was entirely in the know of all the relevant facts far before this time.

4.55. It is a settled position in law that only an overt act of withholding of information would

amount to suppression. In this regard, the noticee places reliance on the decisions of the Apex Court in **Collector of Central Excise, Hyderabad vs. M/s. Chemphar Drugs and Liniments, Hyderabad [1989 (40) E.L.T. 276 (S.C.)]** and **Anand NishiKawa Co. Ltd. vs. Commissioner of Central Excise Appeal, Meerut reported in [2005 (188) E.L.T. 149 (S.C.)].**

4.56. In terms of the applicable decisions, the extended period of limitation is not invocable in the instant case. Therefore, in light of the above, there is no instance of fraud, collusion, willful misstatement or suppression on the part of the noticee, which would justify the invocation of the longer period of limitation.

4.57. It is submitted that in the present facts, far from deliberately suppressing any information, the noticee proceeded *bona fide* to file its returns and pay tax in accordance with law. In fact the books of the accounts of the noticee were also maintained in accordance with the AS-9 revenue recognition. In this regard, it is also submitted that the books of accounts of the DTA Unit of noticee had been subject to EA-Audit earlier also. It is submitted that in none of the said Audits, the Department has ever raised any queries or objections with respect to the operations undertaken by the noticee. It is submitted that the *modus operandi* of the noticee to record revenue in its books of accounts has not changed over the years and as the Department has never objected the same, the noticee was under the *bonafide* belief that the noticee has acted appropriately. Hence, the noticee cannot be asked now to pay duty on the differential amount.

4.58. It is submitted that the extended period of limitation cannot be invoked where there is a *bona fide* belief that Service Tax was not payable. Reliance in this regard is placed on the following decisions.

- **Secretary, Town Hall Committee vs. CCE [2007 (8) STR 170 (Tri-Bang)]**
- **Bharat Aluminium Co. Ltd. vs. CCE [2007 (8) STR 27 (Tri-Delhi)]**
- **Bindas Duplex Ltd. vs. CCE [2007 (7) STR 561 (Tri-Delhi)]**
- **Homa Engineering Works vs. CCE [2007 (7) STR 546 (Tri-Mum)]**

4.59. Furthermore, the issue, if at all, in the present case, is an interpretational issue. The interpretation of the noticee that it is not liable to any additional Service Tax while recording the differential revenue in its books of account is well founded and the extended period of limitation is not applicable to such a case. Reliance in this regard is placed on the following judicial decisions:

- **NRC vs. CCE, Thane [2007 (5) STR 308 (Tri-Mum)]**
- **Shri Shakti LPG Ltd. vs. CCE, Vishakapatnam [2005 (187) EL T 487 (Tri-Bang)]**

4.60. Therefore, in light of the above, there is no instance of fraud, collusion, willful misstatement or suppression on the part of the noticee, which would justify the invocation of the longer period of limitation.

4.61. In view of the above, it is submitted that the SCN is grossly in excess of jurisdiction and is liable to be quashed as being void ab initio.

VII. INTEREST / PENALTY

4.62. At the outset, it is submitted that the SCN itself has no basis in law, and deserves to be struck down. It is further submitted that, given the submissions on merit, no additional Service Tax ought to be payable, as alleged in the SCN. In any event, the entire demand is barred by limitation. Hence, there is no question of imposition of penalty in the present case as the duty demand itself is not sustainable.

No interest can be levied when the demand itself is unsustainable

4.63. In the present case, as the duty demand on the noticee is in itself not sustainable, in light of the submissions set out hereinabove, there can be no question of payment of any interest by the noticee under Section 75 of the Act. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court of India in the case of **Pratibha Processors vs. Union of India [1996 (88) EL T 12 (SC)]** wherein it was held that:

"[The "interest" payable under Section 61(1)(2) of the Act is a *mere* "accessory" *of the principal and if the principal* is *not recoverable/payable,* so is *the interest on it. This* is a *basic principle based on common* sense *and* also *flowing from the language of Section 61(1)(2) of the Act. The principal amount herein* is *the amount of duty payable on clearance of goods. When such principal amount* is *nil because of the exemption,* a *fortiori, interest payable is* also *nil. In other words, we are clear in our mind that the interest is necessarily linked to the duty payable. The interest provided under Section 61 (2) has no independent or separate existence. When the goods are wholly exempted from the payment of duty on removal from the warehouse, one cannot be saddled with the liability to pay interest on* a *non-existing duty. Payment of interest under Section 61 (2) is solely dependent upon the exigibility or factual liability to pay the principal amount, that* is, *the duty on the warehoused goods at the time of delivery. At that time, the principal amount (duty) is not payable due to exemption.* So, *there is no occasion or basis to levy any interest, either [ ]"*

4.64. This position has also been upheld subsequently in the decision of the Hon'ble Supreme Court in the case of **Commissioner of Customs, Chennai vs Jayathi Krishna & Co.**

[2000 (119) E.L.T. 4 (S.C.)]. In light of the above, since the demand itself is unsustainable, there is no question of imposition of interest in the present case.

4.65. It is further submitted that the Supreme Court has consistently held that penalty can only be levied if an intentional act is committed and not otherwise. The following illustrative cases are relied upon in support of this submission.

- **Tamil Nadu Housing Board vs. Collector of Central Excise, Madras [1994 (74) ELT 9 (SC)]**
- **DCW Ltd. vs. Asst. Collector of Central Excise [1996 (88) ELT 31 (Mad)]**

4.66. It is a settled position that something more than a mere failure to pay tax must be shown, i.e. the assessee must be aware that the tax was leviable and must had avoided payment. The word 'evade' in this context means defeating the provision of law for paying duty. In the present facts, as stated above, the factual developments establish that there has been no intention on the noticee's part to avoid any payment of Service Tax. Further, the noticee has clearly not suppressed any facts from the Department and has provided all information to the Department which was requested in the course of investigation. Accordingly, it is submitted that there cannot be any question of imposition of penalty.

4.67. It is therefore clear beyond doubt that at no point of time could the noticee be said to had intentionally sought to evade tax or committed an act of suppression. Consequently, the attempt to impose penalty is against the settled law of the Supreme Court and various other applicable precedents and requires to be set aside.

No penalty is imposable when the actions are bona fide

4.68. It is further submitted that no penalty is leviable where the actions of the assessee had been *bonafide.* Reliance in this regard is placed on the following decisions.

(i) **Commr. of C. Ex., Indore vs. Chandra Motor [2008 (11) STR 299 (Tri-Del)]**

"I find that after considering the facts and circumstances of the case in detail, Commissioner (Appeals) observed that the respondent has acted in a bona fide manner which was not disputed by the Revenue. So, *Commissioner (Appeals) has rightly set aside the penalty. Accordingly, I do not find any reason to interfere with the order of Commissioner (Appeals)."*

(ii) **Catalyst Capital Services Pvt. Ltd. vs. Commissioner of C. Ex., Mumbai-IV [2005 (184) EL T 34 (Tri-Mumbai)]**

"It is contended on behalf of the appellants that there is no mala *fide intention on the part of the appellants in making the late payment of Service Tax. There is also provision in the Finance Act for waiver of the penalty where sufficient cause is shown. As the appellants had already deposited the Service Tax and as there was no* mala *fide intention in making the delayed payment, the penalty imposed thereof i.e. Rs. 7,105- is hereby set aside."*

(iii) **Hariala Depot Service vs. Commissioner of C. Ex., Ahmedabad [2009 (15) STR 277 (Tri-Ahmd)]**

"As is clear from the above, the authorities below are not doubting the genuineness of the appellant or their bona fide intention. Tribunal in case of Mis. Catalyst Capital Services (P) Ltd. v. CCE - 2006 (3) S. T. R. 582 (Tribunal) = 2005 (184) E. L. T. 34 (Tribunal) = 2005 (1) STT-241 (Mum-CESTAT), has held that where there is no mala *fide intention on the*

(iv) **Delhi Tourism and Transportation Dev. Corpn. vs. Commr. of C. Ex, Delhi-I [2007 (7) STR 202 (Tri-Del)]**

"...payment of differential amount of service is due to bona fide error. In the facts and circumstances of the case, the imposition of penalty is not justified and the impugned order is set aside."

4.69. Applying the above precedent, in the present facts as well, there was no mala *fide* intent on the part of the noticee whatsoever as they were under a genuine bona fide belief that no Service Tax was payable with respect to the differential revenue recorded in books of accounts.

4.70. It is submitted that there is therefore no *mens rea* on the part of the noticee to avoid payment of any tax, if payable under the Act. The noticee places reliance on the Tribunal decision in the case of **Smitha Shetty vs. CCE [2004 (156) ELT 84]**, which was approved by the High Court in the case of **CCE vs. Sunitha Shetty [2004 (174) ELT 313]**, wherein it was held that no penalty should be levied where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

4.71. As per the above cited case laws, *mens rea* to evade the tax is important to levy penalty. In the absence of such, and in light of bona fide belief that the tax is not payable due to genuine cause, penalty should not be levied.

No penalty is imposable in cases of a genuine interpretational issue

4.72. It is further submitted that no penalty is leviable where question of interpretation is involved. It is submitted that the noticee was under the genuine impression that no Service Tax is payable on the differential revenue recorded in books of accounts as the

same is done in accordance with the procedures laid down under law. In this context, we refer to the decision of the Tribunal in **M/s Hindustan Lever vs. CCE, Lucknow** 2010 (250) E.L.T. 251 (Tri. Del.), the relevant extract of which is reproduced below:

" ... *26. As regards the issue relating to penalty, as rightly pointed out by the learned advocate for the appellants, the dispute related to the interpretation of statutory provisions and it did not disclose intension to evade the payment of duty and, therefore, there was no justification for imposition of penalty in the matter. Hence, the penalty imposed under the impugned order is liable to be set aside."* (emphasis supplied)

4.73. Reliance is also placed on the decision of the Hon'ble Tribunal in **AEON'S Construction Products Ltd. vs. Commissioner of C. Ex., Chennai [2005 (180) E.L.T. 209 (Tri. Chennai)].** The relevant part of the decision is reproduced hereunder:

"*..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."* (emphasis supplied)

4.74. In the present facts, the issue, if at all, is an interpretation one, and no penalty should therefore be imposed.

4.75. Reliance is also placed on the decision of the Supreme Court in **Hindustan Steel vs. State of Orissa [1978 (2) ELT 159 (SC)]** in support of the contention that no penalty can be imposed when non-payment of Service Tax is borne out of bona fide belief. The relevant portion of the judgement is extracted below:

"Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

4.76. In light of the above, it is submitted that no penalty is imposable on the noticee and the allegation in the SCN that the noticee has deliberately not made efforts to assess the correct value leading to short payment of Service tax is completely incorrect. Further, the allegation of the Department in the SCN that the noticee has contravened the provisions of law is also completely incorrect in light of the aforesaid submissions.

4.77. Hence, no interest can be levied upon the noticee and no penalty can be imposed by the Department on the noticee. Accordingly, the proceedings initiated by the SCN are bound to be dropped on this ground alone

PERSONAL HEARING:

8. Personal hearing in the matter was held on 07.02.2020, wherein Ms. Ruchita Shah, Advocate and Mr. Akash Samani, CA, appeared before me on behalf of the assessee. They reiterated the submissions made vide their written submissions. They submitted a statement of reconciliation of revenue as per P&L account with value of services shown in ST-3 returns. Subsequently, as informed by them during the course of the personal hearing, a Certificate issued by M/s. Mar & Co,, Chartered Accountant was produced by the assessee, in support of their clarifications.

DISCUSSION AND FINDINGS:

9. I have carefully gone through the records of the case, the written submissions filed by the assessee and also taken note of the oral submissions made by the assessee at the time of the personal hearing. I have also gone through the certificate issued by the Chartered Accountant, in this matter.

10. From the Show Cause Notice issued to the assessee, I find that the following allegations have been leveled against the assessee:

From the reconciliation of gross taxable value as per ST-3 returns and revenue from above services, provided as per the P&L account, it was noticed that there was difference between the two figures, implying that the assessee had not fully discharged its Service tax liability as a service provider.

(ii) The assessee had not taken into account the correct assessable value while discharging Service tax for all the incomes received by them for rendering taxable services.

(iii) No evidence was produced by the assessee to substantiate their claim of having paid the Service tax appropriately.

(iv) The above acts of the assessee had rendered them liable to penal action for non payment of appropriate amount of Service tax and for suppression or concealment of taxable services with intent to evade payment of Service tax.

11. I find that the core issue to be decided is whether Service Tax is payable on the difference of income/value of taxable services derived from the reconciliation of gross taxable value as per ST-3 returns and revenue from services provided as per the P&L account. I hereby take up all the issues and the evidences brought forward by the assessee subsequently, to substantiate their claim that they had paid Service Tax appropriately and that there was no short payment of Service Tax

12. The Show Cause Notice has been issued demanding Service Tax amounting to Rs. 34,13,09,753/- (including Cess, SBC & KKC), on the differential value of Rs. 2,65,74,32,673/- as detailed in the table below.

TABLE-A

Statement showing short payment of Service tax						
Year	Service provided		Gross value as per ST-3	Gross Value as per P & L A/c.	Difference of Value	Short payment of S.Tax (incl. Cess)
2012-13	Mor R		227521058	516356527	288835469	35700064
	CES		105673434	683428078	577754644	71410474
2013-14	Mor R		260120360	300713137	40592777	5017267
	CES		256199976	500677374	244477398	30217406
2014-15	Mor R		314773842	597999248	283225406	35006660
	CES		260182336	643453177	383270841	47372276
2015-16	M or R	Apr-May-15, @12.36%	48943521	103827949	54884428	6783715
		June-14th Nov-15, @14%	119989406	313639825	193650419	27111059
		15th Nov-Mar-16, @14.5%	126682543	290290153	163607610	23723103
	CES	Apr-May-15, @ 12.36%	38097938	117212330	79114392	9778539
		June-14th Nov-15, @14%	68027086	322748512	254721426	35661000
		15th Nov-Mar-16,@14.5%	149885980	243183843	93297863	13528190
	Total		1976097480	4633530153	2657432673	341309753

M or R means - Maintenance and Repairs
CES means - Consulting and Engineering services

The reconciliation statement submitted by the assessee, vide their written submission is as under:

TABLE-B

Year	Servi ces	Gross Value as per P&L A/c	Value attributable to SEZ unit(supported by the ST-3 and/or Form 56 F)	Value attributable to DTA unit [3-4]	Gross value as per ST-3 of DTA unit	Difference in values of services due to AS-9 impact			Net differe nce [3-4-6-9]
						Export	Domestic	Net Amount [3-4-6]/[7+8]	
1	2	3	4	5	6	7	8	9	10
2012-13	M&R	22,75,21,058	-	22,75,21,058	22,75,21,058	-	-	-	-
	CES	57,38,69,453	47,16,18,428	10,22,51,025	10,56,73,434	-	-34,22,409	-34,22,409	-
2013-14	M&R	26,01 ,20,360	-	26,01 ,20,360	26,01 ,20,360	-	-	-	-
	CES	93,96,64,245	68,34,28,078	25,62,36, 167	25,61,99,976	-91,189	1,27,380	36,191	-
2014-15	M&R	31,47,73,842	-	31,47,73,842	31,47,73,842	-	-	-	-
	CES	92,66,78,583	64,34,53, 177	28,32,25,406	26,01 ,82,336	2,62,04,617	-31,61,547	2,30,43,070	-
2015-16	M&R	30,19,17,140	-	30,19,17,140	30,19,17,140	-	-	-	-
	CES	1,08,89,85,472	68,31,44,685	40,58,40,787	40,46,83,546	1,19,917	10,37,324	11,57,241	-
		46335309153	2,48,16,44,368	2, 15,18,85,785	2,13,10,71,692	2,62,33,345	-54,19,252	2,08, 14,093	-

14. At the outset the first thing that is noticed is the difference in the Gross value as per ST-3 of DTA unit, as per the Show Cause Notice and the gross value of ST-3 return shown by the assessee in the above statement. I find that in the Show Cause Notice, the total taxable value on which Service Tax has been paid, as per the ST-3 returns, for the period under consideration i.e from 2012-13 to 2015-16, is **Rs.1,97,60,97,480/-**, whereas the value of ST-3 returns, as per the reconciliation statement above is **Rs. 2,13,10,71,692/-**. On comparing the values of services as per ST-3 returns vis-à-vis the values of services considered in the Show Cause Notice, I find that there is discrepancy in the statement of the SCN. During the period of **2015-16**, the gross value on which Service Tax was paid, considered in the SCN is **Rs.55,16,26,474**, instead of **Rs.706,600,686**.This fact is clearly reflected in the ST-3 Returns of the period 2015-16. Thus, I hereby consider the amount of **Rs.2,13,10,71,692/-** shown by the assessee in their reconciliation table above, as the Gross value of ST-3 returns, to be true and correct and will consider the same for further discussion.

15. From the records of the case, I find that the assessee has the following units in the States of Maharashtra and Gujarat. The details of the said units are as under:

Sr.no.	Location	Key activities carried out	Indirect tax registrations
1.	Factory in Ahmedabad	Manufacture of goods as stated above	Registered under the Central Excise Act, 1944
2.	Special Economic Zone Unit ('SEZ') unit in Pune	Design service other than interior decoration and fashion designing, (i.e. Consulting Engineering Services	Registered under single Service tax registration no. AAACD9897PSD002 ('Single Registration')
3.*	Office in Ahmedabad	Maintenance & Repair services, Consulting engineer service, sale of goods outside India	Registered under centralised Service tax registration no. AAACD9897PST001
4.*	Repair centre in Baroda		
5.	Corporate office in Mumbai	Undertaking corporate functions	(Centralised Registration)

**Collectively referred as DTA unit*

16 From the above mentioned table, it is evident that provision of services was undertaken from its DTA unit as well as SEZ unit. Further, the corporate office of the assessee undertook common corporate functions such as finance, business administration, etc. The assessee had separate Service tax registration for its DTA unit and SEZ Unit; and the ST-3 returns were also separately filed for all the three units. However, as the assessee followed a centralized accounting system, consolidated financials were prepared for all the three units wherein the revenue of all the three units was clubbed together.

17. Further, for providing the aforesaid services i.e. Maintenance and Repair Services, Consulting Engineering Services etc, the assessee entered into agreements with its customers, in terms of which, the assessee raised invoices for providing the aforesaid services as and when the same are provided by the assessee to the customers. However, the payment against the said invoices was subject to the various contingencies:

18. In light of the aforesaid contingencies, as there is a possibility that the consideration receivable under the Agreement can be reduced subsequently (i.e. post issuance of invoices), the assessee had to mandatorily follow the principles laid down in the Accounting Standard 9 issued by the Institute of Chartered Accountants of India ('AS-9') for the revenue recognition of such contracts to credit of P&L *A/c.* The principle of the AS-9 has been explained in sub paras no. 1.6 to 1.9 in their defence reply in Para no. 7 above.

19. I find that the demand has been raised by reconciling the ST-3 returns filed by the assessee for the DTA Unit with the consolidated financials of the assessee which included the revenue of all the three units; where as the comparison of the ST-3 returns of the DTA Unit with the financials had to be restricted to the financials of the DTA unit only. However, in the captioned SCN, the demand was raised by comparing the ST-3 returns of the DTA Unit to the financials which inter alia also included the revenue of the SEZ Unit.

20. I now take up the issue of the services attributed to the SEZ unit of the assessee, located in Pune, Maharashtra. At first, I find that the assessment of the said Unit does not fall within the jurisdiction of the Commissioner of GST, Ahmedabad, North. The said fact is evident from the ST-3 returns filed by the assessee for its SEZ Unit, wherein it has been clearly mentioned that the SEZ Unit falls under the jurisdiction of Pune-I New Commissionerate. The copies of the ST-3 returns filed by the SEZ Unit for the F.Y. 2012-2013 to 2015-16 have been scrutinized and they substantiate the claim of the assessee.

21. The gross value of the said services for the period from 2012-13 to 2015-16 has been shown to be Rs. 2,48,58,09,874/- in the ST-3 return of the SEZ unit, where as the value attributed to the services of SEZ unit as per the financials is Rs.2,48,16,44,368/-. The reason for difference put forward by the assessee is that Debit notes not attributable to the said services, were included in the ST-3 returns. Detailed summary of such debit notes along with copies of sample debit notes were submitted by the assessee to prove their claim. In this regard, it comes out that the revenue shown in the P&L A/c is the correct revenue and the same is evident from the fact that it matches with the revenue shown in the Form 56F filed by the assessee for the SEZ Unit before the Income tax Authorities. The copies of the said Form 56F for the F.Y. 2012-13 to 2015-16 have been submitted by the assessee.

22. From the records of the case ,I find that the SEZ unit does not fall in the jurisdication of this Commissionerate and that the said unit is filing ST-3 returns under Pune-I Commissionerate.. Thus I hold that no Service Tax can be demanded from the assessee, on the revenue from services attributed to their SEZ unit located in Pune. It is also pertinent to mention that no Service tax is liable to be paid as the services provided by SEZ unit are exported outside India and the same is reflected in the ST-3 return of the SEZ Unit. Thus I find that the revenue amounting to **Rs. 2,48,16,44,368/-** being the correct revenue attributable to the SEZ Unit of the assessee is required to deducted from the total revenue of **Rs. 4,63,35,30,153/-** ,recognized in the P&L A/c., considered in the SCN. Thus, at this juncture, I hold that no Service Tax is liable to be paid on this value of Rs.2,48,16,44,368/- and thus the Service Tax demanded on this value, is vacated to this extent.

23. Now, having concluded that out of the total value of **Rs.4,63,35,30,153/-,** towards revenue shown in the P&L A/c, no Service Tax is payable on the value of Rs.2,48,16,44,368/-, the same being attributed to the revenue of SEZ unit, Pune; and that Service Tax has been paid on the gross value of Rs.2,13,10,71,692/-, as per the ST-3 Returns of the assessee; only the value of Rs. 2,08,14,093/-, remains to the examined for liability of payment of Service Tax.

24. The assessee in their written submission, as mentioned in sub para 1.5 of Para 7 above, has submitted that it is mandated by the Companies Act for them to follow the principles of revenue recognition laid down under the AS-9 to record the revenue earned by them in their books of accounts. As per the said standards, the revenue recognition at the time of raising any claim is required to be postponed to the extent its collection is uncertain due to the existence of certain uncertainties.The relevant extract of para 9 of the AS 9 is reproduced as under:

> *9. Effect of Uncertainties on Revenue Recognition*
> *9. 1 Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of the service it would not be unreasonable to expect ultimate collection.*
> *9.2 **Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g., for escalation of price, export incentives, interest etc., revenue recognition is postponed to the extent of uncertainty involved.** In such cases, it may be appropriate to recognise revenue only when it is reasonably certain that the ultimate collection will be made. Where there is no uncertainty as to ultimate collection, revenue is recognised at the time of sale or rendering of service even though payments are made by instalments.*
> *9.3 When the uncertainty relating to collectability arises subsequent to the time of sale or the rendering of the service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded.*
> *9.4 An essential criterion for the recognition of revenue is that the consideration receivable for the sale of goods, the rendering of services or from the use by others of enterprise resources is reasonably determinable. **When such consideration is not determinable within reasonable limits, the recognition of revenue is postponed.***
> ***9.5 When recognition of revenue is postponed due to the effect of uncertainties, it is considered as revenue of the period in which it is properly recognised.***

25. It is submitted by the assessee that the assessee had followed the aforesaid procedure laid down under AS-9 to recognize the revenue earned by it. In the present case, as submitted above in para 1.4 of their defence reply above, the total consideration receivable by the assessee, from the customer under the agreement is subject to the contingencies specified under the said agreement, the revenue of the assessee is also not determinable at the time of sale. Therefore, in accordance with the aforesaid standards, the assessee had recognised only the amount which is determinable at the time of raising of invoice and the amount which is subject to the contingencies laid down under the agreement was not recognised by the assessee in books of account at the time of sale of goods. Accordingly, the year wise revenue mentioned in the books of accounts and the revenue mentioned in the respective ST-3 returns did not tally. Therefore, Service tax was demanded from the assessee on this difference in revenue amounting to Rs. 2,08,14,093/-, which pertained to the DTA Unit. It is submitted that the said difference is solely on account of the AS-9 recording and the noticee is mandated by

law to follow the standards laid down in AS-9 for recording its revenue in the books of accounts. It is submitted that the noticee cannot be punished for following the law of the land. Accordingly, the demand raised by the Department with respect to the said differential amount is completely incorrect and the same deserves to be dropped on this ground alone. that the accounting treatment done under the books of accounts for the Income-tax purposes has no correlation to treatment under the tax. In light of the aforesaid, it is submitted that the Department has completely erred in demanding tax on the aforesaid differential amount.

26. It was submitted by the assessee that the net difference of Rs. 2,08,14,093/- in the revenue shown in the P&L A/c. and the revenue shown in ST-3 returns is on account of guidelines laid down under AS-9 for Revenue Recognition.Further, it is submitted that the net amount of Rs. 54,19,252/- pertaining to the domestic transactions undertaken by the assessee has not been recognized in books of accounts on account of the AS-9 principles and the same will be recognized as and when the said revenue is received by the assessee. However, Service tax on the same has been adequately paid by the assessee at the time of raising the respective invoices. Accordingly, no tax can be demanded on the said amount also.

27. Further, it has also been submitted by the assessee that revenue amounting to Rs. 2,62,33,345/-, arising on account of AS-9, pertains to export of services undertaken by the assessee from its DTA Unit. Since no tax is leviable on the said export of services, no Service Tax is liable to be paid on this ground also.The details of the break-up of impact of AS-9 has been submitted by the assessee via email, as under:

Particulars	Revenue recognisition from past period	Provision for Liquidated damages	Revenue deferred in Financial Year (FY)	Impact on account of AS-9
	(a)	(b)	(c)	(a)+(b)+(c)
FY 2012-13				
For Domestic Turnover	(1,73,97,703)	-	2,08,20,112	34,22,409
(A)	**(1,73,97,703)**	-	**2,08,20,112**	**34,22,409**
FY 2013-14				
For Domestic Turnover	(1,53,20,068)	11,25,000	1,40,67,688	(1,27,380)
For Export Turnover	-	-	91,189	91,189
(B)	**(1,53,20,068)**	**11,25,000**	**1,41,58,877**	**(36,191)**
FY 2014-15				
For Domestic Turnover	(40,88,453)	40,00,000	32,50,000	31,61,547
For Export Turnover	(2,62,04,617)	-	-	(2,62,04,617)
(C)	**(3,02,93,070)**	**40,00,000**	**32,50,000**	**(2,30,43,070)**
FY 2015-16				
For Domestic Turnover	(10,37,326)	-	-	(10,37,326)
For Export Turnover	(1,19,917)	-	-	(1,19,917)
(D)	**(11,57,243)**	-	-	**(11,57,243)**
Grand Total				
For Domestic Turnover	(3,78,43,550)	51,25,000	3, 81,37,799	54,19,249
For Export Turnover	(2,63,24,534)	-	91,189	(2,62,33,345)
(A+B+C+D)	**(6,41,68,084)**	**51,25,000**	**3, 82,28,989**	**(2,08,14,095)**

28. In view of the above, I hold that Service Tax is not payable on the amount of Rs.2,08,14,093/- also, as the difference has arisen on account of the AS-9 impact and accordingly, the demand to this extent is also dropped.

29. I hereby rely on the following decisions, relied upon by the assessee, wherein it has been held that treatment of any transaction in books of accounts for Income tax purpose does not govern the taxability under the Indirect Tax.

29.1 CESTAT, Ahmedabad in its decision in the case of M/s. Purni Ads. Pvt. Ltd., reported in 2010 (19) STR 242 (Tri-Ahd), has held as under:

Demand - Assumptions and presumptions - Short payment of Service tax - Audit detected difference between amounts shown in ST-3 return and balance sheet - Finding of Commissioner (Appeals) that method adopted for reconciliation of income incomplete and faulty, sustainable - Receipts held as taxable, without adducing evidence - Tax cannot be assessed merely on assumptions and presumptions - Onus to prove with sufficient evidence not discharged by original authority - Entire demand based on assumption, without evidence - Explanation given by assessee to reconcile differences pointed out by Department, not considered by adjudicating authority - Impugned order upheld - Section 73 of Finance Act, 1994. [paras 7, 8]

29.2 CESTAT, Regional Bench, Allahabad, in its decision in the case of M/s. Go Bindas Entertainment Pvt. Ltd., reported in 2019 (27) GSTL 397 (Tri.All), has held as under:

Demand - Telecom services, development and supply of content - Difference between return and balance sheet figures - Entire demand based on comparison of figures as reflected in balance sheet and ST-3 returns - Adjudicating authority after agreeing in principle with explanation of assessee that said difference is due to accounting system as per Income Tax Law, nevertheless confirming demand without adducing any positive evidence of evasion - Settled that no demand can be confirmed on basis of such difference unless it is established that excess amount pertains to providing any services - Department, having not discharged this onus, demand not sustainable - Impugned order set aside - Section 73 of Finance Act, 1994. [paras 4, 5]

30. Further, a certificate dated 3.3.2020, issued by M/s. Mar & Co., Chartered Accountants,signed by Shri Rushabh Mayank Shah, has been submitted by the assessee, which interalia certifies as under:

1. *I, Rushabh Mayank Shah Partner of MAR & Co, have examined the following records of M/s. Dresser-Rand India Pvt. Ltd. ('Company') for the period from F.Y. 2012-13 to 2015-16 ('relevant period'):*

   (a) Financial statements and the underlying books of accounts; and

   (b) Service tax returns in Form ST-3 filed for Service tax registration no. AAACD9897PST001 in respect of the Company's units located in Domestic Tariff Area ('DTA unit') along with underlying documentation for the same.

2. *Based on the above examination, I/we hereby certify that:*

   a) As per the Company's financial statements and the underlying books of accounts, total revenue earned by the Company for sale of services and such revenue attributable to the Company's DTA unit and the unit located in Special Economic Zone unit, Pune ('SEZ unit') is as under:

Financial Year	Total revenue for sale of services	Revenue attributable to SEZ unit	Revenue attributable to DTA unit
2012-13	80,13,90,511	47,16,18,428	32,97,72,083
2013-14	1,19,97,84,605	68,34,28,078	51,63,56,527
2014-15	1,24, 14,52,425	64,34,53,177	59,79,99,248
2015-16	1,39,09,02,612	68,31,44,685	70,77,57,927
Total	4,63,35,30,153	2,48,16,44,368	2,15,18,85,785

(b) Total value of taxable output services reported in ST-3 returns of the DTA unit of the Company (holding Service tax registration no. AAACD9897PST001), for the relevant period, is as under:

ST-3 returns for the period	Value of Services reported under the category "Maintenance or Repair Services"	Value of services reported under the category "Consulting Engineer Services"	Total Value of taxable output services reported in ST-3 returns.
FY 2012-13			
April-June	5,22,27,155	4,54,92,770	9,77,19,925
July-September	6,01,84,222	1,90,46,176	7,92,30,398
October-March	11,51,09,681	4,11,34,488	15,62,44,169
		Total	**33,31,94,492**
FY 2013-14			
April-September	14,10,51,493	15, 70,67,558	29,81,19,051
October-March	11,90,68,867	9,91,32,418	21,82,01,285
		Total	**51,63,20,336**
FY 2014-15			
April-September	14,30,48,872	7,12,92,248	21,43,41,120
October-March	17,17,24,970	18,88,90,088	36,06,15,058
		Total	**57,49,56,178**
FY 2015-16			
April-September	14,17,67,518	18,30,08,421	32,47,75,939
October-March	16,01,49,622	22,16,75,125	38,18,24,747
		Total	**70,66,00,686**
		Grand Total	**2,13,10, 71,692**

(c) *For compliance with the Accounting Standard-9 issued by the Institute of Chartered Accountants of India ('AS-9'), the Company makes certain adjustments to defer its revenue for various future contingencies and uncertainties. This effectively results into delayed recognition of revenue in books of accounts for which invoice is issued in an earlier financial year. However, in respect such adjustments made by the Company for the relevant period, the Company has paid the amount of Service tax on such revenue at the time of issuance of invoice or receipt of payment, whichever is earlier.*

(d) The reconciliation of turnover as per financial statements of the Company with ST-3 returns filed by the Company's DTA unit (holding Service tax registration no. AAACD9897PST001) attached as Annexure A to this Certificate is true and correct.

31. I find no reason to rebut the above Certificate issued by Chartered Accountants, as the same are supported by documentary evidences such as ST- 3 returns of the assessee, ST-3 returns of the SEZ unit in Pune, details of debit notes etc., produced by the assessee.

32. From the above discussion, it comes out crystal clear that no Service Tax is payable on the differential revenue derived on reconciliation of gross taxable value as per ST-3 returns and revenue from services provided as per the P&L account.Therefore, I drop the entire demand raised in the present SCN, in view of the discussion in the foregoing paras. In light of this, I do not find it necessary to discuss the other aspects of suppression and imposition of penalty. I, hereby, vacate the proceedings initiated against the assessee, vide the SCN no.V/15-32/OA/2017, dtd. 3.11.2017.

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

ORDER

(i) I drop the proceedings initiated against the assessee, vide SCN no. STC/15-32/OA/2017, dtd. 3.11.2017.

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

F.No.STC/15-32/O&A/17

Date: .5.2020

BY R.P.A. D To.

M/s. Dresser-Rand India Private Limited,
Plot No. 187, Phase - I, GIDC Estate,
Naroda, Ahmedabad.

Copy to :

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