आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009
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निबन्धित पावती डाक द्वरा/By R.P.A.D DIN- 20220564WT0000318143

फा.सं./F.No. STC/15-12/OA/2021 आदेश की तारीख़/Date of Order :- 18.05-2022

जारी करने की तारीख़/Date of Issue :- 18.05-2022

द्वारा पारित/Passed by:- आर गुलजार बेगम *IR Gulzar Begum*

अपर आयुक्त / *Additional Commissioner*

मूल आदेश संख्या / Order-In-Original No. 09/ADC/ GB /2022-23

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

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

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

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

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

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

(1) उक्त अपील की प्रति।

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

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

(1) Copy of accompanied Appeal.

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

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notices F.No.STC/15-12/OA/2021 dated 23.04.2021 issued to M/s Veer Procon Limited, 53, Sardar Patel Colony, Nr. Sardar Patel Colony, Bavla, Naranpura, Ahmedabad-380013.

BRIEF FACTS OF THE CASE

M/s Veer Procon Limited, 53, Sardar Patel Colony, Nr. Sardar Patel Colony, Bavla, Naranpura, Ahmedabad, Gujarat- 380013 (hereinafter referred to as the 'Assessee' for the sake of brevity) is registered under Service Tax having Registration No. AADCV2831JSD001 and was engaged in Taxable Services.

2. On going through the third party CBDT data for the Financial Year 2015-16 and 2016-17, it has been observed that the Assessee has declared less taxable value in their Service Tax Return (ST-3) for the F.Y. 2015-16 and 2016-17 as compared to the Service related taxable value they have declared in their Income Tax Return (ITR)/ Form 26AS, the details of which are as under:

Sr. No.	F.Y.	Taxable Value as per ST-3 returns (In Rs.)	Gross Receipts From Services (Value from ITR/26AS) (In Rs.)	Difference Between Value of Services from ITR/26AS and Gross Value in Service Tax Provided (In Rs.)	Resultant Service Tax short paid (in Rs.)
1	2015-16	432000/-	55697977/-	55265977/-	8013567/-
2	2016-17	3658500/-	0/-	0/-	0/-
TOTAL					8013567/-

3. Section 68 of the Finance Act, 1994 provides that 'every person liable to pay service tax shall pay service tax at the rate specified in Section 66/66B ibid in such a manner and within such period which is prescribed under Rule 6 of the Service Tax Rules, 1994. In the instant case, the said notice had not paid service tax as worked out as above in Table for Financial Year 2015-16 and 2016-17.

4. No data was forwarded by CBDT, for the period 2017-18 (upto June-2017) and the assessee has also failed to provide any information regarding rendering of taxable service for this period. Therefore, at this stage, at the time of issue of SCN, it is not possible to quantify short payment of Service Tax, if any, for the period 2017-18 (upto June-2017). With respect to issuance of unquantified demand at the time of issuance of SCN, Master Circular No. 1053/02/2017-CX dated 10.03.2017 issued by the CBEC, New Delhi clarifies that:

"2.8 Quantification of duty demanded: It is desirable that the demand is quantified in the SCN, however if due to some genuine grounds it is not possible to quantify the short levy at the time of issue of SCN, the SCN would not be considered as invalid. It would still be desirable that the principles and manner of computing the amounts due from the noticee are clearly laid down in this part of the SCN. In the case of Gwalior Rayon Mfg. (Wvg.) Co. Vs .UOI, 1982 (010) ELT 0844 (MP), the Madhya Pradesh High Court at Jabalpur affirms the same position that merely because necessary particulars have not been stated in the show cause notice, it could not be a valid ground for quashing the notice, because it is open to the petitioner to seek further particulars, if any, that may be necessary for it to show cause if the same is deficient."

5. As per section 70 of the Finance Act 1994, every person liable to pay service tax is required to himself assess the tax due on the services provided/received by him and thereafter furnish a return to the jurisdictional Superintendent of Service Tax by disclosing wholly & truly all material facts in their service tax returns (ST-3returns). The form, manner and frequency of return are prescribed under Rule 7 of the Service Tax Rules, 1994. In this case, it appears that the said service provider has not assessed the tax dues properly, on the services received by him, as discussed above,

and failed to file correct ST-3 Returns thereby violated the provisions of Section 70(1) of the act read with Rule 7 of the Service Tax Rules, 1994.

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

7. In view of above, it appears that the Assessee has contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of Service tax Rules, 1994 in as much as they failed to pay/ short paid/ deposit Service Tax to the extent of Rs. 80,13,567/-, by declaring less value in their ST-3 Returns vis-a-vis their ITR/ Form 26AS, in such manner and within such period prescribed in respect of taxable services received /provided by them; Section 70 of Finance Act 1994 in as much they failed to properly assess their service tax liability under Rule 2(1)(d) of Service Tax Rules, 1994.

8. It has been noticed that at no point of time, the Assessee has disclosed or intimated to the Department regarding receipt/providing of Service of the differential value, that has come to the notice of the Department only after going through the third party CBDT data generated for the Financial Year 2015-16 and 2016-17. The Government has from the very beginning placed full trust on the service providers and accordingly measures like self-assessment etc, based on mutual trust and confidence are in place. From the evidences, it appears that the said assessee has knowingly suppressed the facts regarding receipt of/providing of services by them worth the differential value as can be seen in the table hereinabove and thereby not paid / short paid/ not deposited Service Tax thereof to the extent of Rs. 8013567/-. It appears that the above act of omission on the part of the Assessee resulted into non-payment of Service tax on account of suppression of material facts and contravention of provisions of Finance Act, 1994 with intent to evade payment of Service tax to the extent mentioned hereinabove. Hence, the same appears to be recoverable from them under the provisions of Section 73(1) of the Finance Act, 1994 by invoking extended period of time, along with Interest thereof at appropriate rate under the provisions of Section 75 of the Finance Act, 1994. Since the above act of omission on the part of the Assessee constitute offence of the nature specified under Section 78 of the Finance Act, 1994, it appears that the Assessee has rendered themselves liable for penalty under Section 78 of the Finance Act, 1994.

9. The said assessee was given opportunity to appear for pre show cause consultation. The pre show cause consultation was fixed on 22.04.2021 but the said assessee did not appear for the same.

10. Therefore, Show Cause Notice was issued to M/s Veer Procon Limited called upon as to why:

(i) The demand for Service tax to the extent of Rs. 80,13,567/- short paid /not paid by them in F.Y. 2015-16 and 2016-17, should not be confirmed and recovered from them under the provisions of Section 73 of the Finance Act, 1994;

(ii) Interest at the appropriate rate should not be recovered from them under the provisions of Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed upon them under the provisions of Section 78 of the Finance Act, 1994.

(iv) Penalty under Section 77(2) of the Finance Act, 1994 should not be imposed on them for the failure to assess their correct Service Tax liability and failed to file correct Service Tax Returns, as required under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994.

DEFENCE REPLY

11. The assessee vide letter dated 21.05.2022 submitted their reply to SCN wherein they vehemently denied the allegations made in the SCN about contravention of certain provisions of the Finance Act, 1994 and/or the rules made thereunder. Considering the following submissions and facts, it is clear that service tax is not payable by them as proposed in the SCN. They further state and submitted that

- the SCN is not sustainable on merit as well as on the ground of limitation. Further, the SCN is also not maintainable on account of host of other grounds as stated hereinafter.
- During the financial year 2015-16, their entire contract income or contract receipt is in respect of services provided by way of construction, erection, commissioning, installation, completion, fitting out, or alteration of a road for use by general public. The said service is exempted from levy of whole of service tax leviable thereon under Sl. No. 13(a) of Notification No. 25/2012-ST, dated 20-06-2012 with effect from 01-07-2012 to 30-06-2017. They gave below relevant extract of Sl. No. 13(a) of the said notification for ready reference.

  "13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-
  (a) a road, bridge, tunnel, or terminal for road transportation for use by general public;"

- according to their bonafide belief, the contract work relating to road construction carried out by them as sub-contractor is also exempt from whole of the service tax leviable thereon under Sl. No. 29(h) of Notification No. 25/2012-ST, dated 20-06-2021 that exempts services by sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt. They are also of the bona fide belief that they have provided works contract service for road construction to contractors providing works contract service related to road which are exempt under Sl. No. 13(a) of Notification No. 25/2012-ST. Accordingly, they hold that the services provided are not liable to any service tax and thus drop the proceedings under the SCN on merit.

- the SCN has is issued presuming Gross Receipts from these exempt services as reflected in Form 26AS as taxable value despite the fact that they have explained by their three different letters to department that road related services provided by us are not liable to service tax. According to Section 65B(12) of the Finance Act, 1994, "assessee" means a person liable to pay tax and includes his agent. Since they are not liable to pay any tax on road related services provided by us in view of the above stated exemption under Sl. No. 13(a) of Notification No. 25/2012-ST, they are not assesse and hence no demand of tax is sustainable against them.

- They submitted following documents in support of their contention that they had provided earth work and other Road Construction related service which is

fully exempt from levy of whole of service tax as per Notification No. 25/2012-ST.

(i) CA Certificate dated 20-05-2021 certifying that the entire contract receipt during the FY 2015-16 is in respect of services provided by them by way of construction, erection, commissioning, installation, completion, fitting out, or alteration of a road for use by general public.

(ii) letter dated 26-03-2018 submitting all documents as stated therein to the Assistant Commissioner, Preventive Wing of Ahmedabad North Commissionerate for the period from 2014-15 to June, 2017 in response to letter dated 13-02-2018 from department. In this letter, apart from submitting all documents as stated therein, it is categorically stated that entire work income of FY 2014-15 to FY 2017-18 (Upto June, 2017) has been towards construction of road and in their humble opinion the same is not taxable. We earnestly requested to consider the contents submitted vide this letter and drop the proceedings under the SCN on merit considering the same.

(iii) Letter dated 15-10-2020 to the Superintendent of Ahmedabad North Commissionerate in response to letter dated 07-10-2020 from department. In this letter, apart from submitting all documents, it is categorically stated that as explained in the letter, entire work income of FY 2015-16 has been towards construction of road and in our humble opinion the same is not taxable. They earnestly requested to consider the contents submitted vide this letter and drop the proceedings under the SCN on merit considering the same.

(iv) Letter dated 16-10-2020 filed with Office of the Superintendent on 19-10-2020 submitting documents and explanations as also contending that the entire work income of FY 2015-16 has been towards construction of road and in our humble submission the same is not taxable. We earnestly request you to consider the contents submitted vide this letter and drop the proceedings under the SCN on merit considering the same.

(v) Sample Bill for August, 2015 for earth work related to Four Laning of Bhilwara-Rajsamand road of Bhavna Engineering Company.

(vi) Sample Bill for period 26-12-2015 to 25-1-2016 of Sadbhav Engineering Ltd. for Road earth work.

(vii) Work Order dated 17-04-2015 issued by Sadbhav Engineering Ltd.

- their entire contract receipt for FY 2015-16 is in relation to Works of construction of Earth work for Project Road, no service tax is payable by them in terms of entry No. 13(a) of Notification No. 25/2012-ST as also under Entry No. 29(h) thereof. Hence, they prayed to hold so and drop all the proceedings under the SCN on merit and thus render justice.

- the departmental officers who had raised inquiry right from 13-02-2018 had perused all documents and submissions and had also sought further details which were also provided by way of three replies filed as stated above. They stated that Officer(s) from Office of Commissioner of CGST, Ahmedabad North Commissionerate who inquired in the matter were satisfied that their service is exempt and had accordingly not issued any SCN to us for the year 2014-15 as is clearly evident from communications starting from 13-02-2018 onwards. They had provided all the information and records to officers and nothing was suppressed as is evident from the communications enclosed with this reply.

- the onus of proving a service to be taxable is on the department and without discharging such onus, proposal to demand service tax is not legal or proper. The SCN proposes demand of service tax without adducing any evidence and based on presumption and assumption that when TDS is deducted, the income is in respect of taxable service. It is settled law that tax cannot be assessed merely on assumption and presumptions. In this case, entire proposal for demand of service tax is based on presumptions and assumptions contrary to

facts on record and hence request to drop all the proceedings under the SCN relying on decision in case of CST v. Purni Ads. Pvt. Ltd. [2010 (9) STR 242 (Tri.-Ahmd.)] that squarely covers the issue in our favour as it was held therein that tax cannot be assessed merely on assumptions and presumptions, the onus to prove with sufficient evidence that the receipts were against the taxable service lies on the department, the entire demand was based on the assumption that all receipts which were accounted by the appellants in their books of account were related to taxable service rendered by the appellants, without establishing the same and hence, the demand was not in accordance with law and therefore has no merits. In their case, the SCN issuing authority has proceeded surprisingly on the basis of total receipts appearing in Form 26AS without verifying whether the same was received towards the value of taxable service or otherwise and that too in total disregard of the fact that the same is received towards road construction service which is fully exempt. It is duty of the Department to establish the demand with evidence which the department has failed to do so and hence we request you to drop all the proceedings under the SCN. We also rely on decision in case of Nirav Travels v. CCE [2012 (27) STR 73 (Tri.-Ahmd.)] wherein it was stated that it was not proper to issue SCN based on balance sheet and profit and loss account without even giving an opportunity to explain the situation.

- The SCN is issued based on assumption and presumptions contrary to facts on record; the SCN is issued without considering the replies dated 26-03-2018, 15-10-2020 and 16-10-2020 filed by them; the SCN is issued without proper due diligence on the part of the department as mandated by CBIC and an unfair attempt is made to demand service tax even though the activity of road construction service is clearly exempt from levy of whole of service tax under Notification No. 25/2012-ST, dated 20-06-2017 w.e.f. 01-07-2012. Further, the SCN is also issued in clear defiance of CBEC direction to grant mandatory pre-show cause notice consultation making it patently illegal and invalid.
- Demand of service tax can be made only if department discharges the onus of showing any taxable service with evidence. Demanding service tax based on figures of 26AS is patently wrong as 26AS does not state any nature of service and it is injustice to presume something else when the records verified by the officers also showed that we have provided all services of road construction which is exempt. Since no service tax is payable on exempt service provided , there is no question of payment of any interest. Since the service tax is not payable, no penalty can be imposed under section 78 or any other section of the Finance Act, 1994.
- in terms of provisions of section 69(1) of the Finance Act, 1994, every person liable to pay any service tax was liable for service tax registration. Since they were liable to pay some service tax under reverse charge, they had taken service tax registration and had also paid due service tax on services where we were liable to pay tax under reverse charge. However, where no service tax is payable for exempt road construction services, they are not assesse for the purpose of service tax and accordingly, no tax was to be assessed by us thereon and thus, the returns filed by them was correct in all respect in so far as they were liable to pay tax. Thus, no penalty can be imposed under section 77(2) of the Finance Act, 1994.
- the demand of entire amount of tax as proposed in the SCN is not sustainable on merit considering above stated submissions. Apart from it, entire demand for FY 2015-16 is not sustainable on the ground of limitation also as the SCN dated 23-04-2021 is served on 27-04-2021 beyond the normal period of limitation of 30 months from relevant date as applicable in terms of provisions of Section 73(1) of the Finance Act, 1994 as there is no fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the said Act or the rules made thereunder with intent to evade

payment of tax on our part. Kindly note that date of filing ST-3 return half year ended 31-03-2016 is 11-04-2016. 30 months from 11-04-2016 would expire on 11-10-2018 and since this SCN is served on 27-04-2021 i. e. beyond 11-10-2018, entire proposed demand of service tax under this SCN is also not sustainable on ground of limitation apart from entire demand being unsustainable on merit. Considering the following facts, it is crystal clear that there is not an iota of evidence of suppression or intent to evade payment of tax on their part.

(i) They have not suppressed any information from department and all transactions are very well reflected in our books of accounts and audited financial statements. The SCN is also issued based on figures taken from income tax related record.

(ii) They were of the bona fide belief that we were not liable to pay any service tax on road construction service as the same is fully exempt under Notification No. 25/2012-ST.

(iii) They have not charged or recovered any service tax as they were of the bonafide belief that no service tax is payable on road construction related services.

(iv) All their service income is reflected in their audited accounts and nothing has been concealed by them. Further, being a public limited company, all audited accounts are public documents accessible to all.

(v) All contract service income is also reflected in income tax return filed with income tax department and nothing has been suppressed by us.

(vi) They have provided all details to Ahmedabad North Commissionerate Central Tax Officers as and when sought as is evident from the correspondence right from 13-02-2018 onwards copies of which are submitted herein.

(vii) The proposal in SCN to invoke extended period of limitation of five years is not legal or proper without in any way substantiating the charge of suppression or intent to evade payment of service tax.

- They drawn attention to Circular No. 1053/02/2017-CX, dated 10-03-2017 wherein it was stated that Board has made pre show cause notice consultation by the Principal Commissioner/ Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs. 50 lakhs (except for preventive/ offence related SCN's) mandatory vide instruction issued from F No. 1080/09/DLA/MISC/15 dated 21st December 2015. The said Circular further directs that such consultation shall be done by the adjudicating authority with the assessee concerned. Despite the clear mandate given by the Board, above referred Show Cause Notice is issued in clear defiance of the Board instruction in this regard. Being aggrieved by such an action, they requested to withdraw this show cause notice and grant us pre-show cause notice consultation giving reasonable opportunity of being heard. SCN issued in defiance of the mandate given by the Board is patently illegal and is not maintainable in law. They also enclose relevant extract from CBEC Circular No. 1053/02/2017=CX, dated 10-03-2017 for Instruction issued from F. No. 1080/09/DLA/MISC/15 dated 21-12-2015. We rely on decision in case of Amadeus India Pvt. Ltd. v. Pr. Commr. of CE, ST & CT [2019 (25) GSTL 486 (Del.)] wherein it was held that SCN issued with demand for earlier period without mandatory pre-Show Cause Notice consultation is not sustainable being contrary to CBEC Circular as departmental circulars are binding on departmental officers. The assessee relied upon the following case laws in their favour.

Rayala Corporation v. Directorate of Enforcement[1969 (2) SCC 412],
CCE, Mumbai-IV v. Damnet Chemicals P. Ltd. [2007 (216) ELT 3 (SC)]. CC v. Seth Enterprises [1990(49) ELT 619 (Tri.-Del
Hon. Supreme Court has, in its decision in Tamilnadu Housing Board v. CCE – 1994 (74) ELT 9 (SC),
Collector v. Chemphar Drugs – 1989 (40) ELT 276 (SC),
Pahwa Chemicals P. Ltd. v. CCE, Delhi [2005 (189) ELT 257 (S.C.)]
Cosmic Dye Chemical v. CCE, Bombay [1995(75) ELT 721(SC)]

Hindustan Steel v. State of Orissa [1978 (2) ELT (J159) (S.C.)] Cement Marketing Co. [1980 (6) ELT 295 (SC)]

- Since no service tax is payable based on the clear legal position, there is no question of payment of any interest and we request you to hold that no interest is payable by us. We also request you to hold that in absence of any contravention of any of the provisions of law on our part, penalties or late fee cannot be imposed under sections of the Finance Act, 1994 or the rules made thereunder.

- For all these reasons and the fact that there was no fraud or collusion or willful mis-statement or suppression of facts, or contravention of any of the provisions of the Finance Act, 1994 or the rules made there under with an intent to evade payment of excise duty, they requested to drop the proceedings under SCN and thus render justice.
- Since no service tax is payable based on the clear legal position, there is no question of payment of any interest and we request you to hold that no interest is payable by us. We also request you to hold that in absence of any contravention of any of the provisions of law on our part, penalties or late fee cannot be imposed under sections of the Finance Act, 1994 or the rules made thereunder.
- For all these reasons and the fact that there was no fraud or collusion or willful mis-statement or suppression of facts, or contravention of any of the provisions of the Finance Act, 1994 or the rules made there under with an intent to evade payment of excise duty, they requested to drop the proceedings under SCN and thus render justice.

PERSONEL HEARING

12. Personal Hearing in this case was granted on 25.04.2022. Shri Nilesh V Suchak, duly authroised representative attended on behalf of the assessee. During the personal hearing, he reiterated the written submission dated 21.05.2021 and has submitted additional submissions to present their views. He requested to drop all further proceedings based on 5 years limitation aspect. They have also filed submission dated 25.04.2022 during the course of personal hearing wherein they reiterated that their services are covered under Sl.No.13(a) of Notification No.25/2012 dated 20.06.2012: that there is no suppression or fraud: that the SCN is not sustainable on the grounds of limitation and therefore requested to drop the proceedings.

DISCUSSION AND FINDINGS

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

14. I have carefully gone through the Show Cause Notice, submission made by the assessee, Audited Balance Sheet, 26AS, STR for the year 2015-16. In the instant case, Show Cause Notice was issued to the assessee demanding Service Tax of Rs.80,13,567/- for the financial year 2015-16 on the basis of data received from Income Tax authorities. The Show Cause Notice alleged non-payment of Service Tax, charging of interest in terms of Section 75 of the Finance Act, 1994 and penalty under Section 77 and 78 of the Finance Act, 1994. Accordingly, I find that the issue which requires determination as of now is whether the assessee is liable to pay service tax of Rs.80,13,567/- for the financial year 2015-16 under proviso to section 73(1) of Finance Act, 1944 or not.

15. On perusal of the reply to SCN, I find that the assessee is engaged is providing services by way of construction, erection , commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a road. Here I would like to

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

"**service**" means *any activity carried out by a person for another for consideration, and includes a declared service. Services covered under Negative list, defined in Section 66D (inserted by the Finance Act, 2012 w.e.f. 1-7-2012), comprise of the following services viz.,*

(a)	*Service by the Government/Local Authority*
(b)	*Service by RBI*
(c)	*Service by Foreign Diplomatic Mission located in India*
(d)	*Service in relation to agriculture*
(e)	*Trading of goods*
(f)	*Manufacture of goods*
(g)	*Selling of space/time for advertisement*
(h)	*Services by access to road or bridge on a payment of Toll charges*
(i)	*Betting, gambling or lottery*
(j)	*Admission to Entertainment Events & Amusement Facilities*
(k)	*Transmission or distribution of electricity*
(l)	*Educational Services*
(m)	*Renting of Residential dwelling for use as residence*
(n)	*Financial services by way of extending deposits, loans or advances and inter se sale or purchase of foreign currency*
(o)	*Transportation of Passenger with or without accompanied belongings*
(p)	*Transportation of goods.*
(q)	*Mortuary/Funeral services*

16. In view of the above, I find that the activities carried out by the assessee falls under the category of taxable service prior to introduction of Negative List as well as post introduction of Negative List the security service provided by the assessee does not fall under category of negative list of services under the provisions of Section 66D of the Finance Act. Therefore, I find that the said service provider is liable to pay Service Tax on income earned from provision of various taxable services provided for the period 2015-16.

17. Further, the assessee vide their submissions stated that during the financial year 2015-16, their entire contract income or contract receipt is in respect of services provided by way of construction, erection, commissioning, installation, completion, fitting out, or alteration of a road for use by general public. The said service is exempted from levy of whole of service tax leviable thereon under Sl. No. 13(a) of Notification No. 25/2012-ST, dated 20-06-2012 with effect from 01-07-2012 to 30-06-2017. They gave below relevant extract of Sl. No. 13(a) of the said notification for ready reference.

"13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;"

18. They have also submitted that the contract work relating to road construction carried out by them as sub-contractor is also exempt from whole of the service tax

leviable thereon under Sl. No. 29(h) of Notification No. 25/2012-ST, dated 20-06-2021 that exempts services by sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt. They are also of the bona fide belief that they have provided works contract service for road construction to contractors providing works contract service related to road which are exempt under Sl. No. 13(a) of Notification No. 25/2012-ST. Accordingly, they hold that the services provided are not liable to any service tax and thus drop the proceedings under the SCN on merit.

19. I have carefully gone through the reply to show Cause Notice field by the assessee wherein they claimed that they are doing road construction works on sub contract basis for the main contractors M/s.Bhavna Engineering Company and M/s.Sadbhav Engineering Ltd and claimed exemption from payment of service tax under Notification No.25/2012 dated 20.06.2012. The assessee has also provided copy of works order dated 17.04.2015 issued by M/s.Sadbhav Enginnering Limited wherein it was mentioned as work order for execution of earthwork, feeding of aggregates and transportation works for the 4 laning MP/Maharashtra Border-Dhule Section of NH-3 from Km 168.500 to Km 265.000 in the state of Maharashtra under NHDP Phase-III. I have gone though the works order and attached schedule wherein the details of works such as scope f work, period for completion and other conditions along with schedule. On perusal of the Show Cause Notice, I find that the demand of service tax is derived on the basis of Gross receipts from services of Form 26AS. I have gone through the Form 26AS for the period 2015-16 in the total amount paid/credited from the account of M./s. Sadbhav Engineering limited is Rs.5,49,96,976/-. However they have not produced any evidence to prove that the said amount credited in their account is derived from the above referred work order given to the assessee by M/s.Sadbhave Engineering limited. Similarly the assessee also not produced the copy of work order to prove that the main Contractor M./s.Sadbhav Engineering has been allotted by the appropriate authority for construction of construction and maintenance of road for public. The work orders for construction of road for road transportation for general public is normally being allotted by a Government Agency i.e National Highway Authroity of India, Central Public Works Department, State Public Works Department or any other Govt.Agency. However in the instant case the assessee claimed that M/s.Sadbhav Engineering have allotted the road construction to the assessee, but they could not produce any agreement/contract/work order that the construction of road for the use of general public is allotted by any Government agency. In the absence of such documents and evidence, it is not possible to arrive a conclusion that the said amount credited to the account of the assessee from the main contractor i.e. M/s.Sadhbhav Engineering company is in lieu of work carried for construction of any road used for pubic or not. In the absence of such documentary evidence, the claim of the assessee that these services are exempted from Service Tax vide Notification No.25/2012 dated 20.06.2021 cannot be accepted. As they are not eligible for exemption from service tax, service tax on Rs.5,49,96,976/- is required to be confirmed and recovered from the assessee.

20. Similarly on perusal of Form 26AS for the Financial Year 2015-16 an amount of Rs.7,01,001/- paid/credited to the account of the assessee from the deductor M/s.Bhavna Engineering Company Private Limited. This amount is also taken in the SCN for demand service tax. On perusal of the documents submitted by the assessee, I find that no documents such as copy of work order, invoices, bank statements, ledger or copy of work or allotted to the said M/s.Bhavna Engineerin Company P. Ltd from any Agency for the construction of Road for public use. In the absence any such supporting documents, it cannot be ascertained whether the income derived from M/s.Bhavna Engineering Company Private Limited is in relation to construction or maintenance of any public road or not. In the absence of such documentary evidence, the claim of the assessee that these services are exempted from Service Tax

vide Notification No.25/2012 dated 20.06.2021 cannot be accepted and therefore the said income of Rs.7,01,001/- is also liable to be taxed.

21. I have also gone through the ST 3 returns filed by the said assessee for the year 2015-16. On perusal of the same I find that they have filed the STR wherein they have mentioned category of taxable service as "Transport of Goods by road/goods Transport Agency Service for the both the STR for the period April 2015 to Sept. 2015 t& April to Sept.2015 to Oct to March 2016. They have not mentioned any other category of service on their STR. As the assessee are providers of taxable services even though which was exempted by way of Exemption Notification, they are required furnish the details of service provided and claim the exemption from payment of service tax by mentioning the relevant Notification No in the specified area of the STR. On furnishing of the details of services providing and relevant Notifications No, the department can verify at the time of scrutiny of STR whether they are eligible for any exemption under claimed Notification. In the instant case, the assessee is failed to furnish the details of service provided and also the details of Notification availed. Herein this case the assessee suo mot claimed exemption from payment of service tax claiming benefit of Notification, however whether they have fulfilled the conditions of the Notifications, if any, could not be verified at the time of scrutiny of STR by the Department.. In this way the assessee is deliberately attempted to evade payment of services ton the services provided by them and not disclosing the details thereof their service tax returns.

22. The assessee in their reply further claimed that the Show Cause Notice is issued on the basis of assumption and presumption that when TDS is deducted, the income is in respect of taxable service. But in the instant case the SCN is issued not on the basis of any presumption but on the basis of Form 26AS which is statutory documents wherein the details of financial transactions and amount credited in the accounts of the assessee have clearly mentioned.

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

"22. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. In Novopan Indian Ltd. (supra), this Court held that a person, invoking an exception or exemption provision to relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave - (1996) 2 SCR 253, held that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption." . Here in the instant case the assessee failed to prove that they are eligible for the exemption Notifications as claimed ion their reply to SCN.

24. Thus in view of the above facts and findings, I am of the opinion that the assessee could not explain with substantial supporting documents to establish that the income shown as credited in their account as detailed in /form 26AS is exempted from payment of service tax. They claimed in the reply to SCN that they are entitled to get benefit of exemption from payment of service tax, however the reply to SCN is not supported with any relied upon documents to substantial to prove that the services provided are falls under Sl.no.13(a) of Notification No.25/2012 dated 20.06.2022. In view of the above, I find that the differential value of Rs.5,52,65,977/- is to be considered as taxable under the ambit of service tax and accordingly the service tax of Rs.80,13,567/- demanded is to be confirmed alongwith interest and appropriate penalty.

25. An assessee registered with Service Tax Department is required to provide information/documents to the department as and when required. However, in this case the assessee failed to furnish/provide the required documents in support of their claim to prove that they are not liable to service tax being the service tax provider. Even during the course of personnel hearing also the assessee failed to submit any documents proving that they are eligible for exemption from payment of service tax or abetment of value for the purpose of calculating service tax liability. In view of the above facts, it is proved that the assessee may not have the data of the service receivers or they might have been try to avoid furnishing the details which may have lead to proof that the service provider is liable to pays service tax.

26. Various Courts including the Apex Court have clearly laid down the principle that tax liability is a civil obligation and therefore, the intent to evade payment of tax cannot be established by peering into the minds of the tax payer, but has to be established through evaluation of tax behavior. M/s.Veer Procon deliberately not supplied their ST-3 Returns and other documents, the actual service provisions rendered by them and service tax involved thereon, with intent to evade the proper payment of service tax on its due date, but only after going through the CBDT data these facts would have come to light. The said assessee himself admits in their reply to SCN that they were provided various services and not paid any service tax The said assessee in their submissions referred various case laws against invoking of extended period, however, in view of the above facts and discussion, it is correctly invoked the extended period while issuing SCN. Moreover, the Hon'ble apex court in the case of Rajasthan Spinning and Weaving Mills / High Court of Gujarat at Ahmedabad in Tax Appeal No. 338 of 2009 in the case of Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd. dated 22.04.2010 has made the following observations regarding applicability of the extended period in different situations.

> *"11. A plain reading of sub-section (1) of section 11A of the Act indicates that the provision is applicable in a case where any duty of excise has either not been levied/paid or has been short levied/short paid, or wrongly refunded, regardless of the fact that such non-levy etc. is on the basis of any approval, acceptance or assessment relating to the rate of duty or valuation under any of the provisions of the Act or Rules thereunder and at that stage it would be open to the Central Excise Officer, in exercise of his discretion to serve the show cause notice on the person chargeable to such duty within one year from the relevant date.*
>
> *12. The Proviso under the said sub-section stipulates that in case of such non-levy, etc. of duty which is by reason of fraud, collusion, or any mis -statement or suppression of facts, or contravention of any provisions of the Act or the rules made there under, the provisions of sub-section (1) of section 11A of the Act shall have effect as if the words one year have been substituted by the words five years.*

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

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

15. To put it differently, the proviso merely provides for a situation where under the provisions of sub-section (1) are recast by the legislature itself extending the period within which the show cause notice for recovery of duty of excise not levied etc. gets enlarged. This position becomes clear when one reads the Explanation in the said sub-section which only says that the period stated as to service of notice shall be excluded in computing the aforesaid period of one year or five years as the case may be.

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

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

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

19. The language employed in the proviso to sub-section (1) of section 11A, is clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder , the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom.

20. Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The

reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of section 11A would be applicable. However, such reasoning appears to be fallacious in as much as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated.

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

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

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

In view of the above facts, the extended period is correctly invoked while issuing this Show Cause Notice

27. Further, they had not claimed any exemption for the said charges collected and provisions of the 'taxable services' during the aforesaid period in the ST-3 Returns, nor did they have sought any specific clarification from the jurisdictional Service Tax assessing authorities regarding the applicability of Service Tax on the services of the same covering the period of this notice. In view of the specific omissions and commissions as elaborated earlier, it is apparent that the assessee had deliberately suppressed the facts of provision of the Taxable Service in the ST-3 Returns during the relevant period. Consequently, this amounts to mis-declaration and willful suppression of facts with the deliberate intent to evade payment of Service Tax.

28. I further find that M/s.Veer Procon Limited had contravened the following provisions of Chapter V of the Finance Act, 1994 and the Service Tax Rules, 1994 with intent to evade payment of Service Tax in respect of "taxable Services" as defined under the provisions of Section 65B (51) of Finance Act, 1994, provided by them to their various service receivers during the period from 01.04.2015 to 31.03.2017:

(i) Section 67 of the Finance Act, 1994 read with Rule 2A(ii)(B)(ii) of Service Tax (Determination of Value) Rules, 2006, in as much as they have failed to determine the net taxable value of taxable service and declared the same to the department.

(ii) Section 68 of the Finance Act, 1994 and Rule 6 of the Service Tax Rules, 1994 , as amended, in as much as they did not pay the appropriate Service Tax on the taxable services provided by them.

(iii) Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 in as much as they, as a service provider, have failed to furnish proper periodical returns in form ST-3 mentioning the particulars of the aforesaid taxable service provided by them, the value of taxable service determinable and other particulars in the manner as provided therein and incorporating the required information to the jurisdictional Superintendent of Service Tax.

29. All above acts of contravention constitute an offence of the nature as described under the provision of Section 77 of the Act, rendering themselves liable to penalty under Section 77 of the Finance Act, 1994, for failure to provide documents/details for further verification in a manner as provided under Section 77 of the Service Tax Rules, 1994

30. As far as imposition of penalty u/s.78 of Finance Act, 1994 is concerned, on perusal of the facts of the case and in view of the above discussion, I find that this is a fit case to levy penalty under section 78 of fiancé Act, 1994 as they failed to pay the correct duty with the intend to evade the same. It is also a fact that they had deliberately not shown in their ST-3 Returns, the actual service provision rendered by them and service tax involved thereon, with intent to evade the proper payment of service tax on its due date, but on verification of data received from CBDT these facts would have not come to light. They have never informed the Service Tax department about the actual provision of taxable services so provided by them to their service recipients during the relevant time and they have also not shown the aforesaid actual provision of taxable service provided them, in respective ST-3 returns filed by them at the relevant period. The assessee have thus, willfully suppressed the actual provision of taxable service provided by them with an intent to evade the Service Tax. It, thus, found that the assessee, as a service provider, deliberately suppressed the actual provision of the taxable services provided by them, from the Jurisdictional Service Tax Authority and failed to determine and pay the due Service Tax with an intention to evade payment of Service Tax in contravention of the various provisions of the Finance Act, 1994 and Rules made thereunder, as discussed hereinabove. Hence I find that this is a fit case to impose penalty u/s.78 of Finance Act,1994.

31. Further, all the above acts of contravention of the various provisions of the Finance Act, 1994, as amended from time to time, and Rules framed there under, on the part the service provider has been committed by way of suppression of facts with an intent to evade payment of service tax and, therefore, the said service tax not paid/short paid is required to be demanded and recovered from them under the proviso to Section 73 (1) of the Finance Act, 1994, as amended from time to time, by invoking extended period of five years. All these acts of contravention of the provisions of Section 65, 67, 68 & 70 of the Finance Act, 1994, as amended from time to time read with Rules 6 and 7 of the erstwhile Service Tax Rules, 1994 liable to penal action under the provisions of Section 78 of the Finance Act, 1994 as amended from time to time. For the sake of clarity, I reconcile the tax liability as under:

32. Further, on perusal of para 6,7 and 8 of the SCN, I find that the levy of service tax for FY 2017-18 (upto June 2017), which was not ascertainable at the time of issuance of the subject SCN, if the same was to be disclosed by the Income Tax department or any other source/agencies, against the said assessee, action was to be initiated against assessee under the proviso to Section 73(1) of the Finance Act, 1994 read with Para 2.8 of the Master Circular No. 1053/02/2017—CX dated 10.03.2017 and the service tax liability was to be recoverable from the assessee accordingly, I

however do not find any charges leveled for demand for FY 2017-18 (upto June 2017) in charging part of the SCN. On perusal of SCN, I further find that the SCN has not questioned the taxability on any income other than the income from sale of services. I therefore refrain from discussing the taxability on other income other than the sale of service.

33. In view of the above discussion and findings, I pass the following orders:-

O R D E R

(i) I confirm the Service Tax demand amounting to Rs.80,13,567/- (Rupees Eighty Lakhs Thirteen Thousand Five Hundred Sixty Seven only) for the period FY 2015-16 under Section 73(1) of chapter V of Finance Act, 1994 read with section 174 of CGST Act,2017 as amended and order M/s.Veer Procon Limited to pay up the amount immediately.

(ii) I order that interest be recovered from M/s.Veer Procon Limited on the service tax amount of Rs.80,13,567/- under the provisions of Section 75 of chapter V of the Finance Act, 1994.

(iii) I impose penalty of Rs.10,000/- (Rupees Ten Thousand only) on M/s. Veer Procon Limited under Section 77(2) of the Finance Act, 1994.

(iv) I impose a penalty of Rs.80,13,567/- (Rupees Eighty Lakhs Thirteen Thousand Five Hundred Sixty Seven only) on M/s.Veer Procon Limited under section 78 of the Finance Act 1994 as amended. I further order that in terms of Section 78 (1) of the Finance Act, 1994 if M/s.Veer Procon Limited pays the amount of Service Tax as determined at Sl. No. (i) above and interest payable thereon at (ii) above within thirty days of the date of communication of this order, the amount of penalty liable to be paid by M/s.Veer Procon Limited shall be twenty-five per cent of the penalty imposed subject to the condition that such reduced penalty is also paid within the period so specified.

R. Gulzar Beg

(R.GULZAR BEGUM)
Additional Commissioner
Central GST & Central Excise
Ahmedabad North.

By Regd. Post AD./Hand Delivery
F.No.STC/15-12/OA/2021

Date:18.05.2022

To
M/s Veer Procon Limited,
53, Sardar Patel Colony, Nr. Sardar Patel Colony,
Bavla, Naranpura, Ahmedabad, Gujarat- 380013

Copy to:

1. The Commissioner of CGST & C.Ex., Ahmedabad North.
2. The D.C/AC, Division-VII, Central Excise & CGST, Ahmedabad North.
3. The Supdt., Range-I, Division-VII, Central Excise & CGST, Ahmedabad North
4. The Superintendent(system) CGST, Ahmedabad North for uploading on website.
5. Guard File