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 द्वारा/By R.P.A.D

DIN-20210764WT0000111F18

फा.सं./F.No. STC/15-30/OA/2020

आदेश की तारीख़/Date of Order :- 23.07.2021
जारी करने की तारीख़/Date of Issue :- 23.07.2021

द्वारा पारित/Passed by:- मारुत त्रिपाठी / *Marut Tripathi*
संयुक्त आयुक्त / Joint *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 15/JC/ MT /2021-22

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 Notice No. DGCEI/AZU/36-28/2020-21 dated 24.08.2020 issued to M/s. Art Nirman Ltd, 319, 2 nd floor, JBR Arcade, Science City Road, sola, Ahmedabad-3800060 and having their business address at Club Babylon, S.P.Ring Road, Nr.Science city, Bhadaj, Ahmedabad.

BRIEF FACTS OF THE CASE:

M/s. 'Art Nirman Ltd, (hereinafter referred as M/s.ANL for the sake of brevity) is a Private Limited company, having its registered office at 2 nd floor, JBR Arcade, Science City Road, sola, Ahmedabad-3800060 and having their business address at Club Babylon, S.P.Ring Road, Nr.Science city, Bhadaj, Ahmedabad are engaged in rendering services i.e construction service in respect of commercial or industrial building and civil structure and work contract service etc. and are having Service Tax Registration No.AADCV5658DSD001 Dated 09.05.2012.

2. The officers of Directorate General of Goods and Services Tax Intelligence (Erstwhile Directorate General of Central Excise Intelligence), Ahmedabad Zonal Unit, Ahmedabad [hereinafter referred to as "DGGI" for the sake of brevity] gathered intelligence that M/s.ANL had provided Works Contract Service to M/s.Dhara Developers, Ahmadabad and received consideration thereon and had not paid Service Tax properly on the consideration received from M/s.Dhara Developers for providing Works Contract Service.

3. Acting on the above intelligence DGGI has initiated investigation against M/s.ANL under search proceedings and withdrawn certain documents under panchnama dated 11.10.2018. During the investigation, it was found that M/s.ANL had provided completion and finishing services like plastering, tiles fittings, painting, electricity activity, plumbing, doors and windows fittings to M/s.Dhara developers and charged Rs.14,06,30,808/- (inclusive of ST) under Works Contract Service.

4. Further investigation revealed that M/s.ANL has charged value of service from M/s.Dhara Devlopers, Ahmedabad for providing Works Contract Service and paid service tax on such taxable consideration @ 5.6% after taking 60% abatement to such taxable consideration by prescribing the work as original work under **Rule 2A(ii)(A) of service Tax (Determination of value) Rules, 2006.** However in terms of provisions under Rules **2A(ii)(B) of service Tax (Determination of value) Rules, 2006,** Service Tax shall be payable on 70% of total amount charged for the works contract entered into for completion and finishing services.

5. On scrutiny of work contract, executed on 01.04.2016, between M/s.Dhara Developers and M/s.ANL, it was found that M/s.Dhara Developers has completed the RCC and masonary works of all the blocks and shops of a residential-cum-commercial building at Gota, Ahmedabad and M/s.ANL has agreed to carry out such remaining construction and finishing activities like plastering , tile fittings, paintings, electricity activity, plumbing doors and window fittings and like other activities as specifically mentioned in annexure –II to complete buildings as per the approved plan and architect design and to bring the building units in saleable conditions.

6. Scrutiny of Annexure II of the said Works contract dated 01.04.2016 revealed that RCC activities of column, Slab Sill, Lintel and Masonry activities of upto Sill and above Lintel of all blocks and shops have already been completed by M/s.Dhara developers. The activities which are to be performed under the said works contract by M/s.ANL are electric & like, zari work, pipe and boxes, chicken mesh, fabrication, fabrication of stair, plaster of main door frame, chat plaster outside, single plaster outside, inside chat plaster, inside single plaster, water proofing, inside plumbing, outside drainage and water supply, flooring, door shutter and fitting, cabling work, false ceiling, alluminium section, colour, putty, texture work, fire hydrants, plumbing accessory terrace water proofing , terrace chaina mosaic, touching etc. Scrutiny of said work order dated 01.04.2016 further revealed that M/s.ANL will have to complete construction of the said building for approximate area of 1,89,565 sq.feet and M/s.Dhara Developer will pay consideration to M/s.ANL @700/sq.feet. Scrutiny of the

Bills alongwith statement of work completed issued by M/s.ANL to M/s. Dhara Developers pursuant to said work order dt.01.04.2016, submitted to DGGI on 09.01.2019, revealed that M/s.ANL had provided completion and finishing service only to M/s. Dhara Developers under the works contract service and charged consideration as money from them. The details of the Bills are as under:

Sr. No.	Bill No.	Date of Invoice	Consideration charged (in Rs.)	Service Tax charged (in Rs.)	Total amount(in Rs.)
1	01/2016-17	27-08-2016	25161704	1509701	26671405
2	02/2016-17	31-08-2016	18610944	1116657	19727601
3	03/2016-17	02-12-2016	33139272	1988357	35127629
4	04/2016-17	09-01-2017	55758654	3345519	59104173
	Total		**132670574**	**7960234**	**140630808**

7. Scrutiny of Ledger Account for FY 2016-17 and 2017-18 of M/s. Dhara Developers withdrawn from office premises of M/s.ANL under punchnama dt.11.10.2018 revealed that M/s.ANL has received the consideration of Rs.14,06,30,808/- inclusive of service tax charged by them from M/s.Dhara developers for providing such completion and finishing services specified under Rule 2A(ii)(B)(ii) of Service Tax (Determination of value) Rules, 2006 under the said Works contract.

8. Further on scrutiny of ST-3 returns filed by M/s.ANL for the period 2016-17 revealed that they have paid service tax after claiming abatement of 60% of such taxable consideration as tabulated below.

Financial Year	Period of Return	Taxable income (in Rs.)	Abatement claimed @ 60% of taxable income	Service Tax paid (in Rs.)
2016-17	April 16-Sept 16	43772648	26263589	2626358
	Oct 16 –March 17	88897926	53338755	5333876
	Total	**132670574**	**79602344**	**7960234**

9. During the course of investigation, the statement of Shri Ashok Kumar, Director of M/s.ANL has recorded on 12.10.2018 wherein he admitted that they have provided activities like plastering , tile fittings, paintings, electricity activity, plumbing doors and window fittings and like other activities to M/s. Dhara Developers and have paid service tax by availing abatement of 60% under works contract. He further agreed that as per provisions of Rule 2A(ii)(B)(ii) of Service Tax (Determination of value) Rules, 2006, it is prescribed that on the above said works, service tax shall be payable on 70% of the total amount charged for works contract. He further confirmed that the activities performed by M/s.ANL under the said work contract squarely falls under the finishing services and that they have availed abatement of 60% and paid service tax on remaining 40%, however after understanding the provisions from the department, he has stated that he will revisit their

stand and if a liability arises, they will pay the differential service tax under works contract services on the above mentioned works contract.

10. On scrutiny of documents of M/s ANL, statement of Shri Ashok Kumar Thakkar dated 12.10.2018 and forgoing paras, it was found that M/s ANL has provided ' Works Contract Service ' to M/s Dhara Developers, Ahmedabad by way of completion and finishing activities like carrying out finishing activities like plastering, tiles fittings, painting, electricity activity, plumbing, doors and windows and like such other activities to complete their building at Gota, Ahmedabad being constructed by them and charged and collected consideration as money from them. From the combined reading of the provisions of Section 66D, Section 65B(51) and clause (h) of Section 66E of Finance Act,1994, it was found that M/s.ANL had provided 'declared service as works contract service" to M/s.Dhara Developers, Ahmedabad and the said service provided by them did not fall in Negative list, as defined in Section 66 D of Finance Act, 1994., hence the said services were taxable services and they were liable to pay appropriate Service Tax leviable on consideration as money from M/s.Dhara Developers.

11. On going through the documents of M/s.ANL, it is found that they have received gross consideration of Rs.13,26,70,574/- and collected service tax of Rs.79,60,234/- thereon from their service receiver for providing taxable services during FY 2016-17 by taking wrong abetment of 60% of **taxable value under Rule 2A(ii)(A) of service Tax (Determination of value) Rules, 2006** and paid service tax on @40% of taxable value instead of service tax on 70% of taxable value in terms of provisions under Rules 2A(ii)(B) of service Tax (Determination of value) Rules, 2006. Accordingly they have suppressed their actual provision of service tax and net taxable value from the department and intended to evade service tax to the tune of Rs.59,70,176/- as detailed below.

(Amount in Rs.)

Month of Invoice	taxable Income shown in invoice	Service Tax payable on 70% of taxable value	Service Tax paid on 40% of taxable value	Service Tax short paid
August, 16	25161704	2641979	1509702	1132277
August, 16	18610944	1954149	1116657	837492
Dec, 16	33139272	3479624	1988356	1491267
January, 17	55758654	5854659	3345519	2509139
Total	**132670574**	**13930410**	**7960234**	**5970176**

12. In the scheme of self-assessment, the department comes to know about the service rendered and payment made only during the scrutiny of the statutory returns filed by the service providers. Therefore, it places greater onus on the assessee to comply with higher standards of disclosure of information in the statutory returns. It is seen from the facts of the emerged during the investigation of the instant case that ANL had failed to disclose the above details in their ST-3 Returns during the aforesaid period. Thus, M/s.ANL have suppressed the material facts from the Department by not disclosing in their ST-3 Returns, the fact about providing completion and finishing services. This appears to be done intentionally so as not to bring their activities to the notice of the Department, though they were registered for providing various taxable services, as discussed earlier. 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. The

responsibility of the tax payer to voluntarily make information disclosures is much greater in a system of self-assessment. In case evaluation of tax behavior of M/s.ANL shows intent to evade payment of service tax by an act of omission in as much as that M/s.ANL though being well aware of the unambiguous provisions of the erstwhile Finance Act, 1994 and Rules made there under, failed to disclose to the Department at any point of time, regarding the short-payment of service tax on amounts recovered by them during the period from April 2016 to March 2017. M/s.ANL 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 for the investigation proceedings conducted by DGGI (erstwhile DGCEI), Zonal Unit, Ahmedabad, these facts would have not come to light.

13. Accordingly, M/s.ANL had failed to declare actual service provision in the ST-3 Returns filed by them during the aforesaid period. Further, M/s.ANL had not claimed any exemption for the said charges collected and provision 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 M/s.ANL had deliberately suppressed the facts of provision of the 'Taxable Service' in the ST-3 Returns during the said period. Consequently, this amounts to mis-declaration and willful suppression of facts with the deliberate intent to evade payment of Service Tax. The short-payment of Service Tax on the amounts so collected by M/s.ANL which appears to be the consideration for providing the 'taxable service', came to the knowledge of the DGGI only due to specific investigations carried out as spelt out earlier. Therefore, the extended period of limitation as envisaged under proviso to Section 73(1) of the erstwhile Finance Act, 1994 appears to be invokable to demand Service Tax for the period April, 2016 and March, 2017.

14. In light of the facts discussed hereinabove and the material evidences available on records, it is further revealed that M/s ANL has contravened the following provisions of Chapter V of the Finance Act, 1994 and the Service Tax Rules, 1994 read with Section 174 of CGST Act 2017 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 01.04.2016 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.

15. Further, 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 Act, ibid, for failing to furnish proper periodical returns in form ST-3 and also as described under the provisions of Section 78 of the Finance act, 1994, rendering themselves liable to penalty under Section 78, of the Finance Act, 1994, ibid, for suppression of actual provision of taxable services provided by them to their various Service recipients with intent to evade payment of Service Tax leviable thereon.

16. . M/s ANL, in spite of having knowledge of the various provisions of Service Tax, has not paid the applicable Service Tax amount to the government at appropriate time. 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. M/s ANL have thus, willfully suppressed the actual provision of taxable service provided by them with an intent to evade the Service Tax. It, thus, appears that M/s ANL, 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 there under, as discussed herein above in length. Hence the extended period of five years, as provided in proviso of sub-section (1) of Section 73 of Finance Act, 1994 is invocable for demanding the Service Tax in the subject matter. Accordingly, an amount of Service Tax to the tune of **Rs. 59,70,176/-** (Service Tax-Rs.55,72,164/-, Swachch Bharat Cess-Rs.1,99,006 Krishi Kalyan Cess-Rs.1,99,006/-) leviable on "taxable Services" provided by them to M/s Dhara Developers, Ahmedabad during the period 01.04.2016 to 31.03.2017, is required to be recovered from them, by invoking extended period of five years, under proviso to sub-section (1) of Section 73 of Chapter V of the Finance Act, 1994 read with Section 174 of CGST Act 2017. Consequently, M/s ANL also liable to pay interest as per Section 75 of the Finance Act, 1994 for delayed payment of aforesaid amount of Service Tax.

17. Accordingly Show Caue Notice No. DGCEI/AZU/36-28/2020-21 dated 24.08.2020 was issued to M/s. Art Nirman Limited asking them as to why:-

(i) Service Tax of **Rs. 59,70,176/-** (Service Tax-Rs.55,72,164/-, Swachch Bharat Cess-Rs.1,99,006 Krishi Kalyan Cess-Rs.1,99,006/-), not paid during the **period from 01.04.2016 to 31.03.2017,** should not be demanded and recovered from them, under proviso to Section 73(1) of Chapter V of the Finance Act, 1994 read with Section 174 of CGST Act 2017;

(ii) interest for delay in payment of Service Tax as mentioned at S. No. (i) hereinabove, should not be recovered from them under Section 75 of the Finance Act, 1994;

(iii) penalty should not be imposed upon them under Section 76 of Chapter V of the Finance Act, 1994;

(iv) penalty should not be imposed upon them under Section 77 of Chapter V of the Finance Act, 1994;

(v) penalty should not be imposed upon them under Section 78 of Chapter V of the Finance Act, 1994.

DEFENCE REPLY:

18. In reply to the show cause notice, M/s. ANL vide their letter dated July 2021 denied all the allegations, averments and contentions leveled against them vide the show cause , notice for imposition of penalty, as if they all are individually and specifically dealt with and traversed, save and except to what has been specifically

admitted by them and denied that there was any suppression on their part in declaring the works contract provided by them and that any penalties as alleged in the subject notice are imposable on them. M/s. ANL in their reply submitted that:

- under the Gujarat Town Planning and Urban Development Act, 1976, a developer is required to obtain commencement permission from the competent authority. In the present case M/s Dhara Developers had obtained the commencement letter issued by Ahmedabad Municipal Corporation on 29.07.2015. At this place, they referred condition no. 5 of the said commencement letter which provided that as per BPMC Act, 1949 the constructed building can be put to use only after grant of the building use permission (BU Permission). They also referred condition No. 16 which provided that the application for drainage / water and other service utility can be made only after receipt of BU Permission. The BU Permission in the present case was granted on 12.01.2017. The grant of BU Permission on 12.01.2017, pursuant to their application dated 02.01.2017, clearly established that the said building was granted permission for use only after 12.01.2017, and the said building could not have been put to use before that date. Even after, 12.01.2017, they were required to make application for the utilities and therefore in no way the said building could have been considered to have been completed in all respect fit for residential purpose even on 12.01.2017. The invoices involved in the present proceedings are for the period prior to the issuance of BU Permission. Copies of the commencement letter and BU Permission were also annexed along with the reply.

- they had entered into a work contract with M/s Dhara Developers on 01.04.2016, wherein, it was clearly shown that M/s Dhara Developers had completed only RCC and Masonry activities for the construction of said building and the remaining work for completion of the said building was to be undertaken by them. The remaining construction work comprise of activities like plastering , tile fitting, painting, electrical activities and other activities so as to complete the building as per the approved plan. Thus, as per the work contract, they were to carry out the remaining construction work of the building leading to the completion of the building as per the approve plan. The above facts clearly go to show that the said building was not completed and they had carried out the remaining construction activity of the original building.

- in the invoices they had clearly mentioned the work completed and the details thereof were mentioned in the annexure attached to the said invoice. As an example, they referred to invoice dated 27.08.2016, and on referring to the annexure attached to the said invoice it is revealed that we had carried out electrical work, fabrication, plaster, water proofing, flooring, plumbing and other works for which they had raised the invoices. The subsequent invoices also reveal the details of work carried out by them. The type of work ranging from flooring to completion of other works clearly establish that the building was not complete, and they had undertaken the work of completion of the work remaining for the completion of the said building. Here, it was submitted that if the work completed by them was undertaken by M/s Dhara Developers, then in that case the department would not have charge the said Dhara Developers for any short payment of service tax. Merely because they had entered into works contract, the nature of transaction and the completion of work of the building would not change so as to deny them the benefit of tax at the rate applicable for original work.

- the subject notice was received by them on 07.09.2020 seeking to recover Service Tax under proviso to section 73 (1) of the said Act. The said Service Tax sought to be recovered pertains to period between 27.08.2016 and 09.01.2017. On going through the show cause notice, it was revealed that invoices at serial no. 1 and 2 of the table at para 3.4.1 were issued on 27.08.2016 and 31.08.2016 respectively and submitted that the period of 30 months enacted with effect from 14.05.2016. Thus, in the present case, the normal period of recovery would be 30 months from the relevant date. The relevant date has been defined under sub section (6) of section 73 of the said Act. For the said 2 invoices, the ST-3 Return was filed on 25.10.2016. Computing 30 months from the date of receipt of the show cause notice i.e. 07.09.2020, the normal period

would expire on 07.03.2018. Thus, the recovery is proposed to be made for a period beyond 30 months for the said 2 invoices. Similarly, invoices at serial no. 3 and 4 of the table at para 3.4.1 were issued on 02.12.2016 and 09.01.2017 respectively. Thus, in the present case the normal period of recovery would be 30 months from the relevant date. The relevant date has been defined under sub section (6) of section 73. For the said 2 invoices, the ST3 Return was filed by us on 20.09.2017. Computing 30 months from the date of receipt of the show cause notice i.e. 07.09.2020, the normal period would expire on 07.03.2018. Thus, the recovery is proposed to be made for a period beyond 30 months for the said 2 invoices. The said recovery can be made after invoking the extended period of limitation of five years provided under proviso to section 73 of the said Act. The extended period of limitation of five years can be invoked only in case of fraud or collusion or wilful mis-statement or suppression of facts, or contravention of any of the provisions of Central Excise Act or Rules with an intent to evade the payment of service tax. On going through the subject notice, it is revealed that at para 6 the allegation of willful suppression has been made. The subject notice does not reveal as to what has been suppressed by them. It was submitted that in order to demand service tax under section 73 of the said Act, by invoking extended period of five years something positive other than mere failure or inaction on the part of the manufacturer or producer or conscious or deliberate withholding of any information which the manufacturer otherwise knew, is required to be established. Further, when the department had full knowledge about the facts and the manufacturer's actions or inactions are based on their belief that they were required or not required to carry out such action or inaction, the period beyond one year cannot be made applicable. In support of the above contention, they placed reliance on the decision of the Hon'ble Supreme Court in the case of **Chemphar Drugs and liniments reported at 1989 (40) ELT 276 (SC).** Not only that the details of all activities carried out by them and the service tax leviable thereon was paid and duly reflected in the returns filed by them. Thus, there was no suppression of any fact or any inaction on their part, as such, the extended period of limitation cannot be invoked for recovery from them.

- in the case of **Padmini Products reported at 1989 (43) ELT 195 (SC),** the Hon'ble Supreme Court held that for invoking the extended period of five years, the ingredients postulate a positive act rather than mere failure to pay duty. In the present case the allegations of suppression of facts made is not tenable as the entire activity was well within the knowledge of department. The Hon'ble Court further observed that even if there was any scope for confusion, divergent opinion and belief the extended period cannot be invoked for recovery. As such, the extended period of five years cannot be invoked against us for recovery and the proceedings initiated vide the subject notice are required to be withdrawn in the interest of justice.

- They quoted the case law of The Hon'ble High Court of Gujarat in the case of **Apex Electricals P. Ltd. Vs. Union of India reported at 1992 (61) ELT 413 (Guj.)** wherein it was held that if any information is not required to be disclosed and if the same is not disclosed, then the allegation of suppression for invoking the extended period cannot be made. In the subject notice, the allegation is mere suppression of facts without disclosing as to which facts were not disclosed by them as also whether they were under statutory obligation to disclose the said facts and still we did not disclose it. In view of above, the allegation of suppression invoked in the subject notice is not tenable.

- in yet another case of **Vasant Sahkari Sakhar Karkhana Ltd. Vs. Collector of Central Excise reported at 1989 (43) ELT 98 (Tribunal)** it was held that the nature of product has to be kept in mind while considering the facts for invoking the extended period of limitation. The nature of services and the premises clearly revealed the activity to be carried out by them. It is further submitted that department in such a situation can hardly be allowed to even allege that they were not aware of the activity being carried out by them. As such, the extended period of limitation for recovery is not available to the department.

- the word "suppression" came up for judicial scrutiny in the case of **Pushpam Pharmaceuticals Vs. Collector reported at 1995 (78) ELT 401 (SC).** The Hon'ble Court observed that the expression suppression has to be construed strictly in view of strong contiguous words like fraud, collusion. The expression does not mean any omission. The act must be deliberate i.e. the correct information was not disclosed deliberately to escape from payment of duty. The Hon'ble Court further observed that where facts are known to both the parties, the omission by one to do what he might have done and not that he must have done does not render it suppression. In the present case, there is absolutely nothing brought on record as to what they were required to do and the same has not been done by them. Further, the escape from duty cannot be the intention as the goods were meant for exports. As such, the allegation of suppression of facts is not tenable.

- it is trite law that extended period cannot be invoked for recovery of tax, if the returns were filed. In the present case, it is undisputed fact that the ST 3 Returns were filed by them. As such, the extended period is not invokable for recovery of any tax. In support of the said contention, they placed reliance on the decision of the Hon'ble Tribunal in the case of **CCE Vs KPTCL reported at 2010 (250) ELT 572 (Tri.-Bang.)**

- the subject notice at para 9.3 has heavily relied on the applicability of extended period of limitation. The only allegation for invoking the extended period of limitation has been set out in para 12 of the subject notice and in the said para the allegation only suppression of facts has been made. They have already demonstrated above that the extended period of limitation on the charge of suppression of facts is not invokable and therefore the reliance placed on the decisions of the Hon'ble Supreme Court is misconceived and misplaced.

- the entire demand having been based on mere presumption and assumption without supported by facts is vitiated by an error of law and no tax can be demanded from them based on such presumption and assumption. The entire case of the department is based on the allegation that they have claimed abatement as per Rule 2 (II) (a) of the service tax (Determination of Value) Rules, 2006, herein after referred to as the said Rules.

- On going through the provisions of Rule 2A (ii) of the said Rules, it was revealed that the said rule stipulates that where value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of works contract, shall determine the value as per clause (A) or clause (B) of the said sub Rule (ii) of Rule 2A of the said Rules. Clause (A) of the said sub Rule (ii) provides that in case of works contract entered into for execution of original work, service tax shall be payable on 40% of the total amount charged for the works contract. In the present case, they have undertaken the remaining construction work of the original work so as to complete the building as per the approve plan and to bring the building units in syllable condition. Thus, they had undertaken the work leading to the completion of the unfinished original work. The above contention is fortified by the building use permission given to the said building after completion of the entire original work. Thus, the entire service tax payable has been correctly worked out and paid and there is no question of any sought payment as alleged in the any show cause notice.

- they have also referred to the provisions of clause (B) of the said Rule 2A (ii) of the said Rules, which stipulates that in case of works contract not covered under clause (A), including the works contract entered into for sub clause (i) or (ii), the service tax shall be payable on 70% of the total amount charge for the works contract. It may be submitted that the said clause (B) was substituted with effect from 01.10.2014. On going through the sub clauses of clause (B) of the Rule 2A (ii) of the said Rules, it was revealed that the said sub clause (i) is not applicable in the present case. Sub clause (ii) of Rule 2A (ii) (B) of the said Rules provides for that in the case of maintenance or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of the immovable property, the service tax shall be payable as per the said clause. It was further submitted that an explanation 1 has

been appended to the said Rule 2A. The said explanation 1 is reproduced below for ease of reference.

"(a) "original works" means---

(i) all new constructions;
(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
(iii) Erection, commissioning or installation of plant, machinery or equipment or structures whether pre-fabricated or otherwise;"

On going through the said Explanation 1, it is revealed that the original works means all the new constructions. In the instant case there is no dispute that the work undertaken by them was not for the completion of incomplete new constructions. In fact, they had undertaken completion of the unfinished work of the new construction and therefore the entire works contract carried out is queerly covered under the original work and the service tax as per the rates specify under Rule 2A(ii) (A) of the said Rules has correctly been discharged by them. As such, the proceedings initiated vide the subject notice is devoid of any merits and the same deservers to be withdrawn in the interest of justice.

- they had entered into a works contract with Dhara Developers for completion of the remaining construction work of the building. The building was at no point of time completed and was incomplete. The incomplete work of the building was completed as per the works contract. It may be submitted that the essence of contract or the reality of transaction as a whole is required to be taken into consideration. The pre-dominant object of the works contract and the trade practices provide a guideline for deciding whether the work was original work or repairing etc as alleged by the department. It is well settled that it is the substance and not the form of the works contract which determine the nature of the transaction. In the instant case, undisputedly the original work was not completed and they undertook the work so as to complete the original work of the building. As such, the entire allegations made in the show cause notice are without any basis and facts on record.

- they had undertaken the completion of remaining construction work as a contractor. Further, on going through the Annexure-1 to the said contract, it is revealed that the rate per activity per square feet was inclusive of the material. It is submitted that there is no dispute that the services provided by them were not classifiable under works contract category. In the instant case having provided the services to M/s Dhara Developers as a contractor under works contract, the exemption available to the original developer for original work would also be available to them. In view of above the allegations made in the show cause notice are not based on facts and therefore the demand of differential service tax is not payable.

- the subject notice proposes to impose penalty on them under various sections of the said Act. It is submitted that for imposition of penalty under the said sections of the said Act, some degree of involvement or knowledge of contravention on the part of the abettor must be shown. In the subject notice, no evidence direct or even indirect has been adduced to show that they had some knowledge of contravention of law, as such, imposition of penalty is not justified. In support of above, they relied on the following decisions against the imposition of penalty.

Liladhar Pasoo Forwarders P. Ltd. Vs. Commissioner of Customs, Mumbai reported at 2000 (122) ELT 737 (T).

Hindustan Steel Ltd. Vs. State of Orissa reported in AIR 1970 SC (253) (1979 ELT (J402).

Akbar Badruddin Jiwani Vs Collector of Customs reported at 1990 (47) ELT 161 (SC).

Commissioner of Central Excise, Mumbai V V/s Nirlon Ltd., reported at 2004 (173) ELT 477 (TRI.-Mumbai).,

City Motors reported at 2010 (19) STR 486(P&H), which was followed by the Hon'ble Tribunal in the case of CCE Vs Merino Industries Ltd. Reported at 2013 (30) STR 413 (Tri.-Del.).

- regarding provisions of Section 76 they submitted that the said section is applicable for cases other than where suppression is alleged. The department having alleged suppression, the provision of section 76 could not have been invoked for imposition of penalty.

- the subject notice also proposes to impose penalty under section 77 of the Finance Act, 1994. The subject notice does not specify the sub section of the said section 77 under which the penalty is sought to be impose. It could be seen that sub section 1 of section 77 comprises of clauses (a) to (e). Thus, it becomes essential to be informed the clause for the contravention of which the penalty is sought to be imposed. The non mention the sub clause in thus in violation of the principles of the natural justice as we do not the opportunity to ascertain the allegations against us for defending it.

- in the alternative, the differential value has to be computed as cum tax value and the demand of tax has to be worked out after considering the differential value as cum tax. In support of above contention, they placed reliance on the decision of the Hon'ble Tribunal in the case of **Vaishali Developers & Builders Vs CCE reported at 2017(47) STR 300 ((Tri.-Del.) and in case of Andhra Pradesh Tourism Development Corporation Vs CCE reported at 2012 (28) STR 595 (Tri.-Bang.)**

19. In view of the facts and circumstances of above, they submitted that the amount of Service Tax sought to be recovered is not recoverable, as also no penalty is imposable on them. Accordingly they requested to drop the impugned Show Cause Notice in the interest of justice.

PERSONAL HEARING:

20. Personal hearing was fixed on 27.05.2021, 11.06.2021 and 01.07.2021 and Shri N.K.Tiwari, duly authorized consultant, appeared through virtual mode for the personal hearing on 01.07.2021. He stated that by 06.07.2021 a written submission will be submitted. They further stated that tax has been correctly paid as it is completion of unfinished original work as is evident from BU. They have submitted their written submission on 14.07.2021.

DISCUSSION AND FINDINGS:

21. I have carefully gone through the facts and available records of the case, written submissions made by M/s.ANL and submissions made during the course of personnel hearing.

22. On perusal of the above, I find that the officers of *"DGGI"* gathered intelligence that M/s.ANL had provided Works contract Service to M/s.Dhara Developers, Ahmadabad and received consideration thereon and had not paid service tax properly on the consideration received from M/s.Dhara Developers for providing Works Contract Service. Based on the above intelligence, DGGI has initiated investigation against M/S.ANL under search proceedings and withdrawn certain documents under panchnama dated 11.10.2018. During the investigation, it was found that M/s.ANL had provided completion and finishing services like plastering, tiles fittings, painting, electricity activity, plumbing, doors and windows fittings to M/s.Dhara developers and charged Rs.14,06,30,808/- (inclusive of ST) under works contract service and paid service tax on 40% of the same after taking 60% abatement by prescribing the work as original work under **Rule 2A(ii)(A) of service Tax (Determination of value) Rules, 2006.** However in terms of provisions under **Rules 2A(ii)(B) of service Tax (Determination of value) Rules, 2006,** Service Tax shall be payable on 70% of total amount charged for the works contract entered into for

completion and finishing services.

23. I have gone through the works contract agreement executed on 01.04.2016 by and between M/s.Dhara Developers and M/s.ANL and it was found that M/s.Dhara Developers has completed the RCC and masonary works of all the blocks and shops of a residential-cum-commercial building at Plot No.141/2 , city surevey no.198/1/2 situated at Gota, Ahmedabad and M/s.ANL has agreed to carry out such remaining construction and finishing activities like plastering , tile fittings, paintings, electricity activity, plumbing doors and window fittings and like other activities as specifically mentioned in annexure –II to complete buildings as per the approved plan and architect design and to bring the building units in saleable conditions.

24. Scrutiny of Annexure II of the said Works contract dated 01.04.2016 revealed that RCC activities of column, Slab Sill, Lintel and Masonry activities of upto Sill above sill and above Lintel of all blocks and shops have already been completed by M/s.Dhara developers. The activities which are to be performed under the said works contract by M/s.ANL are electric & like zari work, pipe and boxes, chicken mesh, fabrication, fabrication of stair, plaster of main door frame, chat plaster outside, single plaster outside, inside chat plaster, inside single plaster, water proofing, inside plumbing, outside drainage and water supply, flooring, door shutter and fitting, cabling work, false ceiling, alluminium section, colour, putty, texture work, fire hydrants, plumbing accessory terrace water proofing, terrace chaina mosaic, touching. Scrutiny of said work order dated 01.0402016 further revealed that M/s.ANL will have to complete construction of the said building for approximate area of 1,89,565 sq.feet and M/s.Dhara Developer will pay consideration to M/s.ANL @700/sq.feet. Scrutiny of the Bills alongwith statement of work completed issued by M/s.ANL to M/s.Dhara Developers pursuant to said work order dt.01.04.2016 submitted to DGGI on 09.01.2019 revealed that M/s.ANL had provided completion and finishing service only to M/s Dhara Developers under the works contract service and charged consideration as money from them as detailed below.

Sr. No.	Bill No.	Date of Invoice	Consideration charged (in Rs.)	Service Tax charged (in Rs.)	Total amount(in Rs.)
1	01/2016-17	27-08-2016	25161704	1509701	26671405
2	02/2016-17	31-08-2016	18610944	1116657	19727601
3	03/2016-17	02-12-2016	33139272	1988357	35127629
4	04/2016-17	09-01-2017	55758654	3345519	59104173
	Total		**132670574**	**7960234**	**140630808**

25. Scrutiny of Ledger Account for FY 2016-17 and 2017-18 of M/s.Dhara Developers withdrawn from office premises of M/s.ANL under punchnama dt.11.10.2018 revealed that M/s.ANL has received the consideration of Rs.14,06,30,808/-(inclusive of service tax) charged by them from M/s.Dhara developers for providing such completion and finishing services specified under Rule 2A(ii)(B)(ii) of Service Tax (Determination of value) Rules,2006 under the said Works contract.

26. Further on scrutiny of ST-3 returns filed by M/s.ANL for the period 2016-17 revealed that they have paid service tax after claiming abatement

of 60% of such taxable consideration as tabulated below.

Financial Year	Period of Return	Taxable income (in Rs.)	Abatement claimed @ 60% of taxable income	Service Tax paid (in Rs.)
2016-17	April 16-Sept 16	43772648	26263589	2626358
	Oct 16 –March 17	88897926	53338755	5333876
	Total	**132670574**	**79602344**	**7960234**

27. On perusal of the statement of Shri Ashok Kumar, Director of M/s.ANL recorded on 12.10.2018, it was found that Shri Ashok Kumar was admitted that they have provided activities like plastering, tile fittings, paintings, electricity activity, plumbing doors and window fittings and like other activities to M/s.Dhara Developers and have paid service tax by availing abatement of 60% under works contract. He further agreed that as per provisions of Rule 2A(ii)(B)(ii) of Service Tax (Determination of value) Rules,2006, it is prescribed that on the above said works, service tax shall be payable on seventy percent of the total amount charged for works contract. He further confirmed that the activities performed by M/s.ANL under the said work contract squarely falls under the finishing services and that they have availed abatement of 60% and paid service tax on 40%, however after understanding the provisions from the department, he has stated that he will revisit their stand and if a liability arises, they will pay the differential service tax under works contract services on the above mentioned works contract.

28. Thus, from the scrutiny of documents of M/s ANL, statement of Shri Ashok Kumar Thakkar dated 12.10.2018 and discussion had in the forgoing paras, I find that M/s ANL has provided "'Works Contract Service" to M/s Dhara Developers, Ahmedabad by way of completion and finishing activities like plastering, tiles fittings, painting, electricity activity, plumbing, fitting doors and windows and like such other activities and charged and collected consideration as money from them. From the combined reading of the provisions of Section 66D, Section 65B(51) and clause (h) of Section 66E, I find that M/s.ANL had provided 'declared service as works contract service" to M/s.Dhara Developers, Ahmedabad and the said service provided by them did not fall in Negative list, as defined in Section 66 D of Finance Act, 1994, hence the said services were taxable services and they were liable to pay appropriate service tax leviable on consideration as money from M/s.Dhara Developers. Further in terms of Rule-2A(ii)(B)(ii) of service tax (Determination of value) Rules 2012, they were liable to pay service tax on the value of 70% of total amount of consideration charged from M/s.Dhara Developers, Ahmedabad.

29. On verification of the documents of M/s.ANL, it is found that they have received gross consideration of Rs.13,26,70,574/- and charged and received service tax of Rs.79,60,234/-(Total Rs.14,06,30,808/-) thereon from M/s.Dhara Developers for providing taxable services during FY 2016-17 availing incorrect abetment of @60% of taxable value instead of availing eligible abatement @ 30% of taxable value which resulted short payment of Rs.59,70,176/-.

30. Further, M/s.ANL in their reply to SCN, submitted and contended that on

going through the Explanation 1, it is revealed that the original works means all the new constructions. In the instant case there is no dispute that the work undertaken by them was not for the completion of incomplete new constructions. In fact, they had undertaken completion of the unfinished work of the new construction and therefore the entire works contract carried out is queerly covered under the original work and the service tax as per the rates specify under Rule 2A(ii) (A) of the said Rules has correctly been discharged by them. As such, the proceedings initiated vide the subject notice is devoid of any merits and the same deservers to be withdrawn.

31. In the present case, on perusal of Rule 2 A of Service Tax (Determination of Value) Rules, 2006, I find that the above contention of M/s.ANL is not correct. The relevant portion of the said Rule reads as under:

" 5.5. Service Tax (Determination of Value) Rules, 2006:- Rule-2A. Determination of value of service portion in the execution of a works contract.- Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) .....;

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

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

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

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

(ii) ***maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property, Service Tax shall be payable on seventy percent of the total amount charged for the works contract.***

32. On perusal of the above said Rule, it can be seen that the service provided by M/s.ANL is covered under Sub Rule 2A(ii)B(ii) of the Service Tax (Determination of Value) Rules, 2006 which specifically mentions that maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property and Service Tax shall be payable on 70% of the total amount charged for the works contract and not covered under Sub Rule 2A(ii)A(ii) of the Service Tax (Determination of Value) Rules, 2006 as claimed by M/s.ANL.

33. Further on Scrutiny of works contract between M/s Dhara Developers, Ahmedabad and M/s ANL which was seized under panchnama dated 11.10.2018 and inventoried at page no. 23 to 33 in the file listed at Sr. No. A-6, revealed that M/s Dhara Developers has completed the RCC and Masonry works of all the blocks and shops of a Residential-cum-commercial building on the Plot of Land No. 141/2, City Survey No. 198/1/2, situated, lying and being at Gota, Ahmedabad and M/s ANL has agreed to carry out such remaining construction and finishing activities like plastering, tiles fittings, paintings, electricity activity, plumbing doors and window fitting and like other activities as specifically mentioned in Annexure-II to complete the buildings as per the approved plan and architect design and to bring the buildings

units in saleable conditions. It clearly reveals that the work done by M/s.ANL is not original works as claimed by them but maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling covered under Sub Rule 2A(ii)B(ii) of the Service Tax (Determination of Value) Rules, 2006 and are liable to pay service tax on seventy percent of the total amount charged for the works contract.

(33)

WORK CONTRACT BETWEEN THE OWNER AND THE CONTRACTOR FOR CONSTRUCTION OF THE BUILDING

THIS AGREEMENT (Hereinafter referred to as the "said Works Contract") is made at Ahmedabad on this April 1, 2016, between M/s. Dhara Developers, a Partnership Firm, registered under the Partnership Act, 1932, having its principal office at –Plot no.141/2, Near Shree Vishnudhara Cross Roads, B/h. Vodafone Tower, S.G. Highway,. Ahmedabad – 382481 (Hereinafter called 'the Owner'), which expression shall unless repugnant to the context or meaning thereof, be deemed to include every Partner for the time being of the said Partnership Firm, the survivor or survivors or the legal representatives, executors or administrators of the last survivor of the ONE PART and M/s. Art Nirman Private Limited, a Private Limited Company Registered under Companies Act, 1956 having CIN : U45200GJ2011PTC064107 and having its registered office at Sf-14 J.B.R Residency, Opp. Satyam Complex, R.K.Royal Party Plot, Science City Road, Sola, Ahmedabad - 380060 (Hereinafter called 'the Contractor') which expression shall unless repugnant to the context or meaning thereof, be deemed to include every Director for the time being of the said Company, the survivor or survivors or the legal representatives, executors or administrators of the last survivor of the SECOND PART.

WHEREAS the First Part is the owner of the plot of land admeasuring 4,522 square meters bearing plot no.141/2 City survey no. 198/1/2 situated, lying and being at Gota, Ahmedabad (Hereinafter referred to as the "said plot of land") and the Owner has completed the RCC & Masonry activities of a Residential-cum-commercial building (Hereinafter referred to as the "said building") on the said plot of land as per approved Plan attached herewith as per "Annexure-I". The details of construction activities completed for the building till the date of execution of this Contract is as per "Annexure-II"

AND WHEREAS the First Part has appointed Mr. Vijay Nanera as the Architect and the said Architect has prepared the plans, drawings and elevations of the said building and the specification of the works to be done along with the material Bill of Quantity.

AND WHEREAS the Second Part is a well-known contractor and is having vast experience in construction of buildings, the Contractor has agreed to carry out such remaining construction and finishing activities like plastering, tiles fittings, painting, electricity activity, plumbing, doors and windows, and like such other activities (as specifically mentioned in Annexure-II) to complete the building as per the approved plan and architect's design and to bring the building units in saleable condition.

ART NIRMAN PVT. LTD. AHMEDABAD

Dhara Developers AHMEDABAD

34. In view of the above facts and discussion, I find that that M/s ANL have wrongly taken abatement @ 60% of taxable value claiming the service provided by them falls under **Rule 2A(ii)(A) of Service Tax (Determination of Value) Rules, 2006** instead of availing correct abatement @30% of taxable value as the service provided by them correctly falls under Rule i.e. **Rule 2A(ii)(B) of Service Tax (Determination of Value) Rules, 2006** by deliberately suppressing the actual provisions of "taxable services" rendered by them. Accordingly M/s.ANL tried to conceal the correct service tax liability from Department and evaded Service Tax to the tune of **Rs. 59,70,176/-** (Service Tax-Rs.55,72,164/-, Swachch Bharat Cess-Rs.1,99,006 and Krishi Kalyan Cess-Rs.1,99,006/-) during the period 01.04.2016 to 31.03.2017 as detailed below:

(Amount in Rs.)

Month of Invoice	taxable Income shown in invoice	Service Tax payable on 70% of taxable value	Service Tax paid on 40% of taxable value	Service Tax short paid
August, 16	25161704	2641979	1509702	1132277
August, 16	18610944	1954149	1116657	837492
December, 16	33139272	3479624	1988356	1491267
January, 17	55758654	5854659	3345519	2509139
Total	**132670574**	**13930410**	**7960234**	**5970176**

35. From the above table and facts of the case, I find that M/s. ANL, during the period from April 2016 to March 2017, provided the taxable services valued at **Rs.13,26,70,574/-** and have evaded Service Tax to the tune of **Rs. 59,70,176/- (Service Tax- Rs.55,72,164/-, Swachch Bharat Cess-Rs.1,99,006 and Krishi Kalyan Cess-Rs.1,99,006/-).** The said amount of **Rs.59,70,176/-** stood recoverable from them under the proviso to sub-section (1) of Section 73 of Chapter V of the Finance Act, 1994 alongwith the applicable interest and penalty.

36. On scrutiny of relevant ST 3 returns for the year 2016-2017, I find that M/s.ANL had failed to disclose the above details in their ST-3 Returns during the period under dispute. Thus, M/S.ANL have suppressed the material facts from the Department by not disclosing in their ST-3 Returns, the fact about providing completion and finishing services. This appears to be done intentionally so as not to bring their activities to the notice of the Department, though they were registered for providing various taxable services, as discussed earlier. 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.ANL had deliberately not shown in their ST-3 Returns, 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 for the investigation proceedings conducted by DGGI (erstwhile DGCEI), Zonal Unit, Ahmedabad, these facts would have not come to light.

37. 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 M/s.ANL 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. The short-payment of Service Tax on the amounts so collected by M/s.ANL which appears to be the consideration for providing the 'taxable service', came to the knowledge of the DGGI only due to specific investigations carried out as spelt out earlier. In view of the above facts, I hold that, the extended period of limitation is correctly invoked under proviso to Section 73(1) of the erstwhile Finance Act, 1994 to demand Service Tax for the period April, 2016 and March, 2017.

38. M/s.ANL 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.

39. I further find that M/s.ANL has contravened the following provisions of Chapter V of the Finance Act, 1994 and the Service Tax Rules, 1994 read with Section 174 of CGST Act 2017 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 01.04.2016 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.

40. 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 Act, ibid, for failing to furnish proper periodical returns in form ST-3. Therefore, I hold that M/s.ANL is liable to pay penalty u/s.77 of Finance Act, 1994.

41. 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 the proposal for imposition of penalty under section 78 of Finance Act, 1994 is correctly made as they failed to pay the correct duty with the intend to evade the same. On perusal of records and from statement of Shri Ashok Kumar, director of M/s.ANL , I find that they had deliberately not shown the actual service provision rendered by them and service tax involved thereon in their ST-3 Returns, with intent to evade the proper payment of service tax on its due date. 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. M/s ANL have, thus, willfully suppressed the

actual provision of taxable services provided 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.

42. In this connection, M/s.ANL has contended that for imposition of penalty some degree of involvement or knowledge of contravention on the part of the abettor must be shown, In this case no evidence direct or indirect has been adduced to show that they had some knowledge of contravention of law, as such imposition of penalty is not justified. They also contended that penalty u/s. 78 is not leviable on them in view of various judgments referred by them in their submissions. On perusal of the referred case laws, I find that the matter involved in the case laws relied upon by them are not similar to the instant case and therefore are not providing any shelter from imposition of penalty u/s.78 of the Act in view of the fact that in spite of having knowledge of the various provisions of Service Tax, they have not paid the applicable Service Tax amount to the government at appropriate time with the intention to evade tax as discussed above.

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

"23. The decision in Dharmendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no jurisdiction in quantifying the amount and penalty must be imposed equal to the duty determined under sub section (2) of Section 11 A. that is what Dharmendra Textile decides". With the above observation, the Hon'ble Apex court held that mens rea is not an essential ingredient to impose penalty under Section 11AC of the Central Excise Act, 1944 and there is no discretion available on quantum of penalty imposable under that section. As penal provisions of Section 78 of the Finance Act, 1944 and Section 11 AC of Central Excise Act, 1944 are pari materia, the ratio of decision of the Apex court is applicable to Service Tax matters also. In view of the above facts and discussions, I find that this is a fit case to impose penalty u/s.78 of Finance Act,1994 and accordingly I hold that M/s.ANL is liable to pay penalty u/s.78 of Finance Act, 1994.

44. As regards the issue of imposition of penalty under Section 76 of the Finance Act, 1994, I observe that penalty under Section 76 and 78 of the Finance Act, 1994 are mutually exclusive and once penalty under Section 78 is imposed, no penalty under Section 76 can be imposed in terms of the proviso inserted in Section 78 w.e.f 10.05.2008 in this regard. Hence I refrain from imposing any penalty u/s.76 of Finance Act,1994.

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

ORDER

(i) I confirm the Service Tax amounting to Rs. 59,70,176/- (Rupees Fifty nine Lakhs Seventy Thousand One Hundred Seventy Six only) {Rs. 55,72,164/- Service Tax, Rs.1,99,006/- Swachch Bharat Cess, Rs.1,99,006/- Krishi Kalyan Cess) 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. Art Nirman Limited, Ahmedabad to pay up the amount immediately.

(ii) I order that interest be recovered from M/s.Art Nirman Limited on the confirmed service tax of Rs. 59,70,176/- 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.Art Nirman Limited under Section 77 of the Finance Act, 1994.

(iv) I impose a penalty of Rs. 59,70,176/- (Rupees Fifty Nine Lakhs Seventy Thousand One Hundred Seventy Six only) on M/s.Art Nirman 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. Art Nirman 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. Art Nirman Limited, Ahmedabad 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.

45. The Show Cause Notice No. DGCEI/AZU/36-28/2020-21 dated 24.08.2020 issued to M/s. Art Nirman Limited is disposed off in the above manner.

(Marut Tripathi)
Joint Commissioner,
CGST & Central Excise,
Ahmedabad North.

Date: 23.07.2021

F. No. STC/15-30/OA/2020

To

M/s. Art Nirman Ltd,
2nd floor, JBR Arcade,
Science city Road,
Sola, Ahmedabad- 380 060.

Copy to:

(1) The Commissioner, Central GST & Central Excise, Ahmedabad North.,

(2) The Joint Director, DGGI, 6th & 7th Floor, I-the address, Opp.HCG Cancer Hospital, Nr.Sola Fly Over, Sola, Ahmedabad-380060.

(3) The Assistant Commissioner, CGST & Central Excise, Division-S.G.Highway West, Ahmedabad North.

(4) The Superintendent, Central GST & Central Excise, Range-III, Division-S.G.Highway West, Ahmedabad North.

(5) Guard File.