



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

निबन्धित पावती डाक द्वारा/By R.P.A.D
फा.सं./F.No. STC/15-170/OA/2020

DIN- 20221064WT000094779C

आदेश की तारीख/Date of Order :- 20.10.2022
जारी करने की तारीख/Date of Issue :- 20.10.2022

द्वारा पारित/Passed by:-

लोकेश डामोर /Lokesh Damor

सयुक्त आयुक्त / Joint Commissioner

मूल आदेश संख्या / Order-In-Original No. 52/JC/ LD /2022-23

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

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

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद 380015-को प्रारूप संख्या एस टी -४ (ST-4) में दाखिल कर सकता है। इस अपील पर रु. 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।

(3) उक्त अपील की प्रति।

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

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

(1) Copy of accompanied Appeal.

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



विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice F.No. STC/15-170/OA/2021 dated 23.10.2020 issued to M/s Devang Jayeshbhai Upadhyay, A-58, Abhishek Society, Bopal, Ahmedabad, Gujarat-380058.



BRIEF FACTS OF THE CASE

M/s. Devang Jayeshbhai Upadhyay, A-58, Abhishek Society, Bopal, Ahmedabad - 380058 (hereinafter referred to as "the said assessee" for the sake of brevity) is engaged in providing services and for the same was registered with Service Tax Department having Registration (ST-2) No. ACVPU6499ESD001.

2. An analysis of "Sales/Gross Receipts from Services (Value from ITR)", the "Total Amount Paid/Credited under 194C, 194H, 194I, 194J" and "Gross value of Services Provided" was undertaken by the Central Board of Direct Taxes (CBDT) for the F.Y. 2015-16 to 2016-17, and details of said analysis was shared by the CBDT with the Central Board of Indirect Taxes (CBIC).

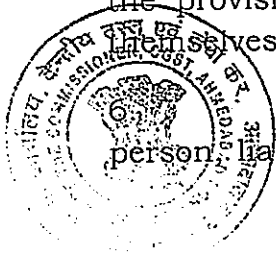
3. As per the records available, on going through the Third party Data received from CBDT of the said assessee for the F.Y. 2015-16 to 2016-17, the Sales/Gross Receipt from Services (Value from ITR) are not tallied with Gross Value of Service Provided, as declared in ST-3 Return of the F.Y. 2015-16 to 2016-17. It was noticed that the said assessee have declared less/not declared any taxable value in their Service Tax Return (ST-3) for the F.Y. 2015-16 to 2016-17 as compared to the Service related taxable value declared in their Income Tax Return (ITR)/Form 26AS for the F.Y. 2015-16 to 2016-17. The details of difference as per CBDT data for the F.Y. 2015-16 to 2016-17 are as under :

Sr. No.	Financia 1 Year	VALUE DIFFERENCE in ITR & STR / TDS & STR) (Whichever is higher) (in Rs.)	Service Tax (in Rs.)
02	2015-16	25297600	3529507
03	2016-17	34464733	5140989
	TOTAL	59762333	8670496

4. Further, it was noticed that the clarification regarding the above said differential value along with documents were called for from the said assessee for assessment purpose vide Supdt's letter F.No. CGST-06/04-64/TPD/AR-I/2020-21 dated 19.10.2020. The said assessee has been asked to furnish the reason for the difference between taxable value shown in ST-3 Return vis-à-vis Income Tax Return filed by the said assessee for the Financial year 2015-16 to 2016-17 alongwith submission of self-certified documents such as audited balance sheet, Profit & Loss account, ledgers, gross trial balance, ITR, Form 26AS, ST-3 Return and details of all the sales invoices issued during F.Y. 2015-16 to 2016-17 but the said assessee has neither produced any documentary evidences of the differential value nor submitted any reply.

5. It was noticed that the said assessee has neither submitted the documents nor extended the cooperation in the matter although sufficient time was provided. This act of non-cooperation of the said assessee has contravened the provisions of Section 72 of the Finance Act, 1994 and thus rendered the assessee liable for penal action under Section 77 of Finance Act, 1994.

As per the provisions of Section 72 of the Finance Act, if any person liable to pay service tax having made a return, fails to assess the tax,



the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

7. As per the provisions of Section 73(1) of the Finance Act where any service tax has not been levied or paid or has been short levied or short paid by the reasons of willful mis-statement or suppression of facts with intent to evade payment of service tax, the Central Excise Officer may within five years from the relevant date, serve notice on the person chargeable with service tax which has not been levied or paid of which has been short levied or short paid requiring him to show cause why he should not pay amount specified in the notice.

8. As per Rule 6 of the Service tax Rules, 1994, the service tax shall be paid to the credit of the Central Government by 5th day of the month, immediately following the said calendar month in which the payments are received, towards the value of taxable service. Rule 7 of the Service Tax Rules, 1994 stipulates that assessee shall submit their service tax returns in the form of ST-3 within the prescribed time.

9. In view of the above, the said assessee have failed to pay/short paid/deposit service tax to the extent of Rs.86,70,496 /- on the difference of taxable value during the period 2015-16 to 2016-17 by declaring less value in their ST-3 Returns vis-a-s their ITR/Form 26AS, in such manner and within such period prescribed in respect of taxable services received/provided by them with an intent to evade payment of service tax. Accordingly the said assessee have failed to discharge the service tax liability of Rs. 86,70,496/- (inclusive of applicable Cess i.e., EC, SHEC, SBC & KKC) worked out on value of Rs. 5,97,62,333/- and therefore, service tax is required to be demanded/recovered from them under Section 73(1) of the Finance Act, 1994 read with Section 68 of the Finance Act, 1994.

10. In view of above, it was noticed that the said assessee have contravened the provisions of :

- (a) **Section 66** of the Finance Act, 1994 in as much as they have failed to collect and pay the service tax as detailed above, to the credit of Central Government.
- (b) **Section 68** of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, as amended, in as much as they have not paid the service tax as mentioned above to the credit of the Government of India within the stipulated time limit;
- (c) **Section 70** of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994, as amended, in as much as they had failed to properly assess their Service Tax liability under Rule 2(1)(d) of Service Tax Rules, 1994 and failed to declare correct value of taxable services as well as exempted services to the department in the prescribed return in Form ST-3.

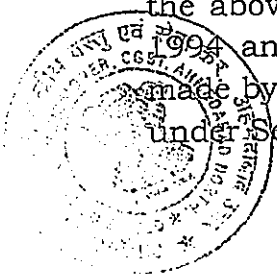


11. It has been noticed that at no point of time, the said assessee has disclosed full, true and correct information about the value of the services provided by them or intimated to the Department regarding receipt/providing of Service of the differential value that has come to the notice of the Department only after going through the Third Party CBDT data generated for the Financial Year 2015-16 to 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.8670496 /-. Thus, there is a deliberate withholding of essential and material information from the department about service provided and value realized by them. It appears that all these material information have been concealed from the department deliberately, consciously and purposefully to evade payment of service tax.

12. As per Section 75 ibid every person liable to pay the tax in accordance with the provisions of Section 68, or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, is liable to pay simple interest (as such rate not below ten per cent and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by Notification in the Official Gazette) for the period by which such crediting of the tax or any part thereof is delayed. It appears that the said assessee has short paid/non-payment of Service Tax of Rs.86,70,496 /- on the actual value received towards taxable services provided which appears to be recoverable under proviso to Section 73(1) of the Finance Act alongwith interest under Section 75 ibid not paid by them under Section 68 of the Finance Act read with Rule 6 of Service Tax Rules, 1994 inasmuch as the said assessee has suppressed the facts to the department and contravened the provisions with an intent to evade payment of Service Tax. The said assessee has not discharged their Service tax liability and hence is liable to pay interest under Section 75 of the Finance Act.

13. All the above acts of contravention on the part of the said assessee resulted into non-payment of Service Tax appears to have been committed by way of suppression of material facts and contravention of provisions of Finance Act, 1994 with an intent to evade payment of service tax as discussed in the foregoing paras and therefore, the said amount of service tax amounting to Rs.86,70,496 /- (inclusive of applicable Cess i.e., EC, SHEC, SBC & KKC) not paid is required to be demanded and recovered from them under the proviso to Section 73(1) of the Finance Act, 1994 alongwith Interest thereof at appropriate rate under the provisions of Section 75 of the Finance Act, 1994.

14. All these acts of contravention of the provisions of Section 67, Section 68 and Section 70 of the Finance Act, 1994 read with Rule 6 & Rule 7 of the Service Tax Rules, 1994 are punishable under the provisions of Section 76 and 77 of the Finance Act, 1994 as amended from time to time. In view of the above, the said assessee have contravened the provisions of Finance Act, 1994 and the rules made there under. All the contraventions and violations made by the said assessee appear to have rendered themselves liable to penalty under Section 76 & Section 77 of the Finance Act.



15. Moreover, in addition to the contravention, omission and commission on the part of the said assessee as stated in the foregoing paras, thereby the said assessee has willfully suppressed the facts, nature and value of service provided by them with an intent to evade the payment of service tax rendering themselves liable for penalty under Section 78 of the Finance Act, 1994.

16. Therefore Show Cause Notice dated 23.10.2020 was issued to M/s.Devang Jayeshbhai Upadhyay called upon to show cause to the as to why;

(i) Differential amount of Service Tax amounting to Rs.8670496/- (Rupees Eighty Six lakhs Seventy thousand Four hundred Ninety Six only) (inclusive of Edu. Cess and S&H Edu. Cess) short paid/not paid by them, should not be confirmed/demanded under proviso to Section 73(1) of the Finance Act, 1994.

(ii) interest at the appropriate rates should not be recovered from them as prescribed under Section 75 of the Finance Act, 1994 from the due date on which the Service Tax was liable to be paid till the date on which the said Service Tax is paid.

(iii) penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 for the failure to make payment of service tax payable by them within prescribed time-limit.

(iv) penalty should not be imposed upon them under Section 77 of the Finance Act, 1994 for the failure to assess the correct tax liability.

(vi) penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 as amended for suppressing and not disclosing the value of the said taxable service provided by them before the department with an intent to evade payment of service tax.

DEFENCE REPLY

17. The assessee vide letter dated 22.02.2022 and 01.03.2022 filed the reply to Show Cause Notice wherein they stated that they are providing services of installation of underground cable laying works and works to Madhya Gujarat Vij company formed by Gujarat Government provide and distribute the power to the people of Gujarat, Baroda, Rajpipla and Anand District on contract basis. All the service income received from Government company and as per Notification No.25/2012 dated 20.06.2012 as amended. clause 12 and 12a, all service provided to Government company exempt from service tax, which is as under:

Notification No.25/2012 service tax dated 20.06.2012 as amended incorporated changes made till issuance of Notification No.10/2017 service tax dated 08.03.2017.

"Notification 25/2012 ---

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



- "12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -
- (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;
- (b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or
- (c) a residential complex meant predominantly for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act;

18. So, turnover difference of ITR and STR shown under notice was exempted under above mentioned notification and hence not liable to impose, collect and pay service tax on that amount and so imposing the service tax on Rs.5,97,62,333/- for Rs.86,70,496/- is unconstitutional. They are not liable to pay service tax under section 73(1) for service tax imposed and revenue is service tax free and there is no question of interest prescribed under Section 75 of Finance Act and penalty under Section 76,77, and 787 of Finance Act, 1994. They have also attached Audit Report, audited trading account, profit and loss account and balance sheet, trial balance Form 26AS ITR acknowledgement for the FY 2015-16 & 2016-17.

19. The assessee have submitted further reply wherein they stated that the service rendered by them to the electricity transmission company are bundled services which are covered under negative list of services covered under Section 66D of the Finance Act, 1994 after 01.07.2012. Hence the service income generating during the year 2015-16 and 2016-17 is totally exempt from payment of service tax which is held in various case laws and specifically in the case of Madhya Pradesh Poorva Kshetra Vidyut Vitran Co Ltd Vs Principal Commissioner (CESTAT Delhi) wherein it was held as " assessee was a wholly owned undertaking of the Government of Madhya Pradesh and was engaged in the distribution of electricity in the eastern area of the state. Te period of dispute was from July 2012 to March 2017 and the dispute raised in this appeal was as to whether service tax was payable on the amount of late payment surcharge, meter rent and supervision charges received by assessee from the electricity consumers. It was held that the "transmission or distribution or electricity by an electricity transmission or distribution utility" as included in the negative list of services in section 66 D(k) of the Fiancée Act, 1994. They have also relied upon the decision of Hon'ble High Court of Gujarat in the case of Torrent Power Ltd Vs UIO in SCA No.5343 of 2018.

20. In view of the above facts they stated that the demand of service tax is not sustainable as the said service are covered under Negative list of services as provided under section 66D of Chapter V of Finance Act, 1994. They also provided copies of invoices prepared by MGVCL in respect of the assessee as there is no service tax charged or collected in all the work orders and accordingly requested to drop the proceedings.



PERSONAL HEARING

21. Personnel Hearing has been granted to the assessee on 19.07.2022, 31.08.2022, 22.09.2022 and 18.10.2022. However neither the assessee nor the authorised representative attended the personnel hearing. The delivery of the P.H. Notices have been confirmed from the speed post tracking system of the Postal department according to which the letter granting P.H. for 31.08.2022 has been delivered on 20.08.2022 vide ID EG145981178IN. P.H. for 22.09.2022 has been delivered on 17.09.2022 vide ID EG193004345IN and P.H. for 18.10.2022 has been delivered on 15.10.2022 vide ID EG222666255. In spite of number of the opportunities for P.H. has been granted, the assessee failed to appear for P.H. Hence I proceed to adjudicate the instant SCN on ex-parte on the basis of reply filed by the assessee and other records available on file.

DISCUSSION AND FINDINGS

22. 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 further.

23. I have carefully gone through SCNs, Reply to the show cause notices, audited Balance sheet for the year 2015-16 and 2016-17, reconciliation statement, copies of invoices for the relevant period. In the instant case, Show Cause Notices were issued to the assessee demanding Service Tax of Rs. 86,70,496/- on differential value of Rs.5,97,62,333/- for the financial year 2015-16 & 2016-17 on the basis of difference of value ITR/P&L/STR/26AS account received from Income Tax authorities. On perusal of the above referred records, I find that the assessee is not registered under Service Tax and also not filed STR for the relevant period. 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(2) and 78 of the Finance Act, 1994.

24. On perusal of the reply to SCN and other documents available on record, I find that the assessee is engaged in providing service of installation of under ground cable laying works and related works to Madhya Gujarat Vij company formed by Gujarat Govt. to distribute power to the people of Gujarat. Now I would like to go through the legal provisions of taxability of the services provided by the assessee.

25. Prior to the introduction of Negative list w.e.f. 1.7.2012, various services were classified and defined according to the different category of services. Further after introduction of negative list with effect from 01.07.2012, service has been defined as:

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—



as well as post introduction of Negative List as the services provided by the assessee does not fall under category of negative list of services under the provisions of Section 66D of the Finance Act.

29. Further, the assessee vide their submissions stated that during the financial year 2015-16 & 2016-17, their contract income or contract receipt is in respect of services provided in relation transmission and distribution of power to government. The said service provider claimed that these service are exempted from levy of whole of service tax leviable thereon under of Notification No. 25/2012-ST, dated 20-06-2012 with effect from 01-07-2012. In this connection, I would like to reproduce herewith the relevant portion of the said Notification :

"Notification 25/2012 ---

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

1.....

2.....

3.....

.....

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

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

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

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

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

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

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

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

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



31. Vide this entry the exemption was partially restored but the condition specifically stated that the contract to provide the said service should have been entered into before 01.03.2015 and appropriate stamp duty is also to be discharged before 01.03.2015. According to which the services provided to Government, a local authority or a governmental authority by way of erection, construction, maintenance, repair, alteration renovation or restoration of Canal, dam or other irrigation works for use other than for commerce, industry, or any other business or profession is exempted from the ambit of service tax.

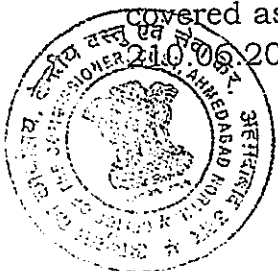
32. At the outset, the assessee claimed that they are providing services of installation of underground cable laying works and works to Madhya Gujarat Vij company formed by Gujarat Government provide and distribute the power to the people of Gujarat, Baroda, Rajpipla and Anand District on contract basis. All the service income received from Government company and as per . Entry No. 12 and 12 (a), of Notification No.25/2012 dated 20.06.2012 as amended, all service provided to Government is exempted from service tax. They have also claimed that under new entry 12A they are entitled to get exemption from on payment of service tax as they are providing services to Govt. They claimed hey they are exempted from payment of service tax under Entry as detailed below:

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

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

According to which the services provided to the Government and also for the purpose other than commerce is exempted from payment of service tax. Herein the instant case, the assessee is providing the services to Uttar Gujarat Vij Company. No doubt the said service receiver is government agency as defined under the service tax, however they are transmitting and distributing the electricity on commercial basis only. They are not supplying electricity for any government or government related projects without charging electricity energy charges. They are providing services of transmission and distribution of electricity by charging appropriate cost along with profit or other duties, hence it cannot be treated as non commercial in nature. Moreover, the assessee did not furnish any documentary evidence to prove that the services provided by them to the Uttar Gujarat Vij Co.Ltd is not involved any commercial element. In the absence of any documentary evidence, the contention of the assessee cannot be accepted. So the contention of the assessee that they are providing services not for commerce has no merit and therefore they are no fall under entry No.12(a) of the Notification No.25/2012 dated 20.06.2012 as claimed by then. In view of the above I find that the assessee is liable to pays service tax on the receipts received from the service receiver and the same revenue is not covered as exempted l under Entry No. 12A(a) of Notification No.25/2012 dated

20.06.2012.



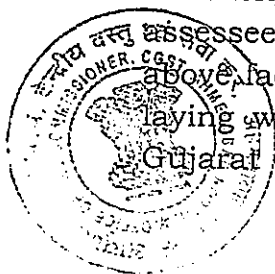
33. On perusal of the documents, reply to SCN, and Notification No.25/2012 dated 20.06.2012, I find that the benefit of entry No.12A(a) is available only if the condition that the contract to provide the said service should have been entered into before 01.03.2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date. However on perusal of the copies of invoices and other records provided by the assessee, I find that the work was allotted to them vide work orders issued after 01.03.2015 and therefore they are not eligible for the exemption under entry No.12A of Notification No.25/2012 dated 20.06.2012

34. The assessee further claimed that the service rendered by them to the Electricity transmission company are bundled services which are covered under negative list of services covered under Section 66 of the Finance Act, 1994 after 01.07.2012. Hence the service income generated during the year 2015-16 and 2016-17 are totally exempted from payment of service tax. I have gone through the list of services covered under Section 66D. According to Entry No.(k) of Negative List the services of "**transmission or distribution of electricity by an electricity transmission or distribution utility**". In the instant issue, the assessee just claimed that the service provided by them are exempted from payment of service tax in view of Entry No (k) of Negative List of services under Section 66D of Finance Act, 1994. On perusal of the Entry No (k) of Section 66D of Finance Act, 1994, I find that the exemption is available to services of transmission or distribution of electricity by an electricity transmission or distribution utility only. The electricity or distribution utility has been interpreted in Section 66B of the Finance Act, 1994 which is reproduced as under:

"Electricity transmission or distribution utility" means the Central Electricity Authority; a State Electricity Board; the Central Transmission Utility or a State Transmission Utility notified under the Electricity Act, 2003 (36 of 2003); or a distribution or transmission licensee under the said Act, or any other entity entrusted with such function by the Central Government or, as the case may be, the State Government;

According to which the transmission or distribution of electricity by an electricity transmission or distribution utility is exempted from payment of service tax. However, in the instant issue, the assessee failed to substantiate that they are an electricity transmission or distribution utility and therefore the service provided by them to the Uttar Gujarat Vij Co Ltd cannot be considered as service under Negative List as envisaged under Section 66D of the Finance Act, 1994. Accordingly the assessee is liable to pay service tax on the taxable income derived from the above referred services.

35. Further the assessee also relied upon case law of Madhya Pradesh Poorva Kshetra Vidyut Vitran Co Ltd Vs. Principal Commissioner (CESTAT Delhi) . In that case, the assessee was a wholly owned under taking of the Government of Madhya Pradesh and was engaged in the distribution of electricity. Hence the said case law is not relevant in the instant issue as the assessee is not wholly owned undertaking of any Government. In view of the above facts, I find that providing service of installation of under ground cable laying works and related works to Madhya Gujarat Vij company formed by Gujarat Govt. is taxable service and therefore they are liable to pay service tax



of Rs.86,70,496/- on the differential value of Rs.5,97,62,333/- for the year 2015-16 & 2016-17 as mentioned in the SCN dated 23.10.2020.

36. The Balance sheet and profit and loss account of an assessee is vital statutory records. Such records are prepared in statutory format and reflect financial transactions, income and expenses and profit and loss incurred by company during a financial year. The said financial records are placed before different legal authorities for evincing true financial position. Assessee was legally obligated to maintain such records according to generally accepted accounting principles. They cannot keep it in unorganized method. The statute provides mechanism for supervision and monitoring of financial records. It is mandate upon auditor to have access to all the bills, vouchers, books and accounts and statements of a company and also to call additional information required for verification and to arrive fair conclusion in respect of the balance sheet and profit and loss accounts. It is also onus upon auditor to verify and make a report on balance sheet and profit and loss accounts that such accounts are in the manner as provided by statute and give a true and fair view on the affairs. The Chartered Accountant, who audited the accounts of the assessee, being qualified professional has given declaration that the balance sheet and profit and loss accounts of the noticee reflect true and correct picture of the transaction and therefore, I have no option other than to accept the classification of income under profit and loss account as true nature of the business and to proceed to conclude instant proceedings accordingly.

37. It is provided under section 68 of the Finance Act, 1994 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 assessee had not paid service tax as worked out above in Table-A.

38. 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 by disclosing wholly & truly all material facts in their service tax returns (ST-3 returns). 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 provided by him, as discussed above, as they failed to file ST-3 Returns and thereby violated the provisions of Section 70(1) of the Act read with Rule 7 of the Service Tax Rules, 1994. From the foregoing paras and discussion made herein above, I find that the assessee has contravened the provisions of -

- (i) Section 67 of the Finance Act, 1994 in as much as they have failed to assess and determine the correct value of taxable services provided by them, as explained in foregoing paras for the SCN period;
- (ii) Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as-much-as they failed to make payment of service tax during the SCN period, to the credit of the Government account within the stipulated time limit;
- (iii) Section 70 of the Finance Act, 1994 as amended read with Rule 7 of the Service Tax Rules, 1994 in as much as they have failed to self-assess the Service Tax on the taxable value and to file correct ST-3 returns during the SCN period.

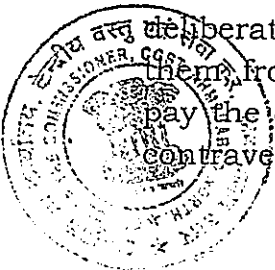


- (iv) Section 77 of the Finance Act, 1994 as much as they did not provide required data / documents, as called for from them.

39. The government has from the very beginning placed full trust on the service tax assessee so far as service tax is concerned and accordingly measures like self-assessments etc., based on mutual trust and confidence are in place. All these operate on the basis of honesty of the service tax assessee; therefore, the governing statutory provisions create an absolute liability, when any provision is contravened or there is a breach of trust, on the part of service tax assessee, no matter how innocently. From the information/data received from CBDT, it appeared that the assessee has not discharged service tax liability in spite of declaring before Income Tax Department. Non-payment of service tax is utter disregard to the requirements of law and the breach of trust deposed on them which is outright act of defiance of law by way of suppression, concealment & non-furnishing value of taxable service with intent to evade payment of service tax. All the above facts of contravention on the part of the service provider have been committed with an intention to evade the payment of service tax by suppressing the facts. Therefore, service tax not paid by the assessee for financial Years F.Y. 2015-16 & 2016-17 is required to be recovered from them under Section 73 (1) of Finance Act, 1994 by invoking extended period of five years under the proviso to Section 73(1) of the Finance Act, 1994.

40. 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, I find that the assessee is liable to pay the said amount along with interest. Thus, the said Service Tax is required to be recovered from the assessee along with interest under Section 75 of the 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 this is a fit case to levy penalty under section 78 of Finance Act, 1994 as they failed to pay the correct duty with the intent 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



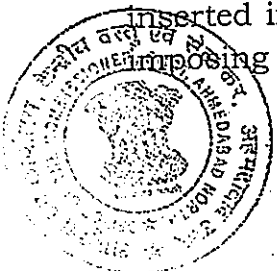
made thereunder, as discussed hereinabove. Hence I find that this is a fit case to impose penalty u/s.78 of Finance Act, 1994.

42. 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 behaviour. The said assessee deliberately not supplied their 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.

43. 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 of the assessee 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 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 along with applicable interest. All these acts of contravention of the provisions of Section 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 on part of assessee have rendered them for penal action under the provisions of Section 78 of the Finance Act, 1994, as amended from time to time. 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.

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.



45. In view of the above facts and findings, I pass the following order.

ORDER

1. I confirm the demand of Service Tax of Rs.86,70,496/- (including cess) (Rupees Eighty Six Lac Seventy Thousand Four Hundred Ninety Six only), which was not paid/short paid during the Financial Years 2015-16 & 2016-17 as per Table supra and order to recover from them under proviso to Sub-section (1) of Section 73 of Finance Act, 1994;
2. I confirm the demand of Interest at the appropriate rate and order to recover from them for the period of delay of payment of service tax mentioned at (1) above under Section 75 of the Finance Act, 1994;
3. I impose penalty of Rs.10,000/- (Rupees Ten Thousand only) on M/s. Devang Jayeshbhai Upadhyay under Section 77 of the Finance Act, 1994
4. I do not impose penalty on M/s. Devang Jayeshbhai Upadhyay under Section 76 of the Finance Act, 1994 as discussed.
5. I impose Penalty of Rs.86,70,496/- (Rupees Eighty Six Lac Seventy Thousand Four Hundred Ninety Six only) 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. Devang Jayeshbhai Upadhyay pays the amount of Service Tax as determined at Sl. No. (1) above and interest payable thereon at (2) above within thirty days of the date of communication of this order, the amount of penalty liable to be paid by M/s. Devang Jayeshbhai Upadhyay 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. Accordingly the Show Cause Notice bearing F.No. STC/15-170/OA/2020 dated 23.10.2020 is disposed off.

(LOKESH DAMOR)
Joint Commissioner
Central GST & Central Excise
Ahmedabad North
Dt.

F.No. STC/15-170/OA/2020

To
M/s. Devang Jayeshbhai Upadhyay,
A-58, Abhishek Society,
Bopal, Ahmedabad - 380058
Copy to:

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

