



आयुक्त का कार्यालय

OFFICE OF THE COMMISSIONER

केंद्रीय वस्तु एवं सेवा कर तथा केंद्रीय उत्पाद शुल्क, अहमदाबाद उत्तर
CENTRAL GOODS & SERVICES TAX & CENTRAL EXCISE, AHMEDABAD NORTH

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निवन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. STC/15-166/OA/2020

आदेश की तारीख/Date of Order:- 28.02.2022

जागी करने की तारीख/Date of Issue :- 01.03.2022

DIN NO: 20220364WT000000F419

द्वारा पारित/Passed by:- आर गुलजार बेगम **IR. GULZAR BEGUM**

अपर आयुक्त / Additional Commissioner

मूल आदेश संख्या / Order-In-Original No. 65/ADC/GB/2021-22

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, (केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केंद्रीय उत्पाद शुल्क भवन, अंबावाडी, अहमदाबाद-380015) को प्रारूप संख्या ड.ए (1-A.E) 1-में दाखिल कर सकता है। इस अपील पर रू) 2.00 दो 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. 2.00 only.

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

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute (as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या ड.ए 1-में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केंद्रीय 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।

उक्त अपील की प्रति।



(2) 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 रू) 2.00 .दो रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 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.2.00.

विषय:- कारण बताओ सूचना/ Show Cause Notice No. STC/15-166/OA/2020 dated 23.10.2020 and issued to **M/S. Mahavir Developers** situated at 19, Jalvihar Bunglows, Sterling City, Bopal, Ahmedabad-380058.

BRIEF FACTS OF THE CASE:

M/s. Mahavir Developers, 19, Jalvihar Bunglows, Sterling City, 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. AAZFM1544JSD001.

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). 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 observed 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.	Financial Year	VALUE DIFFERENCE in ITR & STR / TDS & STR)(Whichever is higher) (in Rs.)	Service Tax (in Rs.)
02	2015-16	2,41,50,000	33,69,394
03	2016-17	2,34,50,000	34,97,958
	TOTAL	4,76,00,000	68,67,353

3. Therefore, the said assessee has less discharged their Service Tax liability and thus is liable to pay Service tax including Cess [@ 12.36% for F.Y. 2015-16 & from 01-04-2015 to 31-05-2015] ; [@ 14% from 01-06-2015 to 14-11-2015] ; [@ 14.50% from 15-11-2015 to 31-05-2016] and [@15% from 01-06-2016 to 31-03-2017] for amounting to Rs.68,67,353/- on the differential value amounting to Rs. 4,76,00,000/- along with applicable interest and penalty for the F.Y. 2015-16 to 2016-17. 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. It is observed that 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 produce any documentary evidences of the differential value nor submit any reply.

4. 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 themselves 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.

5. 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.

6. 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. From the foregoing paras, it was observed that the said assessee have failed to pay/short paid/deposit service tax to the extent of Rs.68,67,353 /- 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.

Thus, it is observed that the said assessee have failed to discharge the service tax liability of Rs. 68,67,353/- (inclusive of applicable Cess i.e., EC, SHEC, SBC & KKC) worked out on value of Rs. 47600000/- 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.



7. In view of above, it is observed 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.

8. 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.68,67,353 /- (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.

9. 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 appear to be 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, it appears that 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. Moreover, in addition to the contravention, omission and commission on the part of the said assessee as stated in the foregoing paras, it is observed that the said assessee has wilfully 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

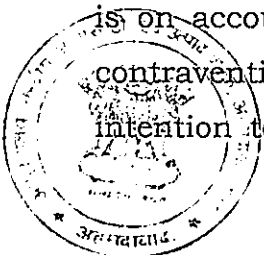


Section 78 of the Finance Act, 1994. Accordingly Show Cause Notice was issued to M/s MAHAVIR DEVELOPERS, called upon to show cause as to why;

- (i) Differential amount of **Service Tax** amounting to **Rs.6867353/- (Rupees Sixty Eight lakhs Sixty Seven thousand Three hundred Fifty Three 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.
- (v) **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 :

10. The assessee vide his letter dated 30.10.2020 has submitted their written reply wherein they stated that the noticee deny all the allegations and averments made vide the subject notice; that they deny contravened the provisions of section of the said Act and thereby are liable for penal action; that the noticee is engaged in providing "Construction of residential complex service"; that noticee has received advances from members for booking of Residential unit and paid the Service tax on the amounts received before receiving Completion certificate; that Noticee has not paid the Service tax on the amount received after receiving Completion Certificate as it is not liable for Service tax that as and when the Sale Deed is registered, the amount from the Ledger of "Advance from members" is transferred to "Sales account" so noticee is not required to pay the Service tax again on registration of Deed; that the Detailed working is provided ; that the present case is not the case of fraud, suppression, willful misstatement of facts, etc. Therefore, penalty under section 78 of the Act cannot be imposed ; that no case has been made out by the Department that the present demand of service tax is on account of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any of the provisions of Act or rules made there under with intention to evade the payment of service tax, therefore, no interest or penalty



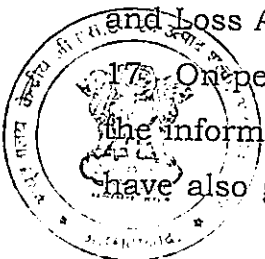
DISCUSSION AND FINDINGS:

12. I have carefully gone through the facts of the case and records available in the case file. I have also gone through the defence reply dated 30.10.2020 and submission dated 18.10.2021 and 25.01.22 filed by the assessee. On going through the same, I find that the impugned show cause notice was issued based on the data shared and provided by the CBDT for the year 2015-16 and 2016-17, on the ground that the assessee had earned substantial Service income of Rs. **4,76,00,000** /- by way of providing taxable services, but has not discharged their Service Tax liability fully and not paid the service tax of Rs. 66,67,353/-. The issue in the impugned Show cause notice is whether the assessee is liable to pay service tax of Rs. 66,67,353/- on the difference value of Rs.4,76,00,000/- under provision to Section 73 of Finance Act, 1994 or not;

13. On going through the Service Tax returns, I find that the Assessee is registered with the Service Tax department under Registration No.AAZFM1544JSD001 and filing returns under construction of residential complex services. I also find that the assessee has not provided the completion certificate by the competent authority". They have contended that the services provided by them are covered under Sr. No 12 of Notification number 026/2012 dated 20.06.2012 "Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority" there is abatement of 75% subject to following condition:

- (i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004.
- (ii) The value of land is included in the amount charged from the service receiver.

14. In view of the above, I find that the Services provided by the assessee for a consideration **can be covered** under Sr No 12 of Notification No. 26/2012 dated 20.06.2012. However, since the completion certificate by the competent authority has not been provided, I am not in a position to ascertain whether noticee can avail the benefit of Sr No 12 of Notification No. 026/2012 dated 20.06.2012 . The assessee has submitted the copies of Balance Sheet, Profit and Loss Account, Ledger of the customers, ST-3 returns for Year 2015-16, 2016-17. On perusing the Profit and Loss Account for the relevant year, I observe that the information about "the income of the company is from sale of Bungalow". I have also gone through Service Tax returns filed by the assessee and I observe



that the assessee has filed returns under construction of residential complex services. I also find from the Service Tax returns for the year 2015-16 that the assessee has not availed the Cenvat Credit during the year. The assessee has availed the benefit of Sr. No. 12 of Notification No. 26/2012 dated 20.06.2012 and has paid the proportionate Service Tax on 25% of value after availing abatement of 75%. The assessee has filed NIL Service Tax return for the year 2016-17 in respect of aforesaid services.

15. However, as stated by the said assessee vide letter dated 25.01.22 the scheme is in remote area and in village area so BU permission is not issued by the authority, I am not in a position to ascertain whether noticee can avail the benefit of Sr No 12 of Notification number 026/2012 dated 20.06.2012 "Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority" in absence of completion certificate issued by competent authority.

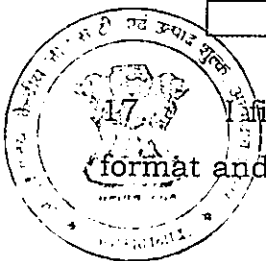
16. In the instant case, I find that the assessee had opted to offer income on the basis of percentage completion method and accordingly they have shown income of sale of flat in the income tax return to an amount of Rs. 3,97,00,000/- in the year 2015-16 and Rs. 2,34,50,000/- in the year 2016-17, which have not been reflected in the Service Tax returns for the same year. The details calculation is narrated herein as under ;

Sr. No.	Financial Year	VALUE DIFFERENCE in ITR & STR / TDS & STR (Whichever is higher) (in Rs.)	Service Tax (in Rs.)
02	2015-16	2,41,50,000	33,69,394
03	2016-17	2,34,50,000	34,97,958
	TOTAL	4,76,00,000	68,67,353

16.1. On going through their financial records i.e. Profit and Loss Account and audited Balance sheet for the year 2015-16 and 2016-17 it was noticed that Sales as per ITR and ST-3 returns as under;

Sr. No	Financial Year	Sales as per ITR	Value of Services shown in ST-3	VALUE DIFF. in ITR & STR / TDS & STR (Whichever is higher) (in Rs.)
02	2015-16	3,97,00,000	1,55,50,000	2,41,50,000
03	2016-17	2,34,50,000	0	2,34,50,000
	TOTAL	6,31,50,000	1,55,50,000	4,76,00,000

I find that the aforementioned records/ returns are prepared in statutory format and reflect financial transactions, income and expenses and profit and loss

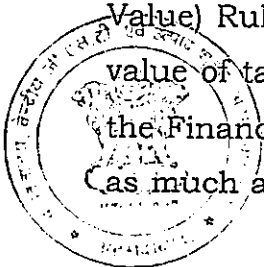


incurred by company/ individual during a financial year. The said financial records are placed before different legal authorities for depicting true and fair financial picture. Assessee is legally obligated to maintain such records according to generally accepted accounting principles. They cannot keep it in an unorganized manner and the statute provides mechanism for supervision and monitoring of financial records. It is mandated 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 at fair conclusion in respect of the balance sheet and profit and loss accounts. It is also an onus cast upon the 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 of the company/ individual. Therefore, I have no option other than to accept the information of nature of business/source of income to be true and fair.

18. I have also gone through the reconciliation statement for the year 2015-16 to 2016-17 provided by the assessee. While going through the same, I find that the assessee has constructed scheme of 24 Bungalows namely Priya Residency in Village Area covered under "Ghuma Gram Panchayat". The assessee has provided the Tax bill issued by "Ghuma Gram Panchayat" dated 28.01.2015. However, as stated above, I am not in a position to ascertain whether noticee can avail the benefit of exemption notification Sr No 12 of Notification number 026/2012 dated 20.06.2012 "Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority" in absence of completion certificate (B.U.Permission) issued by competent authority. In view of above, the Service Tax demand of Rs. 68,67,353/- is required to be recovered from assessee as the assessee has not produced any completion certificate as per Sr. No 12 of Notification number 026/2012 dated 20.06.2012.

19. On perusal of the SCN, I find that the SCN has not questioned the taxability on any income other than the income from sale of services. I therefore refrain from discussing the taxability on other income other than the sale of service.

20. I find that noticee had contravened the provisions of 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; 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; 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; Chapter V of the Finance Act, 1994 and the Service Tax Rules, 1994 with intended 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 for F.Y.2015-16,2016-17.

21. Further, it is observed that the noticee was fully aware about the fact that they were receiving such income which was chargeable under the Service Tax. However, in spite of knowing the facts; they chose not to pay the said applicable dues related to Service Tax by not providing documents. This has been done to escape from the eyes of the department with intent to evade the payment of dues related to Service Tax under the Finance Act, 1994. This fact of non-payment of dues related to Service Tax would have remained unnoticed, if the third party data not received from CBDT. These acts on the part of the noticee are tantamount to willful suppression, concealment and mis-statement of facts, with intent to evade the payment of dues related to Service Tax. In view of the above discussions and findings, the invoking of extended period of limitation under Section 73 of the Finance Act, 1994 is sustainable

22. I find that at no point of time, the noticee have disclosed or intimated to the Department regarding providing/ receipt of Service of the value, the same has come to the notice of the Department only after received the CBDT data for the Financial Year 2015-16 & 2016-17. The Government has right from the very beginning placed full trust on the Service Tax providers and accordingly measures like self-assessment etc, based on mutual trust and confidence are in place. From the evidences, it appeared that the noticee had knowingly suppressed the facts regarding providing/ receipt of services by them worth the differential value as mentioned hereinabove and thereby had not paid / short paid/ not deposited Service Tax thereof to the extent of Rs. 68,67,353/-, the above act of omission on the part of the noticee resulted into non-payment of Service Tax on account of suppression of material facts and contravention of provisions of Finance Act, 1994 with intent to evade the payment of Service tax to the extent mentioned hereinabove.



23. I rely upon the judgment in the case involving Aircel Digilink India Ltd. v/s Commissioner of Central Excise, Jaipur, reported in 2006 (3) STR 386 (Tri.-Del) and the case involving Bharti Cellular Ltd. v/s Commissioner of Central Excise, Delhi, reported in 2006 (3) S.T.R. 423 (Tri.-Del). In both cases, the Hon. Tribunal upheld invocation of extended period after taking note of the fact that appellants had not disclosed certain details and mode of computation in their ST-3 details and that there was nothing on record to suggest that appellants ever approached the office of the Service Tax authorities to ascertain the details of their liability to pay the service tax. Similarly, in case of Insurance & Provident Fund Department v/s. Commissioner of Central Excise, Jaipur-I, 2006 (2) S.T.R. 369 (Tri.-Del.), Hon. Tribunal held that non-disclosure of full amount of premium collected would attract invocation of extended period. The ratio of the above judgments can be applied to the present case also as the noticee had not only suppressed the material facts from the department but also failed to comply with law and procedures, including payment of service tax. In view of the above, I hold that in the facts and circumstances of the present case, proviso to section 73 (1) of Finance Act, 1994, is rightly invoked for raising the demand for service tax against the noticee. In view of the above, I find that extended period for recovery of Service Tax short paid/not paid by the noticee on rendering of said taxable services, under the proviso to section 73(1) of the Finance Act, 1994 was rightly invoked and the SCN is sustainable on limitation. Therefore, the Service Tax amount of Rs. 68,67,353/- is recoverable from the noticee along with Interest as provided in proviso to Section 73(1) of the Finance Act, 1994 read with Section 75 of the Act *ibid*.

24. The constitution Bench of Hon'ble Supreme Court have examined the correctness of the ratio in the case of Sun Export Corporation, Bombay vs Collector of Customs, Bombay (1997)6 SCC 564 in Civil Appeal No. 3327 of 2007 and held that "an exemption notification has to be interpreted strictly and in case of ambiguity or alternate views, the benefit of doubt should go to the Government". Gist of the observations made by the Hon'ble Supreme Court while examining the judgement in the case of Sun Export Corporation, Bombay are as under:-

- (i) Exemption notification should be interpreted strictly; the burden of proof would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
- (ii) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/ assessee and it must be interpreted in favour of the revenue.



- (iii) The ration in Sun Export case (supra) is not correct and all decisions which took similar view as in Sun Export Case (supra) stands overruled.

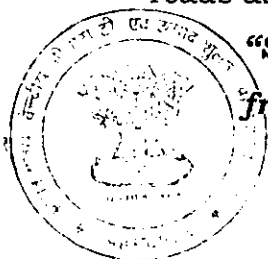
25. The Hon'ble Supreme Court's aforesaid order emphatically held that the burden of providing applicability would be on the assessee to show that his case comes within the parameters of exemption clause or exemption notification. When the assessee avails the benefit of such notification, it is their liability to produce all necessary documents to prove the applicability that his case comes within the parameters of exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the assessee and it must be interpreted in favour of the revenue.

26. As discussed herein above, the Chartered Accountant i.e. representative in his letter head dated 25.01.2022 has submitted that their construction scheme is in remote/ village area, BU permission is not issued by competent authority. I find that merely furnishing such letter does not prove that they are eligible for notification benefit. Therefore I find that M/s. Mahavir Developers has not produced any evidence to establish that they are eligible for the benefit of Sr. No. 12 of Notification No. 26/2012 dated 20.06.2012. Therefore, the Service Tax amount of Rs. 68,67,353/- is recoverable from the noticee along with Interest as provided in proviso to Section 73(1) of the Finance Act, 1994 read with Section 75 of the Act *ibid*, as stated in para 24 of the said order.

27. I find that even on the opportunities arising during the adjudication process, they have not been able to prove their contentions and thus the suppression with an intent to evade payment, on part of the noticee, is proved beyond doubt and proviso to Section 73(1) of the Finance Act, 1994 has rightly been applied in the instant case and therefore, by their such act of omission and commission, the noticee have rendered themselves liable for penalty u/s.76 of Finance Act, 1994..

28. Since in the instant case, suppression of material facts have been established beyond doubt after discussions in the paras supra, I consider this as a fit case for imposition of penalty under Section 78 of the Finance Act, 1994 which reads as under:

"SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —



(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :

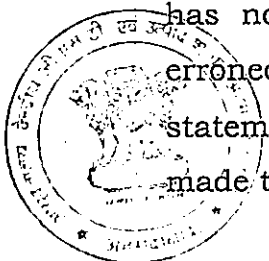
Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the 24 date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :

Provided further that where service tax and interest is paid within a period of thirty days of — the date of service of notice under the proviso to (i) sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded; (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period :

Explanation. — For the purposes of this sub-section, “specified records” means records including computerised data as are required to be maintained by an noticee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the noticee in the books of accounts shall be considered as the specified records.”

29. Thus penalty under Section 78, is attracted whenever any Service Tax has not been levied or not paid or has been short levied or short paid or erroneously refunded by the reasons of fraud, suppression of facts, willful mis-statement or contravention of any provisions of Finance Act, 1994 or of the rules made there under with intent to evade the payment of service tax and this penalty

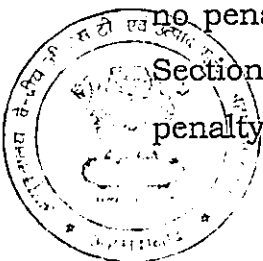


shall not be less than the duty evaded. However, as per the second proviso to section 78, where such service tax along with interest is paid within 30 days from the date of communication of the order penalty would be further reduce to 25% of the service tax so determined. The benefit of reduced penalty shall be available only if such penalty is also paid within 30 days referred to be. Thus the noticee have rendered themselves liable to penalty under Section 78 of the Finance Act, 1994 as they were not paying service tax in spite of the facts that they were providing the taxable service.

30. Regarding penalty under Section 77, I find that the noticee has also contravened the provision of Section 67 of the Finance Act, 1994 in as much as they failed to determine the correct value of taxable services by not mentioning the same in ST3 returns; violated the provisions of Section 68 of the act read with Rule 6 of the Service Tax Rules, 1994 by not paying the Service Tax during the F.Y. 2014-15 to 2015-16. Further, the noticee has not assessed the tax due, property, on the services provided by them, as discussed above, and failed to file correct ST3 returns in time thereby violated the proviso of Section 70 of the act read with Rule 7 of the Service Tax Rules, 1994. In view of the above, they are liable for imposition of appropriate penalty under Section 77 of the Finance Act, 1994.

31. Further, in view of the discussion made in the forgoing paras, I hold that the noticee has failed to pay the service tax on the income received for construction of Residential service by suppressing the facts from the department by contravening the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 and Section 67(1) of the Finance Act, 1994 read with Rule 5(1) of the Service Tax Rules, 1994. The Service Tax totally amounting to Rs. 68,67,353/- is recoverable from the noticee under the provisions of Section 73(1) of the Finance Act, 1994 and they have also rendered themselves liable to pay interest under section 75 of the Finance Act, 1994. They have further rendered themselves liable for penalty under the provisions of Section 78 of the Finance Act, 1994.

32. 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.



33. Therefore, from the factual matrix and the question of law as discussed in the foregoing paras, I pass the following order: -

ORDER

- (i) I confirm demand of service tax of Rs. 68,67,353/-- under the category of Construction of Residential contract services under the proviso of Section 73(1) of the Finance Act, 1994.
- (ii) I order for recovery of interest at appropriate rate from the notice under the provisions of Section 75 of the Finance Act, 1994 on the demand (ii) above.
- (iii) I impose penalty of Rs.10,000/- (Rs. Ten Thousand Only) upon them under Section 77 of Finance Act,1994.
- (iv) I impose penalty of Rs. 68,67,353/-under section 78(1) of the Finance Act, 1994. If the service tax amount is paid along with appropriate interest as applicable, within 30 days from the date of receipt of this order, then the amount of penalty under Section 78 shall be reduced to 25% of the Service Tax amount, provided if such penalty is also paid within such period of 30 days.
- (v) I do not impose any penalty u/s.76 as discussed above at Para 29.

34. The Show Cause Notice F.No. STC/15-166/OA/2020 dated 23.10.2020 is disposed herewith.

R. Gulzar Begum

(R. Gulzar Begum)
Additional Commissioner
Central GST & Central Excise
Ahmedabad North

By Regd. Post AD./Hand Delivery

F.No. STC/15-166/OA/2020

To

M/s MAHAVIR DEVELOPERS,
19, JALVIHAR BUNGLOWS, STERLING CITY,
BOPAL, AHMEDABAD-380058

Copy for information to:

1. The Commissioner of CGST & C.Ex., Ahmedabad North.
2. The Deputy Commissioner Division-VI, Central Excise & CGST, Ahmedabad North.
3. The Superintendent, Range-I, Division-VI, Central Excise & CGST, Ahmedabad North
4. The Superintendent (System) CGST, Ahmedabad North for uploading on website.
5. Guard File

