आयुक्त का कार्यालय,
केंद्रीय जी. एस. टी. एवं
केंद्रीय उत्पाद शुल्क ,अहमदाबाद-- उत्तर,
कस्टम हॉउस,प्रथमतल,
नवरंगपुरा ,अहमदाबाद- 380009

OFFICE OF COMMISSIONER
CENTRAL GST & CENTRAL EXCISE,
AHMEDABAD- NORTH
CUSTOM HOUSE, 1ST FLOOR,
NAVRANGPURA, AHMEDABAD-380009

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निबन्धितपावतीडाकद्वरा/By R.P.A.D
फा.सं./F.No. STC/15-234/OA/2021

DIN-20221264WT000000FEC1
आदेशकीतारीख़/Date of Order :- 26.12.2022
जारीकरनेकीतारीख़/Date of Issue :- 26.12.2022

द्वारापारित/Passed by:- लोकेश डामोर/Lokesh Damor
सयुक्तआयुक्त / Joint Commissioner

मूलआदेशसंख्या / Order-In-Original No.80 /JC/LD /2022-23

जिसव्यक्ति(यों) कोयहप्रतिभेजीजातीहै, उसके/उनकेनिजीप्रयोगकेलिएमुफ्तप्रदानकीजातीहै।

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 विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पादशुल्क ,केन्द्रीय उत्पाद शुल्क भवन,अंबावाड़ी ,अहमदाबाद 380015-को प्रारूपसंख्या एसटी -४ (ST-4)में दाखिल कर सकता है। इस अपी पर रू. 5.00 (पांचरुपये)का न्यायालयशुल्क 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.

उक्तअपील,अपीलकर्ताद्वाराप्रारूपसंख्याएसटी -४ (ST-4) में दोप्रतियों में दाखिल की जानी चाहिए। उसपर 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।

(5) उक्तअपीलकीप्रति।

(6) निर्णयकीप्रतियाँअथवाजिसआदेशकेविरूद्धअपीलकीगईहै,उनमेंसेकमसेकमएकप्रमाणितप्रति हो,यादूसरेआदेशकीप्रतिजिसपररू .5) 00.पांचरूपये (कान्यायालयशुल्क़टिकटलगाहोनाचाहिए।

The appeal should be filed in form एसटी -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:-कारणबताओसूचना/ Proceeding initiated vide Show Cause Notice F.No.STC/15-234/OA/2021 dated 23.04.2021 issued to M/s.Vikas Nitinkumar Shah HUF, W 19 Nilkanthvarni Ghanshyamnagar, Subhash Bridge Naka, Ahmedabad-380 013.

BRIEF FACTS OF THE CASE:-

M/s. Vikas Nitinkumar Shah, HUF, W 19 Nilkanthvarni Ghanshyamnagar, Subhash Bridge Naka, Ahmedabad 380013 (hereinafter referred to as the 'said assessee') having PAN No.AAJHV4901L was engaged in providing taxable services without taking registration.

2. On going through the third party CBDT data for the Financial Year 2015-16 and 2016-17, it was noticed that the said assessee had earned substantial service income by way of providing taxable services, but has neither obtained service tax registration nor paid service tax thereon.

3. With effect from 01.07.2012, the negative list regime came into existence under which all services are taxable and only those services that are mentioned in the negative list are exempted.

4. The nature of activities carried out by the said assessee as Service Provider appeared to be covered under the definition of service and appeared to be not covered under the Negative List as given in Section 66D of the Finance Act, 1994, as amended from time to time. These services also appeared to not be exempted under mega exemption notification no.25/2012-ST dated 20.06.2012, as amended from time to time, and hence the aforesaid services provided by the said assessee appeared to be subjected to service tax.

5. The service tax liability of the said assessee is ascertained on the basis of income mentioned in the ITR returns and form 26AS filed by the said assessee with the Income Tax Department. The figures / data provided by the Income Tax Department was considered as the total taxable value in order to ascertain the service tax liability under Section 67 of the Finance Act, 1994. By considering the said amount as taxable income, the service tax liability was calculated as detailed below :-

Sr .No.	Financial Year	Total value for TDS (Including 194C, 194Ia, 194Ib, 194J, 194)	Service Tax rate	Service Tax payable
1	2015-16	0	14.50%	0
2	2016-17	7,24,83,683/-	15%	1,08,72,552/-
	Total			1,08,72,552/-

6. No data was available for the period 2017-18 (upto June-2017) therefore, at the time of issuance of SCN, it was not possible to quantify short payment of Service Tax, if any, for the period 2017-18 (upto June-2017).

7. Unquantified demand at the time of issuance of SCN

Para 2.8 of the Master Circular No. 1053/02/2017-CX dated 10.03.2017 issued by the CBEC, New Delhi clarifies that:

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

8. From the facts, it appeared that the "Total Amount paid/credited under Section 194C, 194H, 194I, 194J" for the financial year 2017-18 (upto June-17) has not been disclosed by the Income Tax Department. Therefore, the assessable value for the year 2017-18 (upto June-17) was not ascertainable at the time of issuance of show cause notice. Consequently, if any other amount is disclosed by the Income Tax Department or any other sourses/ agencies, against the said assessee, action would be initiated against the said assessee under the proviso to Section 73(1) of the Finance Act, 1994 read with para 2.8 of the Master Circular No. 1053/02/2017-CX dated 10.03.2017, in as much as the service tax liability arising in future, for the period 2017-18 (upto June-17) covered under this show cause notice, would be recoverable from the said assessee accordingly.

9. In light of the facts discussed hereinabove and the material evidences available on records, it was revealed that the said assessee, M/s Vikas Nitinkumar Shah, HUF had contravened the following provisions of Chapter-V of Finance Act, 1994, the Service Tax Rules, 1994;

(i) Section 69(1) of the Finance Act, 1994 read with notification no.33/2012-ST dated 20.06.12 in as much as they failed to obtain service tax registration.

(ii) Section 67 of the Finance Act, 1994 in as much as they failed to determine the correct value of taxable service provided by them as discussed above.

(iii) Failed to register with the department and fail to declare correctly, assess and pay the service tax due on the taxable services provided by them and to maintain records and furnish returns, in such form i.e. ST-3 and in such manner and at such frequency, as required under Section 70 of the Finance Act, 1994 read with Rule 6 & 7 of the Service Tax Rules, 1994.

(iv) Section 66B and Section 68 of the Finance Act, 1994 and Rules 2 & 6 of the Service Tax Rules, 1994 in as much as they failed to pay the service tax correctly at the appropriate rate within the prescribed time in the manner and at the rate as provided under the said provisions

(v) Section 77 of the Finance Act, 1994 in as much as they failed to take registration

(vi) All the above acts of contravention on the part of the said assessee appeared to have 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 was required to be demanded and recovered from them under Section 73(1) of the Finance Act, 1994 by invoking extended period of five years. All these acts of contravention of the provisions of Section 68 and 70 of the Finance Act, 1994 read with Rule 6 and 7 of Service Tax Rules, 1994 appeared to be punishable under the provisions of Section 78 of the Finance Act, 1994 as amended from time to time.

(vii) The said assessee was also liable to pay interest at the appropriate rates for the period from the due date of payment of service tax till the date of actual payment as per the provisions of Section 75 of the Finance Act, 1994.

10. The above said service tax liabilities of the said assessee has been worked out on the basis of limited data / information received from the Income Tax Department for the financial years 2015-16 and 2016-17. Thus, the show cause notice relates exclusively to the information received from the Income Tax Department.

11. It was observed that the assessee had not obtained the service tax registration from the department for the services provided by them for the period 2015-16 to 2017-18 (upto June-17). Therefore, it appeared that the assessee had not paid actual service tax by way of willful suppression of facts and in contravention of provisions of the Finance Act, 1994 and the Rules made thereunder relating to levy and collection of service tax, with intent to evade payment of service tax. The service tax amounting to Rs,1,08,72,552/- was therefore recoverable from them by invoking extended period of five years as per first proviso to sub section (1) of Section 73 of the Finance Act, 1994. For this reason applicable interest under Section 75 of the Finance Act, 1994 was also to be demanded and was recoverable from the assessee and the assessee was also liable to penalty under Section 78 of the Finance Act, 1994.

12. Further, the said assessee was liable to penalty under the provisions of Section 77(1)(a), 77(1)(c) and 77(2) of the Finance Act, 1994 for failure to take registration in accordance with the provisions of Section 69 and for failure to furnish information / documents called for from them.

13. Therefore, a Show Cause Notice bearing F.No.STC/15-234/OA/2021 dated 23.04.2021 was issued to M/s. Vikas Nitinkumar Shah, HUF, W 19 Nilkanthvarni Ghanshyamnagar, Subhash Bridge Naka, Ahmedabad 380013 to show cause to the Additional/Joint Commissioner, CGST & CX, Ahmedabad North having office at 1 Floor, Custom House,. Navrangpura, Ahmedabad as to why:

(i) Service tax of Rs.1,08,72,552/- which was not paid for the financial year 2015-16 and 2016-17 as mentioned above, should not be demanded and recovered from them under the proviso to Sub Section (1) of Section 73 of the Finance Act, 1994;

(ii) Service tax liability not paid during the financial year 2017-18 (upto June-17) ascertained in future, should not be demanded and recovered from them under proviso to sub section (1) of Section 73 of the Finance Act, 1994.

(iii) Interest at the appropriate rate should not be demanded and recovered from them for the period of delay of payment of service tax mentioned at (1) above under Section 75 of the Finance Act, 1994;

(iv) Penalty under the provisions of Section 77(1)(a), 77(1)(c) and 77(2) of the Finance Act, 1994, as amended, should not be imposed on them.

(v) Penalty under Section 78 of the Finance Act, 1994, as amended, should not be imposed on them for suppressing the full value of taxable services and material facts from the department resulting into non payment of service tax as explained above.

DEFENCE REPLY :-

14. In response to Show Cause Notice dated 23.04.2021, the said assessee vide letter dated 22.06.2022 submitted that they were engaged in manufacture of Ready Mix concrete (RMC) falling under Chapter 38 Heading No.3824 Sub Heading No.38245010 of the Central Excise Tariff Act, 1985 which was manufactured at the site of construction for use in construction work at such site on contract or job work basis during the FY 2015-16, 2016-17 and 2017-18 (upto June 2017); that while supplying their RMC, they also undertook the activity of laying of RMC using of concrete pumping at the site of the principal Buyer of RMC; that they had earned income from Manufacturing Ready Mix Concreate (RMC) on contract or job work basis during the FY 2015-16(during the period February 2016 to March 2016) and 2016-17 and FY 2017-18 (up to June 2017) as declared under relevant Profit & Loss Account and Form 26AS.

14.1 They further submitted that they were Registered with Central Excise department having C. Ex. Registration No. AAJHV4901LEM001 dt.08/02/2016 during the F.Y.2015-16 (during the period February 2016 to March 2016) and also filed

Quarterly ER-3 return for the period January 2016 to March 2016; that they had paid C. Ex. Duty @2% as provided by Notification No. 001/2011 C.E. Sr. No. 46 on such manufactured of Ready-mix Concrete (RMC) which is falling under Chapter 38 Heading No. 3824 Sub-Heading No. 38245010 of the C. Ex. Tariff Act 1985; that by Budget 2016, Notification No.12/2012-Central Excise, dated the 17th March, 2012 has been amended vide Notification No. 12/2016-Central Excise dt. 01/03/2016 whereby Ready Mix Concrete (38245010) manufactured at site of construction for use in construction work at site was being fully exempted from Excise duty by Notification No. 12/2016 dt. 1/03/2016 Sr. No. 144. Hence Ready Mix Concrete (S.H.No.38245010) manufactured at site of construction for use in construction work at site was attracted NIL Duty w.e.f. 01/03/2016; as a result, they had surrendered and deposited original copy of Registration certificate No. AAJHV 4901LEM001 Dt.08/02/2016 in terms of the provision of Rule 9 of the CER 2002. w.e.f. 01/04/2016.

14.2 They further submitted that the activity carried out by them amounts to 'manufacture' under section 2 (f) of the Central Excise Act, 1944:-

Ready Mix Concrete (S.H.No.38245010) falls within the ambit of the meaning of word 'manufacture' as envisaged under Section 2(f) of the Central Excise and Salt Act, 1944 as the product Ready Mix Concrete (RMC) is marketable, though within the time frame of its short life and it also satisfies the test of being 'goods'

Provisions of Finance Act-Service Tax Law i.r.t. Negative List:
Sec 66D (f) any process amounting to manufacture or production of goods. (Entry in Negative List)

65B (40) "process amounting to manufacture or production of goods" means a process on which duties of excise are leviable u/s 3 of the Central Excise Act, 1944 (1 of 1944.) or the Medicinal and Toilet Preparations (Excise Duties) Act,1955" (16 of 1955) or any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any State Act for the time being in force.

Therefore, The above phrase 'processes amounting to manufacture or Production of goods' has been defined in section 65B of the Act as a Process on which duties of excise are leviable under section 3 of the Central Excise Act, 1944 (1 of 1944).

The said assessee submitted that the job work done by the notice is covered within clause-(f) of section 66D of the fmance Act, 1944.and Exempted from service tax under Negative List:
(f) Any process amounting to manufacture or production of goods' Manufacture as defined under Section 2 (f) of the Central Excise Act, 1944

In view of the above said grounds, it is clearly established that Ready Mix Concrete (S.H.No.38245010) manufactured on contract or job work basis by them at site of construction for use in construction work at such site is "Job Work Manufacturing" and the same is exempted from Service Tax Law under the Negative Lists.

14.3 They further submitted that it is stated in the subject SCN that it was issued under proviso to Sub -section (1) of section 73 of the Finance ACT, 1944 which is inapplicable to the subject SCN as the said section comes into play only if the person has underpaid / not paid service tax or received excess refund. In the instant case, they were exempt from collection and payment of service tax. Therefore, since the chargeable provisions under section 66B was not applicable in instant case and they received subject notice don't have obligations under the said Act, section 73(1) was inapplicable at the outset itself; that they are not liable to pay any penalty/ interest as service tax was not required to be paid on the grounds mentioned herein above. When service tax was not payable then question does not arise to pay any penalty/interest

14.4 In view of the above, the contentions raised in the subject SCN are not sustainable and maintainable and they are not liable to pay any service tax amount along with interest and penalty.

15. The said assessee has vide their letter dated 24.06.22 made further submission. They reiterated their submissions made earlier. In addition to their earlier submission, they submitted that the present Show Cause Notice was issued basis on assumption and presumption. There was no corroboration of the charges levelled against them. Since, the documents sought for by the Department were not traceable being old, they could not submit the same. These records alone shall not be the only evidence to allege non-payment of service tax. The department failed to adduce any cogent evidence to corroborate the allegations. Thus, the allegation of non-payment of service tax owing to intention to evade payment thereof is nothing but an assumption & presumption. Therefore, the Show Cause Notice deserves to be set aside.

15.1 They further submitted that it was also to be borne in mind that the plea of loss of records has been taken by the appellant's right from the first day. No motive, therefore, can be attributed or that the plea was not spontaneous or it was an afterthought. This being the position in the present case that the documents being old were not traceable

16. The said assessee vide their further letter dated 18.10.2022 submitted that they had charged and collected Rs.25,95,000/- as compensation towards long stay of plant and machinery at side during 2016-17 which has been declared in the P&L A/c for 2016-17, that compensation amount charged and collected towards long stay of plant

and machinery at site during 2016-17 is not a consideration for the provisions of service as defined under Section 65B(44) of the Finance Act and also not covered as declared service contemplated under Section 66E(e) of the Finance Act; the compensation amount charged and collected towards long stay of plant and machinery at site cannot be subjected to service tax.

16.1 They further submitted that compensation amount charged and collected towards long stay of plant and machinery at site was as penalty in relation to long stay of plant and machinery at site for manufacturing/supply of goods at site and was paid to notice by their buyers (i.e. contractor) as penalty for preventing from performing the contract by not providing further line of action to complete the work in time; thus the compensation charged and collected towards delay for completing work by them was in the nature of compensation/penalty only and not consideration and hence cannot be subjected to service tax.

PERSONEL HEARING :-

17. Personal Hearing in this case has been granted to the assessee on 13.05.2022, 24.06.2022 and 18.10.2022. Shri Vikas Nitinkumar Shah and Shri Harshad G. Patel authorised representative appeared for personnel hearing on 18.10.2022. They reiterated their written submission dated 22.06.2022 and 24.06.2022. They further submitted additional written submission dated 18.10.2022 and requested to decide the show cause notice on merit.

DISCUSSION AND FINDINGS :-

18. 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.

19. I have carefully gone through the records of the case, SCN, defence reply, as well as oral submissions made by the said assessee during the course of personal hearing.

20. I find that the issue to be decided is to whether the said assessee is liable to pay service tax amounting to Rs.1,08,72,552/- for the financial year 2015-16 and 2016-17 on the basis of value they had declared in their Income Tax Return (ITR)/ Form 26AS or not.

21. I find that that the said assessee in their reply to the show cause notice has submitted that they were engaged in manufacture of Ready Mix concrete (RMC) falling under Chapter 38 Heading No.3824 Sub Heading No.38245010 of the Central Excise Tariff Act, 1985 which was manufactured at the site of construction for use in construction work at such site on contract or job work basis during the FY 2016-17; that

while supplying their RMC they also undertook the activity of laying of RMC using of concrete pumping at the site of the principal buyer of RMC; that vide Sr. No.144 of Notification No. 12/2016-Central Excise dt. 01/03/2016 Ready Mix Concrete (38245010) manufactured at site of construction for use in construction work at site was being fully exempted from Excise duty. Hence Ready Mix Concrete (S.H.No.38245010) manufactured at site of construction for use in construction work at site was attracted NIL Duty w.e.f. 01/03/2016. They had further submitted that since, the documents sought for by the Department were not traceable being old, they could not submit the same.

22. On perusing Form 26AS for FY 2016-17, the following details of Amount Paid/ Credited and the name of TDS deductor are noticed.

Details of FORM 26AS for FY 2016-17		
Section under which TDS deducted	Name of TDS Deductor	Amount paid/credited
194C	Bygging India Ltd.	700375
194C	ITD Cementation India Ltd	71783308
	TOTAL	7,24,83,683/-

23. As per the 26AS, the income has been shown under Section 194C of Income Tax Act 1961 which is for Contract Income. Further, the value difference as worked out in the SCN for FY 2016-17 is found to be tallying with the total amount credited/paid as per Form 26AS. Therefore, it is evident that the entire amount credited/paid as per Form 26AS has been considered as differential value of taxable service provided by the assessee.

24 On perusal of the records, I find that the said assessee has submitted the following documents :-

(i) Form 26AS for the period 2016-17

(ii) Balance sheet, P& L A/c for the period 2016-17

(iii) Central Excise Registration Certificate dated 08.02.2016

(iv) Surrender of Central Excise Registration Certificate dtd. 01.04.2016

(iv) Vat returns for the period 2016-17

Apart from the above mentioned documents, they have not submitted any other documents till date.

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

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

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

26. In the instant case, I find that the said assessee has stated that they are engaged in manufacture of Ready Mix concrete (RMC) falling under Chapter 38 Heading No.3824 Sub Heading No.38245010 of the Central Excise Tariff Act, 1985 which was manufactured at the site of construction for use in construction work at such site on contract or job work basis during the FY 2016-17; and that while supplying their RMC they also undertook the activity of laying of RMC using of concrete pumping at the site of the principal buyer of RMC. On perusal of Form 26AS for the period 2016-17, I find that they have received income from M/s Bygging India Ltd. and M/s ITD Cementation India Ltd. I find that they have claimed that they are engaged in manufacture of Ready Mix concrete (RMC) falling under Chapter 38 Heading No.3824 Sub Heading No.38245010 of the Central Excise Tariff Act, 1985 which was manufactured at the site of construction for use in construction work at such site, however they have not provided any supporting documents viz. copy of contract entered between the said assessee and M/s Bygging India Ltd., copy of contract entered between the said assessee and M/s ITD Cementation India Ltd., invoices, ledger etc. inspite of providing sufficient time to prove their claim that they are not liable to service tax.

27. A taxable person is required to provide information/documents to the department as and when required. However, in this case the said assessee failed to furnish/provide the required documents in support of their claim to prove that they are

not liable to service tax. Even during the course of personnel hearing also the assessee failed to submit any documents proving that they are eligible for exemption from payment of service tax. In view of the above facts, it is proved that the said assessee might have been try to avoid furnishing the details which may lead to proof that they are liable to pays service tax. In absence of any contract, invoices, ledger or documentary evidence to substantiate that they were engaged in manufacture of Ready Mix concrete (RMC) falling under Chapter Heading No.38245010 of the Central Excise Tariff Act, 1985 which was manufactured at the site of construction for use in construction work at such site and the consideration received was against the same, no benefit can be granted from payment of service tax. The assessee is bound to produce the supporting documents to claim exemption and also has to prove that the conditions from exemption was also fulfilled by them. In the absence of any supporting evidence and documents I am not in a position to accept the contention of the assessee that the income of Rs. 7,24,83,683/- is derived from manufacture of RMC at the site of construction for use in construction work at such site. As the income shown in Form 26AS is under Section 194C i.e. Contract Income, I find that the activity carried out by the said assessee is covered under the definition of Services and not covered under the negative list as given in Section 65D of the Finance Act, 1994 and not exempted under mega exemption notification No.25/2012-ST dated 20.06.2012. Therefore the amount of services provided by the said assessee is subjected to service tax.

28. In view of facts stated hereinabove, the value of services mentioned/declared in the ITR/Form 26AS for Financial Year 2016-17, is considered as taxable Value of Services provided and since the said assessee has not provided any details/data and the reasons for non-payment of service tax, therefore, the exact Service Tax liability cannot be adjudged. Therefore, for calculation and demand of the Service Tax under this notice, the Value of Services declared/mentioned in the ITR/Form 26AS filed by the assessee has been considered for Non-Payment of Total Service Tax, which comes to Rs. 1,08,72,552/- on value of Rs. 7,24,83,683/- for Financial Year 2016-17.

29. 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 Table.

30. 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.*

31. 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 worked out in Tables supra for financial Year 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.

32. 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 assesse 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.

33. 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. M/s.Vikas Nitinkumar Shah, HUF 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. Moreover, the Hon'ble 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.

34. 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.

35. All above acts of contravention constitute an offence of the nature as described under the provision of Section 77 of the Act, rendering themselves liable to penalty under Section 77 of the Finance Act, 1994, for failure to take registration in accordance with the provisions of Section 69 of the Finance Act, 1994, for failure to provide documents/details for further verification and for failure to make payment of service tax and file ST-3 returns.

36. As far as imposition of penalty u/s.78 of Finance Act, 1994 is concerned, on perusal of the facts of the case and in view of the above discussion, I find that this is a fit case to levy penalty under section 78 of fiancé Act, 1994 as they failed to pay the correct duty with the intend to evade the same. It is also a fact that they had deliberately not declared 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 take service tax registration and filed ST-3 returns. The assessee have thus, willfully suppressed the actual provision of taxable service provided by them with an intent to evade the Service Tax. Hence it is found that the said 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.

37. On perusal of para 6,7 & 8 of the SCN, I find that the levy of service tax for FY 2017-18 (upto June 2017), which was not ascertainable at the time of issuance of the subject SCN, if the same was to be disclosed by the Income Tax department or any other source/agencies, against the said assessee, action was to be initiated against assessee under the proviso to Section 73(1) of the Finance Act, 1994 read with Para 2.8 of the Master Circular No. 1053/02/2017—CX dated 10.03.2017 and the service tax liability was to be recoverable from the assessee accordingly. Since the assessee has not provided any details/information/documents for the FY 2017-18 (upto June 2017) and the department has not also adduced any information/evidence and the reason for the non disclosure has also not been made known to the department, I refrain myself from entering into the said period to determine the liability as otherwise of assessee for service tax. On perusal of SCN, I further find that the SCN has not questioned the taxability on any income other than the income shown in 26AS. I therefore refrain from discussing the taxability on other income other than the income shown in 26AS.

38. In view of the above facts and findings, I pass the following order:-

ORDER

(i) I confirm the demand of Service Tax of Rs.1,08,72,552/- (including cess) (Rupees One Crore Eight Lakh Seventy Two Thousand Five Hundred Fifty Two Only), which was not paid/short paid during the Financial Year 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;

(ii) 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 (i) above under Section 75 of the Finance Act, 1994;

(iii) I impose penalty of Rs.10,000/- on M/s. Vikas Nitinkumar Shah, HUF under Section 77(1)(a) of the Finance Act, 1994

(iv) I impose penalty of Rs.10,000/- on M/s. Vikas Nitinkumar Shah, HUF under Section 77(1)(c) of the Finance Act, 1994

(v) I impose penalty of Rs.10,000/- on M/s. Vikas Nitinkumar Shah, HUF under Section 77(2) of the Finance Act, 1994

(vi) I impose Penalty of Rs. 1,08,72,552/- (including cess) (Rupees One Crore Eight Lakh Seventy Two Thousand Five Hundred Fifty Two 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. Vikas Nitinkumar Shah, HUF 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. Vikas Nitinkumar Shah, HUF 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.

39. Accordingly the Show Cause Notice bearing F.No. STC/15-234/OA/2021 dated 23.04.2021 is disposed off.

(Lokesh Damor)
Joint Commissioner
Central GST & Central Excise
Ahmedabad North

By RPAD
F.No. STC/15-234/OA/2021

Dt.:- 26.12.2022

To,
M/s. Vikas Nitinkumar Shah, HUF,
W 19 Nilkanthvarni Ghanshyamnagar,
Subhash Bridge Naka,
Ahmedabad 380013

Copy to:

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. The DC/AC, Central GST & Central Excise, Division-VII Ahmedabad North.
3. The Superintendent, Range-V, Division-VII, Central GST & Central Excise, Ahmedabad North
4. The Superintendent (System), Central GST & Central Excise Ahmedabad North for uploading the order on website.
5. Guard File.