



सत्यमेव जयते

प्रधान आयुक्त का कार्यालय,
Office of the Principal Commissioner,
केन्द्रीय जीएसटी अहमदाबाद दक्षिण आयुक्तालय
Central GST, Commissionerate- Ahmedabad South,
छठी मंजिल, अम्बावाड़ी अहमदाबाद ३८००१५,
6th Floor, GST Bhavan, 380015



फा.सं. F.No.STC/04-47/O&A/2012-13

DIN-20220964WS000000D1ED

आदेश की तारीख: Date of Order: 13.09.2022
जारी करने की तारीख: Date of Issue : 13.09.2022

द्वारा पारित /Passed by: Shri Nalin Bilochan, Joint Commissioner

मूल आदेश सं./Order-In-Original No.: 21/CGST/Ahmd-South/JC/NB/2022-23

यह प्रति उम व्यक्ति) बॉ (को , जिसके) जिनके (लिए यह आदेश जारी किया गया है , उसके) उनके (व्यक्तिगत उपयोग के लिए निःशुल्क प्रदान की जाती है।

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

यदि कोई व्यक्ति इस आदेश से स्वयं को असंतुष्ट अनुभव करता है, तो वह इस आदेश के विरुद्ध आयुक्त) अपील (, केन्द्रीय जीएसटी , केन्द्रीय जीएसटी भवन , अंबावाड़ी , अहमदाबाद- 15 को प्रारूप इ.ए. -1 में अपील कर सकता है। उक्त अपील पक्षकार पर आदेश तामील होने अथवा अथवा उसे डाक द्वारा प्राप्त करने की तारीख से दो माह के भीतर दाखिल की जानी चाहिए। इसपर रुपए 2.00/- केवल का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this order in Form **S.T.4** to Commissioner (Appeals), Central GST, Central GST Bhavan, Near Government Polytechnic, Ambawadi, Ahmedabad -15 within sixty days from date of its communication. The appeal should bear a court fee stamp of Rs.2.00-/- only.

उक्त अपील दो प्रतियों में प्रारूप सं . इ.ए.- .1 में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क) अपील (नियमावली , 2001 के नियम 3के उपबंधों के अनुसार अपीलकर्ताओं द्वारा हस्ताक्षर किए जाने चाहिए। इसकेसाथ निम्नलिखित को संलग्न किया जाए :

The Appeal should be filed in form No. S.T-4 in duplicate. It should be filed by the appellants in accordance with provisions of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be accompanied with the following:

उक्त अपील की प्रति।

Copy of the aforesaid appeal.

निर्णय की दो प्रतियाँ ; उसमें से एक उस आदेश की प्रमाणित प्रतिलिपि होनी चाहिए जिसके विरुद्ध अपील की गई है (अथवा उक्त आदेश की अन्य प्रति जिसपर रु 2.00/- का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।

Copies of the Decision (one of which at least shall be certified copy of the order appealed against) or copy of the said Order bearing a court fee stamp of Rs. 2.00/-

इस आदेश के विरुद्ध आयुक्त) अपील (में शुल्क के 7.5% जहां शुल्क एवं जुर्माना का विवाद है अथवा जुर्माना जहां शिर्फ जुर्माना के बारे में विवाद है उसका भुक्तान करके अपील की जा सकती 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."

संदर्भ/Reference : Show Cause Notice No. F.No.STC/4-47/O&A/12-13 dated 22.10.2012 issued to M/s Shilpa Construction Pvt.Ltd. 41, Payal Park , Satellite Road, Jodhpur Tekra, Ahmedabad.

BRIEF FACTS OF THE CASE

M/s Shilpa Construction Pvt.Ltd. 41, Payal Park , Satellite Road, Jodhpur Tekra, Ahmedabad (hereinafter referred to as 'M/s SCPL') are having Service Tax Registration No.AADCS9884JST001 with effect from 28.10.2004, under the category of "Construction Services in respect of Commercial or Industrial Buildings and Civil Structures as amended adding one more category of "Works Contract" with effect from 09.12.2008.

1.2 An intelligence received from Jaipur-II Commissionerate vide letter C. No. 25/IAR/Gr.VI/JP-11/2007 dated 19.09.2008 of the Commissioner of Central Excise, Jaipur-II and letter C.No.CCO(JZ)ST/59/2008 dated 01.10.2008 of the Joint Commissioner, Central Excise , Jaipur Zone indicated that M/s Shilpa Construction Pvt. Ltd. Ahmedabad was providing taxable services in the category of (i) Civil Construction of Commercial and Industrial Buildings/Roads (ii) Erection , Installation & Commissioning relating to the petrol pumps for M/s BPCL ,M/s HPCL & M/s IOCL for which they were registered with the department. They entered into written contract with all three service receivers. M/s SCPL was paying the service tax after availing the abatement of 67% under Notification.No.19/2003-ST dated 21.08.2003, Notification No.15/2004-ST dated 10.09.2004 and Notification No.01/2006-ST dated 01.03.2006.

1.3 Acting on the said intelligence, an inquiry into the matter was initiated. M/s SCPL was asked vide this office letters dated 03.02.2009, 27.03.2009, 04.08.10, 10.12.2010, 30.12.2010, 24.01.2011, 23.02.2011, 11.03.2011, 25.03.2011, 25.10.2011 and 18.05.2012 to furnish information/documents viz. Balance Sheets, Profit & Loss Accounts, Income Tax Returns, Bank Statements, Income Ledgers, agreements and contracts, the details of service tax payments made.

2. In response to the above mentioned various letters, M/s SCPL vide their letter dated 18.02.2009, 27.04.2009, and 06.08.2010 informed that -

- (i) They are engaged in the business of civil construction of commercial and industrial buildings and accordingly obtained ST-2 certificate in the category of Commercial & Industrial Construction Services. They entered into various contracts with BPCL for construction/Installation of petrol pumps. In certain cases, work has been awarded on the SOR basis, where no agreement is entered into. They have also conducted work of installation of tank, dispensing pump, pipe line fitting, fencing etc. which is part of civil construction. They further submitted that as their contracts are principally of construction they can not be artificially bifurcated for erection, commissioning, installation services and construction services.
- (ii) They also submitted that they have not provided any erection and commissioning services to BPCL. Tank installation, etc. forms an insignificant part of composite contracts for construction services of petrol pumps.
- (iii) In case of Tank installation, Tanks have been provided by the company and value of such tank have been billed as NIL in their Invoices.
- (iv) They submitted a copy of Memorandum of Agreement No.JT/AGMT/2003-04/38 dated 10.02.2004 (vide letter dated 27.04.2009) and Copy of ST-2, ST-3 for 2006-07 & 2009-10 & Balance Sheet for 2008- 09 only.

3. Summons dated 07.06.2012 and 06.08.2012 were issued to the authorized persons of M/s SCPL to submit the remaining required documents & to give the statement. M/s SCPL submitted ST-3 Returns for 2009-10 & 2010-11 and copy of Balance Sheets for 2008-09 to 2010-11 vide their letter dated 04.06.2012 and informed that;

- (i) Plant & Machinery have not been supplied by service recipient to them during 2007-08 to 2010-11 and no income was received against repair and maintenance service during 2007-08 to 2010-11. They have obtained S.Tax Registration No.AADCS9884JST001 for

providing construction service in respect of commercial or industrial building & civil structure (w.e.f.28.10.2004) and works contract services (w.e.f. 09.12.2008). They further submitted that they have not provided any kind of maintenance and repair services of drive way, roads, lights and repair of chambers etc.

- (ii) They submitted ST-3 returns for 2007-08 & 2008-09 vide their letter dated 13.09.2012 and submitted that;

-the service rendered falls under the category of construction service and commercial or industrial construction services.

-the contracts were for construction of petrol pumps and executed civil works and other related works as per contracts agreements with BPCL. BPCL provided the Tanks and Pump to be fitted in which has no relation in providing construction services and riot utilized the same for providing said services.

-the works undertaken falls under the category of "Construction service" the scope of this service was enlarged as 'commercial or industrial service' from June- 2005.

-the abatement have been taken under the notification no.12/2003/ST dated 20.06.2003 as no cenvat credit on inputs & input services has been taken. The explanation of the provision requires material should have been provided or used by provider of service, which is not in present case and accordingly the value of the tanks supplied is not includible in the gross value charged.

-during the year 2007-08 to 2008-09 various works had been carried out of M/s BPCL falling under the category of 'Commercial or Industrial Construction Services' & 'Works Contract Services' and no work is carried out with BPCL in 2009-10 to 2010-11.

3.1. Further summons/letter dated 19.09.2012, 10.10.2012/26.09.2012 were issued to the authorized person to give the statement and to produce the income ledger & all contracts awarded to them for the period from 2007-08 to 2010- 11 by M/s BPCL, M/s Reliance Industries and others, to submit the bifurcation of the income related to maintenance & repair services and bifurcation of income of exempted services if any provided during 2007-08 to 2011-12.

3.2 Nobody appeared in this office to give the statement and to submit the required information /data as required above but they simply sent letters dated 28.09.2012, 12.10.12, 13.10.12 & 15.10.12 under which they repeated the things which they had already submitted earlier except submission of some sample invoices issued to M/s BPCL, M/s Reliance Industries & others , some ledgers in respect of these service receivers and a list of work orders awarded to them by these oil companies to construct the petrol pumps but did not submit any of work order in question till date. M/s SCPL did not submit bifurcation of exempted services. Further vide their letter dated 12.10.12 they produced, ST-3 returns for 2011-12 along with the trial balance sheet, details of VAT deducted at source by these companies in respect of works contracts and a list of labour service for construction of their individual homes/bungalows along with the invoices & ledgers to the tune of Rs.17,31,664/- the details are as per annexure "B" to this show cause notice, as exempted services. Accordingly in absence of the documentary evidences i.e. contracts, all invoices etc., the exemption cannot be allowed to the assessee other than the construction of individual home. M/s SCPL has claimed the exemption in respect of services rendered for construction of the roads. The roads constructed by them are one part of the construction/installation of petrol pumps constructed for BPCL, Reliance Industries & others (for which there is no separate contract). In such a situation Board has clarified vide MOF Instruction F.No.B1/6/2005-TRU, dated 27.07.2005 that if the contract for construction of commercial complex is a single contract (composite contract) and the construction of road is not recognized as a separate activity as per the contract, then the service tax would be leviable on the gross amount charged for construction/installation of petrol pump including the value of construction of roads. It can be seen on the basis of income ledgers & some of invoices submitted (as no

contracts have been submitted till date), in all the cases where the exemption is claimed against construction of roads, none of the roads were/are constructed for utilization of transportation of general public and hence no exemption is available to the service provider as all roads constructed in such a manner are/were part of the composite contract used in installation / construction of the petrol pumps. The construction of drive way cannot be equated with the construction of road in as much as such driveway was/are not for public utility purpose but the same was/are in connection with the petrol pump owned by the owner.

3.3 M/s SCPL has also not submitted contracts for the period 2007-08 to 2011-12 till date, but they submitted some of invoices & ledgers etc. for the period from 2007-08 to 2010-11. However, the ledgers, invoices & contracts have not been submitted as desired in services related to "Works Contracts". As desired in the chapter of works contract, M/s SCPL has also not submitted the value of services and value of material supplied by them to the service receiver as it appears they have rendered services only pertaining to installation/construction of petrol pumps which are not to be classifiable under the category of "Works Contracts". M/s SCPL, vide their letter dated 12.10.12 submitted the certificates of VAT deducted at source by these companies but due to non inclusion of value of goods supplied free of cost they are not eligible to works contracts scheme. Thus it is clear that the service provider is deliberately classifying services pertaining to installation of petrol pumps as "works contracts" to evade the payment of service tax. The assessee had amended their ST-2 Certificate by addition of this category i.e. "Works Contracts" w.e.f. 09.12.2008 in addition to existing category of "Industrial & Commercial Construction" (w.e.f.28.10.2004) but they were showing the income in ST-3 Returns in the category of "Works Contract" from 2007-08 i.e. prior to taking the registration in this category (09.12.2008) to evade payment of service tax. The Board vide Master Circular no. 96/7/2007-S.T, dated 23.08.2007 has clarified that a service provider who paid service tax prior to 01.06.2007 for the taxable service, namely, commercial or industrial construction services/construction of complex services as the case may be, is not entitled to change the classification of the single composite services for the purpose of payment of service tax on or after 1.6.2007. In view of the above clarification, it is clear that M/s SCPL is not entitled to avail the composition scheme, as they did not exercise the option as per Rule 3(3) of Works Contract Rules, 2007 to avail the benefit of the composition scheme. In the present case M/s SCPL was rendering the services related to construction/installation of petrol pumps and paying the service tax by availing the benefit 67% abatement under the Notification No.01 /2006-ST dated 01.03.2006 under the category of construction of industrial & commercial construction prior to 09. 12.2008, hence the service provider is not entitled to change the classification to "works contracts" w.e.f 09.12.2008 under the composition scheme. Accordingly, the service tax is to be recoverable on the services rendered to construct the petrol pumps under the category of Erection, commissioning and installation of plant & machinery at normal/general rate of service tax (at the specified rate u/s 66 of Finance Act, 1994) on the gross amount received by the service provider) instead of 4% of the gross amount charged for the works contracts. Further, the benefit of the composition scheme cannot be extended to the party, as they have not opted for the composition scheme, as required under Rule, 3(3) of the "Works Contract" Rules, 2007 and also the issue has also been clarified by the Board vide para no.3 of the Circular No. 128/10/2010-ST dated 24.08.2010. This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract.

4. Whereas , on the basis of available documents/data & records which have been submitted by assessee and forwarded by the Deputy Commissioner (Anti Evasion), Central Excise Commissionerate, Jaipur-II vide their letter C.NO.V(16)94/AE/JP- 11/2008 dated 03.12.2008 , it is observed that the said service provider was registered with the department in the category of "Commercial and Industrial Construction services" w.e.f. 28.10.2004 which was amended later on 09.12.2008 by adding one more service in the category of "Works Contracts". They were filing ST-3 Returns for "commercial construction services" and "works contracts". On verification of the documents i.e. contracts forwarded by Jaipur-II Commissionerate & the invoices, it was noticed that they were/are engaged in providing the services of "construction and

erection, installation & commissioning services" relating to Petrol Pump for Bharat Petroleum Corporation Ltd. (BPCL) & others and paying the S.Tax after availing the abatement of 67% of gross income/value under the Notification No.15/2004-ST dated 10.09.2004. Notification 15/2004-ST dated 10.09.04 pertain to commercial construction services only. Subsequently, the service provider availed of benefit of Notification No. 01/2006-ST dated 01.03.2006 under category of Commercial or Industrial Construction. The services (installation/construction of petrol pumps) provided by the said service provider are covered under the category of "Erection, Commissioning and Installation of Plant, Machinery and Equipment".

5.1 The Board vide Circular No.62/11/2003-ST dated 21.08.2003 has clarified that the activities pertaining to installation of new Petrol Pump are covered under the category of "Commissioning and Installation of Plant, Machinery and Equipment" w.e.f. 01.07.2003. Further, the Notification No. 19/2003-ST dated 21.08.2003 provides that in case of contract, which involves the commissioning & Installation service along with supply of plant, machinery or equipment, service tax will be payable only on 33% of the gross amount/value charged for commissioning or installation and supply of plant, machinery or equipment. Accordingly, this notification for abatement was applicable only when plant, machinery and equipments are supplied by the service provider and the service provider also undertakes work of installation and commissioning of the same. Since the said service provider has not supplied such plant, equipment etc. such as storage tanks and petrol pumps, as M/s BPCL & others has provided the Tanks and petrol pump machines in all cases as clearly mentioned in the Memorandum of Agreement nos. JT/AGMT/2003-04/38 and JT/AGMT/2004-05/08 dated 02.06.2004 dated 10.02.2004 and 02.06.2004 respectively, forwarded by the Jaipur-II Commissionerate, that Tanks and Petrol pump are/were to be supplied by the BPCL Company, thus said service provider is not eligible for abatement of notification no.19/2003-ST dated 21.08.2003 and Notification No.01/2006-ST dated 01.03.2012. The issue has been clarified by DGCEI Instructions F.No.137/118/2007-CX.4 dated 13.11.2007 that if the gross amount charged does not include the value of goods & material supplied of provided or used by the provider of the construction service for providing such services, abatement is not available under this notification.

5.2. The CBEC vide para 2.6 of Circular No.59/8/2003-ST dated 20.06.2003 has also clarified that it is up to the service provider to show the breakup of commissioning or installation charges and in case service provider shows consolidated amount, service tax would be leviable on such consolidated amount and clarified in para no.14 of CBEC Circular No. 79/9/2004-ST dated 17.09.2004 that 'erection' service was also included in installation and commissioning services w.e.f.10.09.2004. Erection refers to the civil works of installation/commissioning of a plant or machinery; Erection involves civil works, which would otherwise fall under the category of construction services, however, in the case of composite contract for erection, commissioning and installation, the erection charges would be taxed as part of this category of service.

6. As per above it is clear that the service rendered by the said service provider for construction/installation of Petrol pumps are covered under the category of 'Installation and Commissioning of Plant, machinery and equipment since 01.07.2003 and under the category of "Erection, commissioning and Installation of plant, machinery and Equipment" since 10.09.2004. In both the cases, the relevant Notification for abatement was 19/2003-ST dated 21.08.2003. This notification was superseded by notification No.01/2006-ST dated 01.03.2006 vide which all such notifications for abatement were consolidated. As per this notification, abatement of 67% is available only when the service pertains to Erections, Commissioning, or Installation under a contract for supplying a plant, machinery or equipment and erection, commissioning or installation of such plant, machinery or equipment. Since in the present case there is no contract for supplying plant, machinery or equipment, these notifications are not applicable in this case.

6.1 Secondly, it is also noticed from the plain study of the composite contracts made between M/s SCPL the said service provider & M/s BPCL Company bearing nos. JT/AGMT/2003-04/38 and JT/AGMT/2004-05/08 dated 10.02.2004 and 02.06.2004 respectively, that M/s SCPL was

also awarded the work order for repairing of drive way, road lights, repairing of chambers, cleaning of canopy and toilets etc. These services are falling under the definition of "Repair and Maintenance". Accordingly the assessee is not also entitled to avail the benefit of abatement under Notification No. 15/2004-ST and 01/2006-ST because such abatements is not available to repair and maintenance services. Thus M/s SCPL ought to get registered under the category of "Repair & Maintenance services" and pay the service tax on the gross amount received without availing the abatement under above mentioned notifications. M/s SCPL has not submitted any Data/Income pertaining to 'Maintenance & Repair Services' despite of repeated reminders/summons till today.

6.2 Thus it appears that M/s SCPL was classifying the services wrongly to avail the 67% abatements under the above mentioned notifications to pay the service tax only on 33% of value by suppressing the facts as the services rendered by them relating to construction/Installation of Petrol Pumps is falling under the category of "Installation and Commissioning of plant, machinery and equipment" w.e.f 01.07.2003 / "Erection, Commissioning and Installation of Plant, Machinery and equipment" since 10.09.2004 instead of "commercial & Industrial Construction". Accordingly they have short paid the service tax as shown in Annexure "A" during the period from 2007-08 to 2011- 12 by showing the value in two categories i.e. (i) Commercial & Industrial Constructions" and (ii) Works Contracts.

7 It has been noticed on the basis of the documents i.e. Balance Sheet , P& L Account ,ST-3 Returns , Income Tax returns ,reconciliation , works contracts (only provided copies of two contracts as sample bearing nos..IT/AGMT/2003-04/38 and JT/AGMT/2004-05/08 dated 02.06.2004 dated 10.02.2004 respectively) and income ledgers/invoices etc. of the assessee for the period from 2007-08 to 2011-12 fiat M/S SCPL is mainly engaged into providing the taxable services pertaining to construction / Installation of petrol punk S which is falling in the category of "Installation and Commissioning of plant, machinery and equipment" w.e.f 01.07.2003/ "Erection, Commissioning al4d Installation of Plant, Machinery and equipment" since 10.09.2004" and "Maintenance & Repair Services" to their various clients mainly to M/s BPCL and various other clients (petroleum / other companies) but they have not got registered for these services till date. On the basis of all documents provided, work sheet is prepared showing Total Service Tax liability as mentioned in Annexure "A" .

7.2 Whereas it appears, that M/s SCPL had earned a total taxable Income of Rs.15,53,53,730/- during the period 2007-08 to 2011-12 on which service tax liability comes to Rs.1,69,45,738/- .They had shown taxable Income/Value in ST-3 Returns filed to the department to the tune of Rs.8,12,45,054/- and Rs.6,74,47,299/- in the category of "commercial & industrial construction" and "works contracts" respectively and paid total service tax of Rs. 97,73,308/- for the period from 2007-08 to 2011-12. Thus MIs SCPL appears to have short paid Service Tax to the tune of Rs.71,72,430/- for the said period.

8. Whereas, Section 65(105) (zzd) of the Finance Act, 1994 defines taxable service in relation to Commissioning and Installation of plant, machinery or Equipment effective from 01.07.2003 as under :-

"Taxable service" means any service provided to a customer, by a commissioning and installation agency in relation to commissioning and installation"

As per Section 65(39)(a) of the Finance Act,1994 the terms "Erection Commissioning and Installation" is defined as follows.-

"During the period 10.09.04 to 15.06.2005 "Erection, Commissioning or Installation" means any service provided by a commissioning and Installation agency in relation to Erection Commissioning or Installation of Plant, Machinery or Equipment;"

From 16.06.05, "Erection, Commission or Installation" means any service provided by a commissioning and Installation agency, in relation to-

(i) erection, commissioning or installation of plant, machinery or equipment or structures, whether prefabricated or otherwise; or

(ii) installation of—

(a) electrical and electronic devices, including wiring or fitting thereof; or

(b) plumbing, drain laying or other installation for transport of fluid; or

(c) heating, ventilation or air conditioning including related pipe work, duct work and sheet metal work; or

(d) thermal installation, sound installation, fire proofing of water proofing; or

(e) lift and escalates, fire escape staircases or travelators; or such other similar services.

8.1 Whereas, the ingredients of tire definition are as follow:- the service must be provided by commissioning and installation agency; the services should be in relation to commissioning or installation of plant, machinery or equipment (up to 10.09.04) and from 10.09.04 in relation to erection, commissioning or installation of plant, machinery or equipment, the definition stands amended so as to read as any agency providing the services in relation to erection, commissioning or installation. The agency can be partnership, company, proprietary firm, private or public company, charitable organization etc.

9. In clause 64 of Section 65 of the Finance Act, 1994 "Management, Maintenance or Repair" is defined as below: -

"Management, Maintenance or Repair" means any service provided by —

(i) any person under a contract or an agreement; or

(ii) a manufacturer or any person authorized by him, in relation to —

(a) management of properties, whether immovable or not;

(b) maintenance or repair of properties, whether immovable or not; or

(c) Maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle."

9.2 Under section 65(105) (zzg) of the Finance Act, 1994 the taxable service (management, maintenance or repair services) means any service provided or to be provided to any person, by any person in relation to management, maintenance or repair. The Service Provider had collected certain amount towards "Maintenance and Repair Services" but they have not submitted bifurcation of the data pertaining to income/value earned against the management, maintenance & repair services rendered to their various clients during the period from 2007-08 to 2010-11.

9.3 From the financial documents of Ws SCPL and clarification given in this regard during investigation, it appears that they were/are engaged in the activity of Maintenance & Repair work for the drive way, roads, lights, repairing of chambers, cleaning of canopy and toilet etc. as mentioned in the agreements submitted as sample bearing nos. JT/AGMT/2003-04/38 and JT/AGMT/2004-05/08 dated 02.06.2004 dated 10.02.2004 respectively, awarded to the service provider by MIs BPCL. The above mentioned activities of maintenance and repair work related to installation/constructions of petrol pumps appears to be taxable under the category of "Management, Maintenance or Repair Service" and on these service there is no abatement of 67% of the value available to the service provider as they have paid service tax on the value of management, maintenance & repair after availing the benefit of abatement notification No.01/2006-ST dated 01.03.2006. M/s SCPL has not produced the bifurcation related to this service and simply submitted that in case of composite contracts it is not possible to bifurcate the value/income service wise. Accordingly, in absence of bifurcation of the income of this service the quantification of the service tax is to be recovered from the service provider for the period from 2007-08 to 201 0-11 could not possible.

10. From the above, it appears that M/s Shilpa Construction Pvt.Ltd. is engaged in the business of providing the taxable service in the category of (1)"Installation and Commissioning of plant ,machinery and equipment" w.e.f 01.07.2003 "Erection, Commissioning and Installation of Plant ,Machinery and equipment" since 10.09.2004" (2) maintenance & Repair Service, and is liable to pay the service tax on the total taxable amount of consideration charged and received by

theirs. The total tax liability thereon comes to Rs.1,69,45,738/- details as mentioned in Annexure "A" to this Show Cause Notice. Further, it appears that the M/s SCPL not deposited the service tax in respect of above mentioned services and not got registered with the department for these services as they deliberately got registered in the category of "Industrial & commercial construction" and "works contracts" with an intent to evade payment of service tax. M/s SCPL has also provided the taxable services in the category of "maintenance & Repair Services" without taking Service Tax registration and not paying appropriate service tax payable under the said categories.

11. All the above facts on the part of M/s SCPL appear to have been committed by way of suppression of facts with intent to evade payment of service tax. M/s SCPL had deliberately not got registration under the category of "Installation and Commissioning of plant ,machinery and equipment" / "Erection, Commissioning and Installation of Plant ,Machinery and equipment" and 'Maintenance & repair Service" and not paid service tax on the aforesaid services which is required to be demanded as per Annexure A" and recovered front them under* the proviso to Section 73(1) of the Finance Act, 1994 by invoking extended period of five years. All these acts of contraventions of the provisions of Section 66, 67, 68,70 & 73A of the Finance Act, 1994 read with Rules 4, 5, 6 and 7 of the Service Tax Rules, 1994 appear to be punishable under the provisions of Section 76,77 of the Finance Act, 1994. Moreover, in addition to the contravention, omission and commissions on the part of M/s SCPL as stated in the foregoing paras, it appears that, they have 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.

12. Thus, it appeared that M/s Shilpa Construction Pvt. Ltd. , 41 , Payal Park, Satelite Road , Jodhpur Tekra , Ahmedabad have contravened the provisions of:

- (a) Section 69 of the Chapter V of the Finance Act, 1994, read with Rule 4 of the Service Tax Rules, 1994 in as much as the assessee have failed to take registration for taxable services provided by them in appropriate category;
- (b) Section 68 of the Chapter V of the Finance Act, 1994, read with Rule 6 of the Service Tax Rules, 1994 in as much as the noticee have failed to pay appropriate service tax by the prescribed due dates for the said services provided by them;
- (c) Section 70 of the Chapter V of the Finance Act, 1994, read with Rule 7 of the Service Tax Rules, 1994 in as much as they failed to assess the tax due on the services provided by them and furnish actual details of the value of taxable services rendered by them in the periodical returns submitted to the Service Tax department in respect of the said services provided by them.

13. Therefore a show cause notice F.No.STC/4-47/O&A/12-13 dated 22.10.2012 was issued to M/s Shilpa Construction Pvt.Ltd., 41, Payal Park, Satelite Road, Jodhpur Tekra, Ahmedabad by which they were called upon to show cause to the Commissioner of Service Tax, Ahmedabad having office at 1st floor, Central Excise Bhavan, Near Polytechnic, Ambawadi, Ahmedabad- 15 as to why;

- (i) The total value of Rs. 15,53,53,730/- received by M/s Shilpa Construction Pvt.Ltd., Ahmedabad against the services rendered falling under the category of (a) "Installation and Commissioning of plant ,machinery and equipment"/ "Erection, Commissioning and Installation of Plant ,Machine and equipment" and (b) "Maintenance & Repair Service", during the period 2007-08 to 2011-12 should not be considered as "taxable value".
- (ii) The service tax short paid amounting to Rs.71,72,430/- (As per Annexure "A) may not be demanded and recovered under section 73(1) of Finance, Act,1994 read with Section 68 of the Finance Act, 1994.

- (iii) Interest as applicable under Section 75 of the Finance Act, 1994 Oil total outstanding service tax amount as above should not be demanded from them.
- (iv) Penalty under Section 76 of Finance Act, 1994 of the Chapter V of the Finance Act should not be imposed upon them for failing to pay the service tax.
- (v) Penalty under Section 77(1)(a), 77(1) (c) (i) , (ii) & (iii) of the Finance Act, 1994 should not be imposed on them, in as much as they failed to take registration for (a) 'Installation and Commissioning of plant ,machinery and equipment"/>"Erection, Commissioning and Installation of Plant ,Machinery and equipment" and (b) "Maintenance & Repair Service" and for failure to self-assess the tax due on services provided by them.
- (vi) Penalty under Section 78 of the Act should not be imposed on them, for suppressing the value of taxable service with intent to evade the service tax.

DEFENSE SUBMISSION

14.1 M/s SCPL submitted defense by their letter dated 22.10.2012 wherein they, *inter alia*, submitted that the activity carried out was Commercial Construction and not of Erection and Commissioning. They submitted that the department has accepted that the work executed by them consisted of civil construction, building, flooring, roofing, sanitary electrical work, superstructure, fencing, piping, supply and laying of pipeline, valve etc and road work. Thus, M/s SCPL submitted that, the principal activity carried out by them are of civil construction along with putting up cylindrical underground tanks in masonry pit with RCC slab, which is an insignificant part of the total contract.

14.2 M/s SCPL submitted that by reading the definition of 'Erection, Commissioning and Installation', it is clear that the work executed by them did not fall under any of the category mentioned in the definition. They contended that putting of underground petrol tank cannot be regarded as installation of plant and machinery. They also submitted that the Circular No.62/11/2003-ST dated 21.08.2003 is in their favour as it talked about putting up a water tank by a plumber shall not be chargeable to tax under the said category. They also submitted that the said circular is redundant as the same is withdrawn w.e.f. 23.08.2007. M/s SCPL submitted that one can treat any activity as installation only if, after completion of the said work, such plant or machinery is ready for the ultimate usage which is not in their case and, therefore, the activity done by them cannot be regarded as installation. They submitted that in their own case, CESTAT has considered their activity as construction. They have also relied upon Circular No.59/8/2003-ST dated 20.06.2003.

14.3 M/s SCPL submitted that work carried out by them is classifiable under 'works contract'. They submitted that where a composite contract entered into involving material and services simultaneously and services are classified as 'works contract service'. M/s SCPL submitted that they had applied for the registration before paying the service tax under the said category. Moreover, works contract tax (VAT) has been deducted by the service receiver before making payment for the work conducted. As the main ingredient to fall under the 'works contract service' is to have a composite contract having both the elements of material to be sold and services to be rendered. Where these both the ingredients are present, the work has to fall under the said service.

14.4 M/s SCPL submitted that they had constructed road separately. In their own case, M/s SCPL submitted that, road work carried out of similar nature is treated as exempt by honourable CESTAT.

14.5 M/s SCPL submitted that free supply material is also exempt under 'works contract service' before 07.07.2009 as notification No.32/2007-ST was amended on 07.07.2009.

14.6 M/s SCPL also submitted that they never had intended to evade service tax liability by suppressing the facts. M/s SCPL submitted that the notice is time barred for F.Y 2007-08, 2008-09 and 2009-10 as suppression of facts to evade service tax is not involved.

14.7 M/s SCPL submitted that they are eligible for benefit of cum-duty valuation and benefit of Section 80 should be invoked.

15. In an addition written submission dated 10.07.2013, M/s SCPL submitted that the SCN was issued in vague manner. They relied upon the case of United Telecoms Ltd-2011-TIOL-56-CESTAT-BANG. They contended that the activity carried out is Commercial Construction and not of Erection and Commissioning. M/s SCPL has submitted that from 16.06.2005, the definition of Commercial and Industrial Construction service has been made wider enough to cover all the works of repair, renovation and reconditioning and hence disallowance of 67% abatement under the category of maintenance and repair service is wrong as they have availed abatement under the category of Construction of Commercial and Industrial service. They relied upon the case of Subhash Khandelwal & Sons-2011 (24) STR.461 (Tri-Del). M/s SCPL also submitted that as per the detailed description attached in earlier submission for the work executed for the year 2007-08 and 2008-09, it is evident that most of the work executed is of road work which is exempted. They further contended that the activity which is department strives to tax under repair and maintenance service is in the nature of works contract service.

PERSONAL HEARING

16. Shri Bishan Shah, Chartered Accountant jointed in the personal hearing virtually on 09.06.2022. He reiterated their submission made earlier. He also informed that he would send additional submission through e-mail. Accordingly, in their additional submission made through e-mail, M/s SCPL has made following points:

A. Activities carried out by the assessee are Works Contract service and not Installation & Commissioning of plant, machinery & equipment Or Maintenance & Repair service. The Assessee has relied upon the identical judgment pronounced in case of M/s Ram Sewak Tiwari [2022 (5) TMI 483] by CESTAT New Delhi.

B. Free supply of material is not required to be included while calculating Gross value of taxable services under 'Works Contract Services'. The same is affirmed in case of Hon'ble Supreme Court in case of Commissioner of Service Tax Vs. Bhayana Builders (P) Ltd [2018(10) GSTL 118(SC)]

C. Adjudication of the SCN is required to be done within 1 year/ 6 months from the Date of Notice. With this regards the Assessee relies on judgment pronounced in case of Sunder System Pvt Ltd Vs. UOI [2020(33) GSTL 621 (Del.)]

D. SCN is vague and incoherent.

DISCUSSION AND FINDINGS

17. I have carefully gone through the facts of the case on record and various submissions made by M/s SCPL. On recapitulating, I find that the issue involved in the present show cause notice is that M/s SCPL were engaged in providing the services of "construction and erection, installation & commissioning services" relating to Petrol Pump for Bharat Petroleum Corporation Ltd. (BPCL) and others and paid service tax after availing the abatement of 67% of gross income/value under the Notification No.15/2004-ST dated 10.09.2004. Subsequently, the service provider availed of benefit of Notification No.01/2006-ST dated 01.03.2006 under category of Commercial or Industrial Construction. The notice alleges that the services of installation/construction of petrol pumps provided by M/s SCPL are covered under the category of "Erection, Commissioning and Installation of Plant, Machinery and Equipment". Accordingly differential service tax has been demanded in the subject show cause notice.

18. The contentions raised by M/s SCPL against the allegations leveled in the subject show cause notice are that the activities carried out by them are Works Contract service and not Installation & Commissioning of plant, machinery & equipment or Maintenance & Repair service. They have submitted that free supply of material is not required to be included while calculating Gross value of taxable services under 'Works Contract Services'. They have also raised a point regarding adjudication of the SCN within 1 year/6 months from the date of Notice. They have also alleged that SCN is vague and incoherent.

19. On going through the subject show cause notice it is noticed that differential service tax has been demanded considering the entire income shown in the balance sheet as service of 'Erection, commissioning and installation service' after adjusting the service tax already paid by M/s SCPL. Thus, the moot question to be answered in the subject matter is whether the activity carried out by M/s SCPL is the service of 'Erection, commissioning and installation service' or otherwise.

20. Before going to the merits of the case it would be prudent to look into the circumstances under which the subject notice was caused to be issued. As mentioned at paragraph 1.2 of the show cause notice, an intelligence received from Jaipur-II Commissionerate vide letter C. No. 25/IAR/Gr.VI/JP-11/2007 dated 19.09.2008 of the Commissioner of Central Excise, Jaipur-II and letter C.No.CCO(JZ)ST/59/2008 dated 01.10.2008 of the Joint Commissioner, Central Excise, Jaipur Zone indicated that M/s Shilpa Construction Pvt. Ltd. Ahmedabad was providing taxable services in the category of (i) Civil Construction of Commercial and Industrial Buildings/Roads (ii) Erection, Installation & Commissioning relating to the petrol pumps for M/s BPCL, M/s HPCL & M/s IOCL for which they were registered with the department. They entered into written contract with all three service receivers. M/s SCPL was paying the service tax after availing the abatement of 67% under Notification.No.19/2003-ST dated 21.08.2003, Notification No.15/2004-ST dated 10.09.2004 and Notification No.01/2006-ST dated 01.03.2006.



21.1 In letter C. No. 25/IAR/Gr.VI/JP-11/2007 dated 19.09.2008 of the Commissioner of Central Excise, Jaipur-II addressed to Chief Commissioner, Central Excise, Jaipur Zone and letter C.No.CCO(JZ)ST/59/2008 dated 01.10.2008 of the Joint Commissioner, Central Excise, Jaipur Zone addressed to Director General, DGST, Mumbai it is mentioned that the Board vide Circular No.62/11/2003-ST dated 21.08.2003 has clarified that **the activities pertaining to installation of new Petrol Pump are covered under the category of "Commissioning and Installation of Plant, Machinery and Equipment" w.e.f. 01.07.2003**. The show cause notice, I observe, also reproduced the same at paragraph 5 of the show cause notice.

21.2 However, on going through the Circular No.62/11/2003-ST dated 21.08.2003, I could not find any such clarification to the effect that the activities pertaining to installation of new Petrol Pump are covered under the category of "Commissioning and Installation of Plant, Machinery and Equipment". The said Circular is reproduced below:

Circular No. 62/11/2003-S.T., dated 21-8-2003
F.No. B3/7/2003-TRU
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Miscellaneous issues relating to the services on which service tax has been imposed with effect from 1-7-2003.

1. Commissioning or installation :

1.1 Commissioning or installation of plant, equipment or machinery by a commissioning or installation agency, is chargeable to service tax. A doubt has been raised as to whether the services like a plumber putting up a water tank, fitting pipes and tubing, an electrician putting up electric wire and fittings, installation of booster motors, air conditioners, water filters, hand-pumps, water heaters etc. will be chargeable to service tax.

1.2 As commonly understood, the activity of installation means the act of putting an equipment, machinery or plant into its place and making it ready for use. The activity of installation will start after erection which would refer to putting up civil structures. Commissioning of a plant would mean operationalising an installed plant/equipment/machinery. In this backdrop it is clarified that putting up a water tank, piping, electric wiring, in a residential premises etc. would not be covered in the definition of taxable service and thus, would not be taxable. However, installing a booster pump, air-conditioner, water filter, water heater etc. would be covered in the definition and be taxable, as all these things are machinery or equipment.

1.3 Notification No.18/2003-Service Tax, dated 21-8-2003 has been issued which exempts commission or installation services provided by a commissioning or installation agency other than a commercial concern. Accordingly, the commissioning or installation services provided by an individual will be exempt from service tax.

1.4 Notification No.19/2003-Service Tax, dated 21-8-2003 has been issued which provides that in case of a contract which involves the commissioning or installation service along with supply of plant, machinery or equipment, service tax will be payable only on 33% of the gross amount charged for commissioning or installation and supply of plant, machinery or equipment. It is optional for the assessee to avail of this notification. It is emphasized under this notification that the gross amount (33% of which is chargeable to service tax) shall include the value of the plant, machinery, equipment, parts and any other material sold by the service provider along with the commission or installation service. The benefit of this notification can be availed for a contract only if the exemption under Notification No.12/2003-Service Tax, dated 20-6-2003 is not availed for that contract.

21.3 In view of the above, it appears that, some misrepresentation of facts was made in the said letters as there is no such clarification in the said circular that **installation of new Petrol**



Pump are covered under the category of "Commissioning and Installation of Plant, Machinery and Equipment".

22.1 Now, coming to the merits of the case, the question to be answered is whether the activity carried out by M/s SCPL is covered under the definition of 'erection, commissioning and installation' defined in the statute.

22.2 As per Section 65(39)(a) of the Finance Act, 1994 the terms "Erection Commissioning and Installation" is defined as follows:-

"Erection, Commission or Installation" means any service provided by a commissioning and Installation agency, in relation to-

- (i) erection, commissioning or installation of plant, machinery or equipment or structures, whether prefabricated or otherwise; or*
- (ii) installation of—*
 - (a) electrical and electronic devices, including wiring or fitting thereof; or*
 - (b) plumbing, drain laying or other installation for transport of fluid; or*
 - (c) heating, ventilation or air conditioning including related pipe work, duct work and sheet metal work; or*
 - (d) thermal installation, sound installation, fire proofing or water proofing; or*
 - (e) lift and escalates, fire escape staircases or travelators; or such other similar services.*

22.3 Section 65(105) (zzd) of the Finance Act, 1994 defines taxable service in relation to Commissioning and Installation of plant, machinery or Equipment effective from 01.07.2003 as under :-

"Taxable service" means any service provided to a customer, by a commissioning and installation agency in relation to commissioning and installation"

22.4 Thus, the ingredients of the definition are as follow:-

- (i) the service must be provided by commissioning and installation agency;*
- (ii) the services should be in relation to erection, commissioning or installation of plant, machinery or equipment.*

22.5 Thus the main ingredients that must be present in the provision of service are that the service must be provided by commissioning and installation agency and the services should be in relation to erection, commissioning or installation of plant, machinery or equipment. The show cause notice has relied upon two work orders/contract Nos. JT/AGMT/2003-04/38 and JT/AGMT/2004-05/08 dated 10.02.2004 awarded by M/s BPCL. However, the demand in the show cause notice has been made for the period 2007-08 onwards. Thus, effectively there is no evidence enclosed with the show cause notice to prove that the services provided by M/s SCPL during the period for which demand raised are in relation to erection, commissioning or installation of plant, machinery or equipment. In absence of any evidence made available in file to suggest that the service provide by M/s SCPL is erection, commissioning or installation of plant, machinery or equipment, I am unable to agree with the allegations raised in the show cause notice.



23.1 On going through the two work orders/contract Nos. JT/AGMT/2003-04/38 and JT/AGMT/2004-05/08 dated 10.02.2004 awarded by M/s BPCL to M/s SCPL, I find that the same are related to construction work where the principal activities involved are (1) Earth work & Excavation (2) Fencing (3) Construction work for building (4) Roofing & Ceiling (5) Door and Windows (6) Floor, Kota Stone and Tiles (7) White washing, distempering & painting (8) Road Work (9) Sanitation and water supply (10) Underground tank installation (11) Pipe fitting (12) Replacement of pumps (13) Fabrication of Emblem Pole (14) Electrical works (15) Cable and Cable Tray (16) Electrical Panel/Distribution Board and (17) Wiring work. Thus, I am of the considered opinion that the contract is an indivisible works contract for construction of civil structure and it, in no way, can be termed as a contract from erection, commissioning or installation service as alleged in the show cause notice. I find that in Jaipur Commissionerte, from where the intelligence was passed on, show cause notice in identical situation was issued to M/s Ram Sewak Tiwari, Sodala, Jaipur vide show cause notice C. No.V(H)ST/Adj-I/84/2009 dated 23.04.2009 and the same was decided by OIO No.43/ST/JPR-I/2010/ADC dated 29.07.2010 and further an OIA No.187 (DKV) ST/JPR-I/2011 dated 09.05.2011. The department as well as the assessee has filed appeal against the said OIA and by Final Order No.58096-58097/2017 dated 10.11.2017, CESTAT has held as under:

"6. We note that similar type of contracts with reference to setting up of retail petrol pumps have come on many occasions for decision before the Tribunal. It has been consistently held that these contracts are to be held liable for service tax under works contract service only. Considering the nature of contract in the present case also, we hold that these are to be taxed as works contract service w.e.f 01.06.2007. We note that the impugned order split up the single contract only based on the bill rates and the detailed invoices raised. WE find such bifurcation is not sustainable. The appellant carried out the composite work order through the bills are raised based on the completion of the work category-wise giving different account codes to various types of works. This itself cannot be considered as different services provided to the clients...."

23.2 In the above order CESTAT has held that contracts for setting up of retail petrol pumps are to be held liable for service tax under works contract service only. In the present case also M/s SCPL had carried out civil construction work as discussed in the foregoing paragraph. They have discharged the service tax liability accordingly. As such, the present show cause notice demanding service tax under the category of 'erection, commissioning or installation service' is not sustainable. I also find that Hon'ble Tribunal in the case of *Subhash Khandelwal & sons-2011 (24) S.T.R. 461 (Tri. - Del.)* has held similar view in identical situation. The tribunal held as under:

5. As is clear from the above, there is a finding by the adjudicating authority that the appellant has undertaken the work required for pre-commissioning of petrol pump. The definition of 'commissioning and installation' reveals that the same takes into ambit the services provided in relation to commissioning or installation of plant and machinery or equipment and not completing the job for pre-commissioning. Inasmuch admittedly the appellants have done civil construction necessary for a petrol pump where the machines have to be installed, it cannot be said that they have themselves undertaken the services falling under the category of commissioning and installation. As such, the confirmation of service tax against them is neither justified nor warranted.



23.3 Also, in the case of *Nanawat Construction Co.-2017 (52) S.T.R. 280 (Tri. - Del.)*, it is held as under:

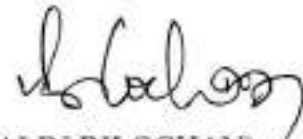
4. We find that an identical dispute was the subject matter of the Tribunal's order in the case of CCE, Bhopal v. Sonali India - 2014 (34) S.T.R. 47 (Tri.-Del.) and in identical facts and circumstances of the case, the Tribunal observed, by following a pre decision in the case of Bhayana Builders (P) Ltd. v. CST, Delhi - 2013 (32) S.T.R. 49 (Tri.-LB) that value of free supply items like pumps and tanks cannot be considered towards value. Similarly in the case of Subhash Khandelwal & Sons v. CCE, Jaipur-I - 2011 (24) S.T.R. 461 (Tri.-Del.) it was held that civil construction work such as erection of FRP tanks etc., necessary for a petrol pump where machines need to be installed is mere pre-commissioning and nowhere includes any installation or commissioning of any plant, machinery or equipment so as to invite Service Tax liability.

23.4 In view of the consistent and clear ruling of CESTAT, I hold that the work carried out by M/s SCPL cannot be considered as 'erection, commissioning or installation of plant, machinery or equipment' but it is 'works contract service'. According to the show cause notice itself (paragraph 3.3) they were showing the income in ST-3 Returns in the category of "Works Contract" from 2007-08. Thus, the payment of service tax by M/s SCPL is in consonance with the decision of Hon'ble Tribunal as referred to above. Thus, the proposition in the subject show cause notice to levy service tax under the category of 'erection, commissioning or installation of plant, machinery or equipment' would not stand scrutiny by law and accordingly I am obligated to follow the judicial discipline set by the above mentioned decisions of Tribunal.

24. In view of the above discussions and findings, I pass the following order.

ORDER

I drop the proceedings initiated vide show cause notice F.No.STC/4-47/O&A/12-13 dated 22.10.2012 against M/s Shilpa Construction Pvt.Ltd. 41, Payal Park , Satellite Road, Jodhpur Tekra, Ahmedabad.



(NALIN BILOCHAN)
Joint Commissioner
CGST, Ahmedabad South.

F.No.STC/04-47/O&A/2012-13

Date: 13.09.2022

To
M/s Shilpa Construction Pvt.Ltd.
41, Payal Park , Satellite Road,
Jodhpur Tekra, Ahmedabad

Copy to:

- (1) The Principal Commissioner, Central Goods and Services Tax, Ahmedabad South, Ahmedabad.
- (2) The Deputy/Assistant Commissioner, CGST, Division- VII, Ahmedabad South.
- (3) Deputy/Asstt. Commissioner (TAR), CGST, Ahmedabad South
- (4) The Superintendent Range- I, CGST, Division- VII, Ahmedabad South
- (5) The Superintendent (System), CGST, Ahmedabad South.
- (6) Guard file.