CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

SERVICE TAX Appeal No. 10275 of 2022

[Arising out of OIO-BVR-EXCUS-000-COMM-14-2021-22 dated 02/03/2022 passed by Commissioner of Central Excise, Customs and Service Tax-BHAVNAGAR]

KRISHNA CONSTRUCTION CO **.....Appellant**
1SadhanaSocietyDevbaug
Bhavnagar
Gujarat

VERSUS

C.C.E. & S.T.-BHAVNAGAR **.....Respondent**
Plot No.6776/B-1...Siddhi Sadan,
NarayanUpadhyayMarg,
BesideGandhiClinic,
NearParimialChowk,
Bhavnagar,
Gujarat- 364001

APPEARANCE:
Shri P P Jadeja, Consultant for the Appellant
Shri. Dharmendra Kanjani, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A / 10973 /2022

DATE OF HEARING: 12.07.2022

DATE OF DECISION:12.08.2022

RAMESH NAIR

This appeal is directed against the impugned Order-in-Original No. BVR-EXCUS-000-COMM-14-2021-22 dated 02-03-2022, passed by the Principal Commissioner, Central Excise, Bhavnagar, wherein a total Demand of Service Tax Rs. 1,59,56,741/- has been confirmed with interest and

penalties on the Appellant for his alleged Services provided to Railways during the period from F.Y. 2014-15 to 2017-18 [upto 30-06-2017].

2. Brief facts of case are that M/s Krishna Construction Co, Bhavnagar is Appellant, holder of Income Tax PAN- AACFK2418A, engaged in Commercial or Industrial construction and provided services to Railways. Income Tax authorities shared data of the Income shown by Appellant in Income Tax Returns filed from time to time. Perusing said data shared by Income Tax authorities, Central Excise officers at Bhavnagar noticed that Appellant had not paid Service Tax of Rs.3,61,66,662/- from the years FY 2014-15 to 2017-18 [upto 30-06-2017]. Superintendent of Central Excise, Bhavnagar requested Appellant to provide details of Income receipts and to submit documents related to Service Tax paid, which was not responded by Appellant. Therefore, Show Cause Notice No. V/15-36/DEM/HQ/2020-21 dated 21-09-2020 demanding total Service Tax of Rs.3,61,66,662/- was issued. Appellant participated in adjudication proceedings, submitted documents and objected total demand of Service Tax. However, impugned Order-in-Original No. BVR-EXCUS-000-COMM-14-2021-22 dated 02-03-2022 confirmed demand of Rs. 1,59,56,741/- with interest and imposed penalties and also dropped total Service Tax demand of Rs. 2,02,09,921/-. Therefore, the said Appellant is before this Tribunal in Appeal.

3. Shri P. P. Jadeja, Learned Authorized Representative, appearing for the Appellant submits that demand confirmed in this O-I-O is not sustainable. He submits that Appellant have provided the services to Western Railway, which is a part of Ministry of Railway i.e. "Government". Indian Railways are operated under the Railways Act 1989 and Service Tax exemptions are also available to the Services provided by and to the Indian Railways. Appellant has not provided services to any other person except

Railways. The services provided to Government are exempted. Appellant was under bona fide belief that similarly placed other parties providing services to Railways were neither registered nor paying Service Tax and they are not liable to Service Tax. Under such bona fide belief, Appellant had not obtained the Service Tax Registration and genuinely believed that they are also not liable to pay Service Tax.

3.1 He also submits that the levy of Service Tax under relevant Section 65(25b) of Finance Act 1994 is clearly to levy Service Tax on Commercial or Industrial construction service. Such Commercial or Industrial construction of building or structure in respect of "railways" is excluded from the scope of levy of such Service Tax. The provision for levy has stipulated that Commercial or Industrial construction service does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Thus, he submits that services to Railways were in exclusion clause from the levy of Service Tax, otherwise attached to 'commercial or industrial construction service'.

3.2 He submits that for issuance of SCN for Service Tax demand, Revenue has relied upon Data/TDS/26AS shared by Income Tax authorities. He further submits that it is settled principal in law that Service Tax demand cannot be raised on the basis of assessment by Income Tax Authorities. Thus, the entire demand of Service Tax confirmed with interest and Penalty deserves to be set aside on this ground alone. He has also relied upon the following decisions to support his submission :-

- 2008 (10) S.T.R. 578 (Tri. - Bang.)- Synergy Audio Visual Workshop P. Ltd vs CCE
- Wooding Consulting Ltd. Vs. CCE, Indore 2007 (7) S.T.R. 411 (Tri. - Del.)

- CCE Jaipur-I Vs. Tahal Consulting Engineers Ltd. – 2016(44) S.T.R. 671 (Tri. Del)
- CESTAT Order No. A/10270-10275 / 2022 dated 17-03-2022 in Service Tax Appeal No. 10599 of 2021-DB filed by Appellant M/s J.P. ISCON PVT LTD
- CESTAT Order No. A/ 10804 /2022 dated 15-07-2022 in Service Tax Appeal No. 10027 of 2020 filed by Appellant M/s SHRESTH LEASING & FINANCE LTD
- CESTAT Order in FORWARD RESOURCES PVT LTD
- CESTAT Order in VATSAL RESOURCES PVT LTD

3.3 Without prejudice to the above submissions, he submits that the Order is beyond scope of SCN. Demand of Service Tax confirmed is under specific activity heads in Order dated 02-03-2022, which are neither specifically mentioned nor proposed in Show Cause Notice dt. 21-09-2020. It is settled that Show Cause Notice is foundation of any case by Revenue and adjudication order beyond such SCN cannot be sustained, which is the settled law by plethora of decisions.

3.4 He also submits that O-I-O dated 02-03-2022 has not correctly appreciated fact that Appellant has provided services only to Government (Indian Railways), which have exemption under Notification No. 25/2012-ST dt. 20-12-2012**.** Appellant submit that adjudicating authority has confirmed demand of Service Tax on finding that services to Railways were not related to Original works. Appellant has given detailed clarification for their activities in Appeal where Service Tax demand is confirmed. Appellant is eligible for exemption under Sr. No. 12 of Notification No. 25/2012-ST, which allows exemption to the Repair and Maintenance of a civil structure of Government. The services of Appellant were to India Railways (Western), which is a part of Central Government and such Repairs and Maintenance of civil structure of

Railways meant predominantly for use other than for commerce, industry, or any other business or profession. Appellant is eligible for said exemption. Hence, the demand of Service Tax for total amount of Rs. 1,59,56,741/- confirmed by adjudicating authority deserves to be set aside and Appeal filed by Appellant deserves to be allowed in this case.

3.5 He submits that Appellant is not likely to receive any other amounts towards Service Tax from Indian Railways who have made payments of services long back and Appellant has closed books of accounts. The received amount has to be treated as "Cum-tax-value"**,** in terms of Section 67(2) of Finance Act 1994, even if service tax is held to be payable**.**

3.6 He submits that Appellant believed that all services provided to Indian Railways are exempted and no similar contractors pay Service Tax. Under such bona fide belief, Appellant had not obtained Service Tax Registration and genuinely believed that they are not liable to pay Service Tax. Since this issue involved is interpretation of provisions, extended period cannot be invoked, in absence of mala fide intention to evade Service Tax for initiation of SCN beyond normal period. Show Cause Notice dated 21-09-2020 for demand of Service Tax from F.Y. 2014-15 to 2017-18[30-06-2017] is issued invoking extended period beyond normal period. No evidence of mala fide intention to evade Service Tax brought on record by Revenue to initiate SCN invoking extended period. The law on invocation of such extended period is settled. He relied upon the Hon'ble Supreme Court's decisions in the cases of Padmini Products-1989 (43) ELT 195 (SC)**,** Chemphar Drugs & Liniments - 1989 (40) ELT 276 (SC), H.M.M. Limited – 1995 (76) ELT 497 (SC).

3.7 He submits that Penalties imposed on Appellant are not justified, in absence of mala fide intentions to evade payment of Service Tax, which is not brought on record through any clinching positive evidences.

4. On the other hand appearing on behalf of the Revenue, Shri Dharmendra Kanjani, Superintendent (Authorised Representative) reiterates finding of impugned Order and submits that although, SCN dt. 21-09-2020 was issued only on the basis of data shared by Income Tax Authorities, but, it is not correct to say that confirmation of demand by adjudicating authority is only on the basis of said shared data. Appellant have also filed their own documents related to services provided by them during adjudication proceedings of SCN and hence adjudicating authority has rightly passed this Order-in-Original. He submits that the classification of service is not relevant after 01.07.2012. He submits that activities for which demand is confirmed by adjudicating authority are not covered under the exemption Notification No. 25/2012-ST. He submits supply of manpower for cleaning Railway station and manage unmanned Railway crossing by **"**Gate Mitra**"** was only cleaning service and supply of manpower service, which are not eligible for exemption under Notification No. 25/2012-ST. He also Submits to uphold impugned O-I-O.

5. Heard both sides and perused the relevant records of the case. We find that in the facts of this case, the issue requiring our consideration is whether the demand of Service Tax as confirmed with Interest and penalties by the Adjudicating Authority is sustainable or otherwise. We find that there is no dispute on the facts on either side that Appellant have provided services to Western Railway, which is a part of the Ministry of Railway i.e. "Government" and that Appellant has not provided services to any person except Railways. We also note that after issuance of SCN dated 21-09-2020, Appellant has also participated in the adjudication proceedings conducted and have made submissions along with documents of Income Tax Returns, their work orders issued by Indian Railways and their other financial records including profit & loss accounts etc with a prayer to drop the Service Tax demand in this case, issued unduly invoking extended period for demand.

5.1 We find that the Adjudicating Authority has confirmed demand of Service Tax for the period from F.Y. 2014-15 to 2016-17 as under :-

Item of Work	**2014-15 (Rs)**	**2015-16 (Rs)**	**2016-17 (Rs)**	2017-18 **(Rs)**	**Total**
W R Contract Income	0	0	26,94,777	**0**	26,94,777
WR P Way maintenance Labour	1,39,68,321	7,19,96,874	2,08,98,393	**0**	10,68,63,588
Cleaning of Station	2,47,171	0	0	**0**	2,47,171
Flash Butt Welding	17,89,512	0	0	**0**	17,89,512
Total Rs.	1,60,05,004	7,19,96,874	2,35,93,175	**0**	11,15,95,053
Rate of Service Tax	**12.36 %**	**14.5 %**	**15 %**		
Total Liability of Service Tax Rs.	19,78,218	1,04,39,547	35,38,976	**0**	1,59,56,741
Total Service Tax confirmed Rs.	**1,59,56,741**				

The impugned O-I-O dated 02-03-2022 has confirmed the demand only on the finding that the above services were not related to the "Original works" as referred to in Notification No. 25/2012-ST, considering availability of such exemption under Sr No. 14 of the said Notification No. 25/2012-ST. Therefore, we examine the submissions raised on behalf of the Appellant in this regard one by one as under :-

5.2 On behalf of Appellant it is submitted that without conducting any independent inquiry or investigation, demand of Service Tax is not sustainable only on the basis of document or information or data provided by Income Tax authorities to Central Excise Officers. Service Tax demand cannot be raised on the basis of assessment by Income Tax Authorities. We find that there is no dispute on fact that in this case Show Cause Notice proposing demand of Service Tax, Revenue has solely relied upon Data/TDS/26AS declared by Appellant in their Income Tax Returns for the FY 2014-15 to 2016-17, which are shared by Income Tax authorities. Declarations under Income Tax Act

1961 are Annual Consolidated Tax Statements. Income Tax and Service Tax are two different & separate and independent special Central Acts and their provisions are operating in two totally different and independent fields. By relying on 26AS/TDS Statement/ 3CD statement under the Income Tax Act 1961, demand of Service Tax cannot be made. We note that Tribunal Decision in case of Synergy Audio Visual Workshop Pvt Ltd V/s C.S.T. - **2008 (10) S.T.R. 578 (Tri. - Bang.)**, has held as under:

> *"The other ground is for confirming demands is that the appellants had shown certain amounts due from the parties in their Income Tax returns and Revenue has proceeded to demand Service Tax on this amount shown in the Balance Sheet. The appellants have relied on large number of judgments which has settled the issue that amounts shown in the Income Tax returns or Balance Sheet are not liable for Service Tax. In view of these judgments, the appellant succeed on this ground also. The impugned order is set aside and the appeal is allowed."*

The Tribunal in the case of Calvin Wooding Consulting Ltd. Vs. CCE, Indore reported in 2007 (7) S.T.R. 411 (Tri. - Del.) has also held as under:

> *"21. The liability of the recipient cannot arise merely from the fact that, the income-tax was deducted at source, which was the requirement of the Income-tax Act, on the recipient who made payment to the foreign supplier. Such a statutory requirement, as exists under the Income-tax law on the person making the payment to deduct tax at source, as a tax collecting agency of the Revenue, does not exist under the provisions of the Service Tax law, and no obligation was cast upon the recipient of the service to make any deduction from the amounts payable by way of consideration, under the statutory provisions. Authorization to pay Service Tax under a contractual arrangement which obliged the recipient to pay the tax and file return, was a matter distinct and different from a statutory obligation to make tax deduction as a collecting agency, as envisaged under the Incometax law. The Commissioner (Appeals) has, therefore, rightly set aside the orders-in-original insofar as respondent of Service Tax Appeals Nos. 170, 171 and 173 of 2005 was concerned."*

The Tribunal in case of CCE. Jaipur-I Vs. Tahal Consulting Engineers Ltd. – **2016(44) S.T.R. 671 (Tri. Del)** has also held that demand of Services Tax on the basis of TDS /26AS statements/ 3CD Statements are not sustainable. Such a similar view is also taken by this Tribunal at Ahmedabad vide the following decisions :-

- Order No. A/10270-10275/2022 dt. 17-03-2022 in Appeal No. ST/10599/2021-DB filed by M/s J.P. ISCON PVT LTD
- Order No. A/10804/2022 dated 15-07-2022 in Service Tax Appeal No. ST/10027/2020 filed by M/s SHRESTH LEASING & FINANCE LTD. Similar view is taken in
- Order dated 15-07-2022 in case of M/s Forward Resources Pvt Ltd,
- Order dated 15-07-2022 in case of M/s Reynolds Petro Chem Ltd, and
- Order dated 15-07-2022 in case of M/s Vatsal Resources Pvt Ltd,

In the above decisions, it is consistent view that demand of Services Tax on the basis of shared data of TDS/26AS/3CD Statements are not sustainable. We note that it is settled that Service Tax demand cannot be raised only on the basis of any such assessment made by the Income Tax Authorities. Information or data or documents relied upon loses its evidentiary value in absence of any independent inquiry which was mandatorily required to have been conducted by concerned officers of Central Excise department at Bhavnagar, before issuance of the Show Cause Notice dated 21-09-2020. Further the data provided by the Income Tax Authorities does not appear processed in terms of the Section 36A or 36B of Central Excise Act 1944, made applicable in Service Tax matters by section 83 of Finance Act 1994. Section 36A and 36B of Central Excise Act 1944 clearly provide a safety net before use of the electronic data or computerized documents. In this case, provisions of Section 36A and Section 36B does not appear satisfied as conditions imposed does not appear followed by Central Excise department. Hence, shared data by Income Tax department cannot be used against Appellant without independent inquiry/investigation carried by the Revenue. Therefore, demand of Service Tax confirmed with interest and Penalty by the adjudicating authority also deserves to be set aside on this ground.

5.2 As regards, Order beyond SCN, it is submitted on behalf of the Appellant that Demand of Service Tax confirmed is under specific activities in impugned order dated 02-03-2022, which are not specifically proposed in Show Cause Notice dated 21-09-2020. We also note that it is settled that Show Cause Notice is the foundation in case of revenue for the levy and the recovery of duty or Service Tax. It is settled that for building any such case, revenue has to consolidate all their points against Noticee and incorporate in Show Cause Notice and to provide opportunity to Noticee to defend their case in compliance to the principles of natural justice. It is settled that orders beyond scope of SCN are not sustainable in law. In facts of this case, Show Cause Notice dated 21-09-2020 has undisputedly been issued only on the basis of Data shared by Income Tax Authorities, without any reference or any details of actual services provided by Appellant. When Service Tax is demanded on alleged services by SCN, it is obligation of Revenue to show that appellant had rendered services to customers with positive evidences. In the present case, department failed to do so. Further, we do not agree with submission of Ld. Departmental representative that classification of service is not relevant/important after 01.07.2012. In the present case, demand was raised without reference of any specified or declared Services. Section 65B(44) has provided definition of "Service", but, various services are placed in "Negative list" under Section 66D, not attracting Service Tax and there are Services which were allowed Exemptions from Service Tax under Notification No. 25/2012-ST and many such other Notifications issued. Therefore, the very foundation of allegation in SCN has to be with reference to specific categories or classification of alleged Service(s) for demanding Service Tax on the Taxable value determined under the Finance Act, 1994. It is impermissible under law to issue any baseless SCN on assumption or presumptions and later on in adjudication the allegation can be improvised. In facts of this case, when Appellant did not respond to communication issued by Superintendent of

Central Excise, the law has provided unlimited powers to Central Excise officers to search premises of Appellant and seized documents and collect evidences before issue of SCN to frame appropriate charges against the Appellant and conduct appropriate inquiry on evasion of Service Tax by the Appellant. In this case, the department has chosen not to exercise such unlimited powers to establish case of evasion of Service Tax. It was necessary for the Department to specify the activity and the nature of service that was to be taxed and for this it was necessary for the Department to point out how the activity of Appellant is covered under which specific clause of services described in Finance Act 1994. Following case laws substantiate view that Show cause notice is the foundation in the matter of levy and collection/recovery of duty, penalty and interest; Revenue cannot argue case not made out in show cause notice and; that Department cannot travel beyond show cause notice and that party to whom Show Cause Notice is issued must be made aware of allegations made against it and that this is a mandatory requirement of natural justice. Unless Appellant is put to such specific notice, he has no opportunity to meet the case against him:-

- 2006 (201)ELT-513(S.C.) - *CC* v. *Toyo Engineering India Ltd.*
- 2007 (215)ELT-489(S.C.) - CCE v. Ballarpur Industries Ltd.
- 2008 (232)ELT-7 (S.C.) - CCE v. Gas Authority of India Ltd.
- 2009 (241)ELT-481(S.C.) - CCE v. Champdany Industries Ltd.
- 2016(334)ELT-577(SC)-Precision Rubber Industries (P) Ltd v/s CCE
- 2018 (10) GSTL- 479 (Tri. - Mumbai) - Swapnil Asnodkar
- 2011 (22) STR- 571 (Tribunal)-United Telecoms Ltd.
- 1997 (94) ELT- 289 (S.C.) -Kaur & Singh v. C.C.E., New Delhi -

5.3 The aforesaid decisions clearly hold that it is imperative for Revenue to specify under which services an activity is covered and in absence of any specific service pointed out in any such Show Cause Notice, demand

cannot be confirmed as Noticee will not be made known as to which precise service has been rendered by him. There is no authority in law to improvise defective SCN by the adjudication Order, because in that situation such Order would be the order beyond the scope of SCN, which is not sustainable in the settled law. Therefore, this impugned Order-in-Original is also beyond the scope of SCN and deserves to be set aside on this ground also.

5.4 We also find that impugned O-I-O dated 02-03-2022 has not appreciated facts that Appellant has provided services only to Government i.e. to Railways, which has exemption under Mega Exemption Notification No. 25/2012-ST dt. 20-12-2012 [Sr.No.12]**.** The adjudicating authority has confirmed the demand of Service Tax for FY 2014-15 to 2016-17 as shown in above para. The O-I-O dated 02-03-2022 has confirmed the demand only on finding that the above services were not related to "Original Works". Appellant has given detailed clarification for the said services in Appeal and submitted that they are eligible for exemption under Sr. No. 12 of the said Exemption Notification No. 25/2012-ST. Therefore the relevant Sr. No. 12 of the said Notification No. 25/2012-ST dated 20-6-2012, which has provided such exemption has been reproduced as under :-

> **"12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -**
>
> **(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;"**

5.5 Now, we examine the activities on which Service Tax has been confirmed by adjudicating authority vis-à-vis availability of exemption :-

(i) "**W R Contract income" :-** The adjudicating authority has confirmed Service Tax demand of Rs. 4,02,217/- @ 15 % on the total amount of

Rs. 26,94,777/-, shown as "Gate Mitra Income" in Profit & Loss account against Western Railway Contract Income for the year 2016-17. Adjudicating authority has noted that scope of work done by Appellant for this contract is of posting of Gate Mitra on vulnerable unmanned level crossing on SUNR-LMO section of SSE(PW) WC & DLJ and LMO-PPVS&RLA-MHV sections for 12 months. Adjudicating authority has treated this activity as 'Manpower Recruitment supply/Agency service'. Therefore, O-I-O has held that Appellant is liable to pay service tax on this activity and denied exemption under Notification No. 25/2012-ST. Appellant has submitted that they are not engaged into providing any manpower only as a "Manpower Recruitment Agency/supply service" and that their contracts were to maintain unmanned railway crossings. We find this activity is services of Maintenance of unmanned crossing of Indian Railways. Activities performed by Appellant under contract was to maintain unmanned Railway crossings primarily for safety. Therefore, activity by Appellant is not supply of manpower as such, but, it is maintenance of unmanned railway crossings, which is covered under the ambit of Maintenance of the unmanned Railway crossings. We also find that Maintenance Service is defined to mean any service provided by any person under contract or agreement in relation to maintenance of properties, whether immovable or not, excluding a motor vehicle. Appellant is neither supplying manpower nor appellant is 'engaged' in rendering services of supply of manpower as such. Therefore, Service Tax could not have been confirmed as maintenance service is exempted as per serial No.12 of Notification NO.25/2012-ST dated 20/06/2012. Hence, for activity of maintenance of unmanned Railway crossings, Service Tax @ 15 % equal to Rs. 4,02,217/- on the Taxable value of Rs. 26,94,777/- is not recoverable from Appellant.

(ii) **"WR P Way maintenance Labour"** :- The adjudicating authority has confirmed Service Tax demand for Rs. 1,53,00,790/- on total amount of Rs. 10,68,63,588/-, which has been shown in their Profit & Loss A/c. The adjudicating authority has given findings in O-I-O dt. 02-03-2022 with reference to work orders that the activity of Appellant is permanent way maintenance, under which they have to inspect railway tracks and have to perform normal routine maintenance of Railway Tracks. Amounts received for service are shown in Profit & Loss account. O-I-O dt. 02-03-2022 has noted that work orders are for yearly maintenance of Railway Tracks. The scope of work is to inspect Railway track and to perform normal routine maintenance work on existing rails/tracks viz removing, fastening, lubrication of ERC, Cleaning of grass, over hauling of LCs, carting of rails. Adjudicating Authority has denied exemption as it is not related to "Original work" of construction, erection, commissioning, or installation pertaining to the Railways. Appellant has submitted that they are eligible for exemption under the Sr. No. 12 of the said Notification No. 25/2012-ST which provided such exemption for such Maintenance. We find this activity is services of Maintenance of the Railway Tracks, beyond doubt. Therefore, activity by Appellant is maintenance of railway tracks, which is covered under the ambit of Maintenance of Railway tracks. Therefore, Service Tax could not have been confirmed as this service is Maintenance of Railway Tracks only and it is undoubtedly exempted under the serial No. 12 of the Notification NO.25/2012-ST dated 20/06/2012.

(iii) **"Cleaning of Station**" :- The adjudicating authority has confirmed Service Tax of Rs. 30,530/- **@** 12.36 % on amount of Rs. 2,47,171/-, which is shown as "Cleaning of Station Income" in Profit & Loss accounts for FY 2014-15, carried out against contract dt. 01-07-2011. The O-I-O

has held that Appellant has provided service of cleaning of station during F.Y. 2014-15 which is liable to Service Tax and O-I-O has confirmed Service Tax demand. Appellant submitted that they have provided service to Railways for Maintenance of Station by way of picking rags etc which is Maintenance by cleaning of Railway Station. Cleaning of Station is included in the activity of Maintenance of station. We also note that Services of maintenance including maintenance or repair of properties, whether immovable or not were introduced w.e.f. 01-07-2003 by the Notification No. 7/2003-ST dated 20-06-2003 and "Cleaning Services" of commercial or industrial buildings and premises thereof were introduced w.e.f. 16-06-2005 by Notification No. 15/2005-ST dated 07-06-2005. Services of "maintenance or repair" is covered u/s 65(105)(zzg) of Finance Act 1994 w.e.f. 01-07-2003 whereas the activity of "cleaning Service" is covered under Section 65(105)(zzzd) of the Finance Act 1994 w.e.f. 16-06-2005. However, "Cleaning Service" covers commercial or industrial buildings and premises thereof or factory, plant or machinery, tank or reservoir of such commercial or industrial buildings and premises thereof. But, Railway stations are also not commercial or industrial buildings, covered under the ambit of "Cleaning Service". Accordingly, activity of Appellant of picking rags etc is not cleaning service but it is covered under Maintenance of Railway Station. Therefore, the said activity will merit classification under maintenance of the Railway Station service, in terms of Section 65A of Finance Act 1994 and Budget Circular No.334/4/06-TRU dt. 28-02-2006 which is eligible for exemption under the Sr. No. 12 of Notification No. 25/2012-ST. Accordingly, demand of Service Tax on amount of Rs.2,47,171/-, attracting total amount of Service Tax Rs. 30,530/- deserves to be set aside and we do so.

(iv) "**W R Grinding FB welding":-** The adjudicating authority has confirmed Service Tax of Rs. 2,21,184/- @ 12.36 % on the amount of Rs. 17,89,512/-, which is shown as "Grinding FB Welding Income" in Profit & Loss accounts for FY 2014-15. As per impugned O-I-O, Appellant have only provided the service of Grinding of Flash Butt (Electric Resistance) Welding service to Western Railway under which Appellant carried out work of Grinding of rails on a flash butt welding, programmed welding sequence for welding of the rail joints during the F.Y. 2014-15 and the total amount of Rs.17,89,512/- has been received for it which is shown as "WR Grinding FB is welding". There is no detailed discussion in O-I-O regarding nature of process undertaken and nature of welding carried out on Rails/Railway Tracks. This Activity in our view is only Repairs & Maintenance. The work was carried out as per Tender floated on 25-04-2012 and it has to be treated as Repair and Maintenance of Railway Track only. Therefore, such Grinding Flash Butt (Electric Resistance) Welding activity on the Rail Tracks of Western Railway under which Appellant have carried out work during F.Y. 2014-15 is nothing but Repairs and Maintenance of Railway Tracks. Thus, contract was for work for maintenance, repairs, which is exempted under Sr No. 12 of Notification No. 25/2012-ST from payment of Service Tax on value of amount paid by Railways to Appellant. Adjudicating Authority has denied exemption which is available under sr. No. 12 of Notification No. 25/2012-ST. Accordingly, Service Tax demand of Rs. 2,21,184/- on the amount of Rs. 17,89,512/-, deserves to be set aside.

5.6 The provisions of Section 65A of Finance Act 1994 provides for classification of taxable services. It is settled law that activity shall be classified of a service which gives a service essential character, as per section 65A ibid as it is applicable. The activity of maintenance, repairs

are distinct and separate taxable services listed under Sr. No. 12 of Notification No. 25/2012-ST. Hence, O-I-O is not in accordance with provisions of Finance Act 1994. Sr. No 12 of Notification 25/2012-ST allows exemption in respect of repair and maintenance of a civil structure. Therefore, services of Appellant were to Railways (Western), for Repairs and Maintenance is eligible for the above exemption.

5.7 We observe that it is held in catena of cases that Tribunal being a final fact finding authority can admit any fresh evidence and also argument. This issue has been considered by the Hon'ble Supreme Court (Three Judges Bench), in the case of National Thermal Power Co. Ltd. v. Commissioner of Income Tax, in 1998 (99) E.L.T. 200 (S.C.), which is to the effect that the Tribunal has jurisdiction to examine question of law which arises on facts, as found by authorities below, and having bearing on tax liability of assessee, even though said question was neither raised before lower authorities nor in appeal before Tribunal, but sought to be added later as additional ground by separate letter. In Devangere Cotton Mills Ltd v/s Commissioner - 2006 (198) E.L.T. 482 (S.C.), the Hon'ble Supreme Court has held that Tribunal has got wide power to hear and consider a new ground and decide appeal. In Utkarsh Corporate Service V/s. CCE, 2014 (34) STR (35) (Guj), the Hon'ble Gujarat High Court also held that additional legal grounds can be raised before any authority. Decision in 2000 (115) E.L.T. 403 (Tribunal) -GODREJ FOODS LTD vs CCE, support this view.

5.8 We also do not find any necessity to go into further details of the other points raised against Order-in-Original by Appellant like time limitation for demand invoking extended period not sustainable in this case, computing "Cum-Tax-Value" for Service Tax demand, though such

points may have substantial force in favour of Appellant, when demand of Service Tax is not sustained on merits in the facts of this case.

5.9 In view of the above findings total demand of Service Tax confirmed by adjudicating authority as well as imposition of interest and penalties also deserves to be set aside and we do so.

6. As per our above discussions and findings, we are of the considered view that the impugned order confirming the demand of Service Tax with interest and imposing penalties on appellant is unsustainable and liable to be set aside. Accordingly, the impugned Order-in-Original is set aside and the Service Tax Appeal filed by the Appellant is allowed, with consequential relief, if any, in accordance with the law.

(Pronounced in the open court on 12.08.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PALAK