

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

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10921 of 2022-DB

[Arising out of Order-in-Original/Appeal No BVR-EXCUS-000-COMM-009-2022-23 dated 14.09.2022 passed by Commissioner of Central Excise, Customs and Service Tax-BHAVNAGAR]

Shree Kankeshwari Enterprise

.... Appellant

11 Vaibhav Complex Jafrabad Road Rajula
Amreli, Amreli, Gujarat-365560

VERSUS

Commissioner of Central Excise & ST, Bhavnagar

.... Respondent

Plot No.6776/B-1...Siddhi Sadan, Narayan Upadhyay
Marg, Beside Gandhi Clinic, Near Parimial Chowk,
Bhavnagar, Gujarat-364001

APPEARANCE :

Shri PP Jadeja, Consultant for the Appellant

Shri Rajesh Nathan, Assistant Commissioner, (AR)for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 12.06.2023

DATE OF DECISION: 28.06.2023

FINAL ORDER NO. 11380/2023

RAMESH NAIR :

This appeal is directed against the impugned Order-in-Original No. BVR-EXCUS-000-COMM-009-2022-23 dated 14-09-2022. The issue involved in this Appeal is whether alleged Service Tax liability arises against the Appellant for the period during the F.Y. 2015-16 to 2016-17 or otherwise.

2. Brief facts of the case are that Appellant is engaged in providing work contract Services to the State Government, local authority or governmental authority and also to private parties by way of construction of road, bridge, tunnel, ponds or irrigation work, Repairs and Maintenance of civil structure etc. Appellant is Registered as AA class Road contractor with Gujarat Government, providing service for construction/repair of Roads, Repairs and

Maintenance of roads, civil structure etc. to R & B Department of Gujarat Government and Panchayat etc. in Gujarat and private parties. Appellant had obtained Service Tax Registration No: ABOFS6733MSD002 and paid Service Tax, when taxable services were provided. Appellant has discharged service tax liabilities from time to time, filed all statutory ST-3 Returns. The Income Tax authorities shared Appellant's data of 26AS shown in Income Tax Returns. Perusing said data shared by Income Tax authorities, Central Excise officers at Bhavnagar noticed that the Appellant had short paid Service Tax for the F.Y. 2015-16 to 2016-17. Superintendent of Central Excise, Bhavnagar requested Appellant vide letter No. AR-RJL/3rd party-DGARM/Reg/2020-21 dated 15-04-2021 to provide details of Income receipts and to submit documents related to Service Tax paid, which was not responded by the Appellant who claims not to have received the said letter dated 15-04-2021. The Show Cause Notice No.V/15-126/DEM/HQ/20-21 dated 19-04-2021 demanding total Service Tax of Rs.4,02,21,381/- was issued on the basis of the said 26AS data. However, Order-In-Original No. BVR-EXCUS-000-COMM-009-2022-23 dated 14-09-2022 confirmed the demand of Rs. 3,95,32,273/- with interest and imposed penalties on the Appellant. Hence, Appellant is before this Tribunal by Service Tax Appeal No. ST/10921/2022-DB.

3. Shri P. P. Jadeja, Learned Authorized Representative, appearing for Appellant vehemently submits against SCN dated 19-04-2021 and that the demand confirmed by impugned Order-in-Original is not sustainable. He submits that Appellant as a Registered unit under Service Tax, has paid Service Tax and filed all statutory ST-3 Returns; that Appellant has provided services to the State Government, local authority etc. which were exempted by Service Tax Notification No. 25/2012-ST vide Sr. Nos.

12(d),12(e), 12A(a), 13(a)and 29(h).SCN dated 19-04-2021 has not considered the facts and the Order-In-Original thereon is beyond SCN, which is not sustainable in the law, considering facts and exemption availed.

3.1 He also submits that it is settled principal of law that Service Tax demand cannot be raised on the basis of data of the Income tax Authorities, without conducting any independent enquiry. He submits that the data of Income Tax in 26AS relied upon in SCN/O-I-O does not have its evidentiary value in absence of any independent evidence. He submits that by relying 26AS data for demand of service tax cannot be made. He has relied upon the following decisions :-

- Ved Security Vs. CCE, Ranchi -III 2019(6) TMI 383 CESTAT, Kolkata
- Synergy Audio Visual Workshop Pvt Ltd V/s CST - 2008 (10) S.T.R. 578 (Tri. - Bang.)
- Calvin Wooding Consulting Ltd. Vs. CCE 2007 (7) S.T.R. 411 (Tri. - Del.)
- CCE Vs. Tahal Consulting Engineers Ltd. – 2016(44) S.T.R. 671 (Tri. Del)
- J.P. ISCON PVT. LTD vsCCE vs 2022 (63) G.S.T.L. 64 (Tri. - Ahmd.)
- Shresth Leasing & Finance Ltd - 2023 (68) GSTL-143(Tri-Ahmd)
- FORWARD RESOURCES PVT. LTD - 2023 (69) G.S.T.L. 76 (Tri. - Ahmd.)
- VATSAL RESOURCES PVT LTD - 2023 (68) GSTL-279(Tri-Ahmd)
- REYNOLDS PETRO CHEM LTD - 2023 (68) GSTL-292(Tri-Ahmd)
- State of Gujarat v/s Novelty Electronics – 2018(16)GSTL-87(Guj.)

3.2 He also submits that impugned Order is beyond the SCN. Demand of Service Tax is confirmed by denial of Service Tax Mega Exemption Notification No. 25/2012-ST, whereas SCN has been issued only on the basis of 26AS Data provided by Income Tax, without proposing denial of benefit of Notification in Show Cause Notice dated 19-04-2021. He submits that foundation of SCN is without legally sustainable base for demanding Service Tax. He submits that the following case laws laid down that SCN is foundation in the matter of levy and collection/recovery of duty, penalty and

interest; Revenue cannot argue case not made in SCN and; that Department cannot travel beyond the show cause notice as settled in the following judgments:-

- 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.

He also submits that aforesaid decisions clearly hold there is no authority in law to improvise any such defective SCN by O-I-O. He also submits that the calculation of Service Tax demand is erroneous as Show Cause Notice has presumed entire receipt as the consideration of “**Taxable services**”, which is against principle of law laid down by the Hon’ble Supreme Court in case of M/s Larsen and Toubro - 2014 (303) ELT 3 (SC). The Show Cause Notice itself suffers from incurable deficiency and the impugned Order-in-Original dated 14-09-2022 is therefore beyond SCN and deserves to be set aside.

3.3 He also submits that SCN has not specified under which clause Service activity falls, for determining taxability of services, it is very important. In absence of exact sub-heading under which service falls, taxability of service cannot be decided. Decisions in United Telecoms Ltd. v. CST – 2011(22)STR-571 (TRI), Swapnil Asnodkar-2018(10)GSTL-479(Tri-Mumbai), Balaji Enterprises -2020(33)GSTL-97 and ITC Ltd. -2014(33)STR-67(Tri-Del) support this. Demand of service tax cannot be sustained on this ground also.

3.4 He also submits that Appellant has provided services related to construction of roads etc to Government authorities/agencies and their activity are covered under the Mega Exemption of Service Tax vide Sr. Nos 12(d), 12(e), 12A(a), 13(a) and 29(h) of Notification No. 25/2012-ST.

Appellant has submitted details of all transaction in FY 2015-16 which were with 12 entities and in FY 2016-17 their transactions were with 16 entities. He submits that sale transactions of goods have also been treated as services for confirming demands. Appellant has also submitted VAT returns. He also submits that in some transactions in FY 2015-16 and 2016-17, Appellant has provided taxable services to some parties and has also paid appropriate service tax thereon, but such transactions have also been included in the service tax demand by SCN and confirmed by the O-I-O. Neither Commissioner issuing SCN nor adjudicating perused records correctly before SCN and in O-I-O. He submits that incorrect finding are in O-I-O that Appellant has not submitted sufficient documentary evidences to substantiate their claim. Appellant has given detailed clarification and documents for services and that they have submitted documents to show eligibility for the exemption. The Appellant is within four walls for eligibility of the exemption and hence the entire demand deserves to be set aside.

3.5 He also submits that Appellant is not likely to receive any other amounts towards Service Tax from Government authorities 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.

3.8 He also submits that this being a case of interpretation of provisions, extended period cannot be invoked. Appellant has paid the Service Tax wherever service was taxable for amount received from private parties. Since issue involved genuine interpretation of statutory provisions, charge of suppression of facts, wilful misstatement, fraud, etc., cannot be leveled, for initiation of SCN beyond normal period. Appellant pray to set aside demand

confirmed against Appellant on the ground of limitation. It is settled law that there must be deliberate attempt by Appellant to suppress facts from Department with an intention to evade payment of Service Tax, which is not existing. Show Cause Notice dated 19-04-2021 for demand of Service Tax for the period from the FY 2015-16 to 2016-17 is issued beyond the normal period. Therefore, the entire demand confirmed against Appellant deserves to be set aside on this ground of limitation. Following decisions are relied upon by the Appellant :-

- Padmini Products v. CCE -1989(43)ELT-195(S.C.)
- CCE v. Chemphar Drugs & Liniments-1986(43)ELT-276(S.C.)
- GopalZardaUdyog v. CCE -2005(188)ELT-251(S.C.)
- Lubri-Chem Industries Ltd. v. CCE -1994(73)ELT-257(S.C.)
- Anand Nishikawa Co. Ltd. v. CCE -2005(188)ELT-149(S.C.)

3.9 He submits that Penalties imposed on Appellant are not justified, in absence of mala fide intentions to evade payment of the Service Tax, which is not brought on record through any clinching positive evidences. Accordingly, he submits that the Appeal filed by the Appellant may be allowed with the consequential benefits.

4. Shri Rajesh Nathan learned Assistant Commissioner, Authorised Representative, appearing on behalf of the Revenue, reiterates the finding of impugned Order and submits that though SCN dated 19-04-2021 was issued only on the basis of 26AS data shared by the Income Tax Authorities, O-I-O has given fairly reasonable findings to confirm the service Tax demand and hence O-I-O may be upheld.

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 alleged demand of Service Tax as confirmed with Interest and Penalties by the Adjudicating Authority is sustainable or otherwise.

5.1 We find that there is no dispute on the facts on either side that Appellant had the Service Tax Registration No: ABOFS6733MSD002 and that Appellant have provided the services to Government authorities/agencies. After issuance of SCN dated 19-04-2021 for the financial Year 2015-16 to 2016-17, Appellant have also participated in adjudication proceedings and have made submissions with documents like the Balance Sheets, profit & loss Accounts, Work orders, Invoices issued, agreements of their sub-contract, their financial records for FY 2015-16 to 2016-17 including detailed ledgers etc. Appellant have submitted that they are eligible for the exemption availed and reflected in their ST-3 Returns and has prayed to drop the entire Service Tax demand in this case, issued unduly invoking extended period for the total demand of Service Tax.

5.2 We find that the Id Commissioner has issued SCN on the basis of 26AS data for demand of Service Tax for FY 2015-16 to 2016-17 as under :-

Details	2015-16 (in Rs.)	2016-17 (in Rs.)
Value of taxable service as per 26AS	22,02,53,840	18,62,94,256
Income on which Service Tax paid	8,04,56,520	5,32,89,120
Value on which Service Tax not paid	13,97,97,320	13,30,05,136
Rate of Service Tax	14.50 %	15 %
Service Tax payable on differential value Rs.	2,02,70,611	1,99,50,770
Total Service Tax payable with cessRs.	4,02,21,381	

The impugned Order-in-Original dated 14-09-2022 has confirmed the demand on the following calculations :-

Details	FY 2015-16 (in Rs.)	FY 2016-17 (in Rs.)
As per SCN	2,02,70,611	1,99,50,770
Service Tax paid as per ST-3	4,78,947	2,10,161
Service Tax payable	1,97,91,664	1,97,40,609

Total Service Tax payable with cess Rs.	3,95,32,273
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5.3 We find that it is settled by now that without conducting any independent inquiry or investigation, the demand of Service Tax can not be sustained only on the basis of “26AS data” provided by the Income Tax authorities to the Central Excise Officers at Bhavnagar. Service Tax demand cannot be raised on the basis of assessment by the Income Tax Authorities. There is no dispute on the fact that Show Cause Notice for demand of the Service Tax is solely on Data/TDS/26AS of Appellant in Income Tax Returns for the FY 2015-16 to 2016-17, which are shared by Income Tax authorities. Declarations under Income Tax Act 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 different and independent fields. By relying only on “26AS data” of Income Tax, demand of Service Tax cannot be made.

5.4 We note that the Tribunal in case of Synergy Audio Visual Workshop Pvt Ltd V/s CST -2008 (10) STR 578 (Tri-Bang), has held that :

“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 held that demand of Services Tax on the basis of TDS /26AS statements/3CD Statements are not sustainable.

Similar view has been taken by this Tribunal at Ahmedabad vide the following decisions :-

- J.P. ISCON PVT. LTD vsCCE vs 2022 (63) G.S.T.L. 64 (Tri. - Ahmd.)
- Shresth Leasing & Finance Ltd - 2023 (68) GSTL-143(Tri-Ahmd)
- FORWARD RESOURCES PVT. LTD - 2023 (69) G.S.T.L. 76 (Tri. - Ahmd.)
- VATSAL RESOURCES PVT LTD - 2023 (68) GSTL-279(Tri-Ahmd)
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- State of Gujarat v/s Novelty Electronics – 2018(16)GSTL-87(Guj.)

In the above case ofJ.P. ISCON PVT. LTD -2022 (63) GSTL 64 (Tri - Ahmd), it has been held as under :-

"18. We have considered the submissions made at length by both sides and perused the records. We find that the Revenue has proceeded in confirmation of the demand on the basis of documents and information provided by the Income Tax Department. The entire case of Revenue in the present matter is based on .xls sheets retrieved by the Income Tax Authorities and Statement of Smt. Kalindi Shah recorded by the Income tax Authorities. However, it is seen that apart from recording the statement of Shri VenkataramanaGanesa in the present matter no independent investigation has been carried out by the department. We observed that Department has not brought out any independent facts or evidence as who is the service receiver, whether the cash receipts shown in the xls. Files pertaining to the service component only or otherwise and no corroborative evidence produced in support of details mentioned in the said xls. files. In the present matter collection of a huge amount of cash in respect of provisions of services involved. However not a single rupee of unaccounted cash was found during the search conducted by the Income-tax.

The Hon'ble Gujarat High Court in the matter of *State of Gujarat v. Novelty Electronics* – 2018(16) GSTL-87 (Guj.) held that -

“14. In the opinion of this Court, the findings recorded by the Income Tax authorities during the course of search, could have been made a starting point for inquiry as regards the discrepancy in the physical stock and that shown in the stock register. However, the statement made by the dealer, *ipso facto*, could not have been the basis of an addition. Acting upon the findings recorded by the Income Tax authorities, the authorities under the Value Added Tax Act were required to make an independent examination into the facts before making the assessment. As noted hereinabove, the Commercial Tax Department had also searched the premises of the dealer and no discrepancies could be found in stock and the investigation report of the department had given a clean chit to the appellant. In these circumstances, the Tribunal was wholly justified in setting aside the order of the first appellate authority to the extent it had confirmed the demand which had no legal basis, and confirming the order to the extent it had reduced the tax liability imposed by the assessing authority. The second and third questions as proposed, therefore, also do not merit acceptance. Without conducting the independent enquiry, the demand of Service tax only on the basis of document/information/data provided by the Income-tax authorities by the Revenue legally not sustainable. The documents relied upon loses its evidentiary value in absence of any independent enquiry.”

In the above decisions, it is the 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 19-04-2021. 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. Further, the data provided by Income Tax authorities simply show the details of Income received from sale of services and Service Tax paid thereon. However, in Income Tax Returns, no further details of exemptions availed on services requires to be declared, hence,

there may be mis-matched in data of Income tax vis-à-vis Service Tax Returns filed, depending facts of cases.

5.5 We note from records that Appellant had paid some Service Tax on self-assessment basis. Therefore, when 26AS data showed payment of Service Tax, it was obligatory on Commissioner issuing SCN dated 19-04-2021 to have it crossed checked, with Service Tax ST-3 Returns filed, if any, which would show exemption is claimed in ST-3 Returns filed by Appellant. Had Commissioner perused/examined 26SAS data correctly before issuance of this SCN dated 19-04-2021, then, scope of SCN would have been with reference to some allegations to deny exemption claimed on one or the other reason. Thus, demand of Service Tax in this SCN only on 26AS data is without application of mind. Appellant has submitted that Demand of Service Tax confirmed in the impugned Order dated 14-09-2022 by denial of exemption No. 25/2012-ST, which is not specifically alleged in Show Cause Notice dated 19-04-2021. We also note that it is settled that Show Cause Notice is the foundation in case of revenue for levy or recovery of duty/Service Tax. It is settled that orders beyond scope of SCN are not sustainable in the settled law. The demand of Service Tax confirmed with interest and Penalty by adjudicating authority also deserves to be set aside on this ground.

5.6 In the facts of this case, the SCN dated 19-04-2021 has been undisputedly issued only on the basis of "26AS Data" shared by Income Tax. There is no reference in SCN of claim or availability of any exemption or details of actual services provided by the Appellant. When Service Tax is demanded on alleged services by SCN, it is obligation of Revenue to show that appellant had rendered such services to customers with the evidences.

In present case, department has failed to do so. Section 65B(44) has provided definition of "Service", but, various services were also placed in "Negative list" u/s 66D, not attracting Service Tax and there were many Services which were allowed Exemptions from Service Tax under Notification No. 25/2012-ST and many such other Notifications issued. Hence, it is impermissible under law to issue any baseless SCN on assumption or presumptions and later on, SCN can be improvised by O-I-O in adjudication. Appellant is registered Service Provider, his service Tax payments, ST-3 Returns are on records & available with department and authorities issuing SCN dated 19-04-2021 did not even verify such details before issuing SCN. When communication dated 15-04-2021 issued by Superintendent of Central Excise, which appellant say not received by them, the ACT/Rules has provided unlimited powers to Central Excise officers to search premises of Appellant and to seize documents and collect evidences before issue of SCN to frame correct charges against Appellant on alleged evasion of Service Tax. In this case, officers have chosen not to exercise such unlimited powers to establish case of evasion of Service Tax against Appellant. It was necessary for Department to specify activity and nature of service that was to be taxed under specific clause of services or declared services described in the Finance Act 1994. The case laws cited by the appellant hold that Revenue cannot argue a case which was not made out in SCN and adjudicating authority cannot travel beyond the SCN, as the law settled by plethora of decisions by Tribunals, and higher forums. The decisions relied upon by Appellant support this view.

5.7 We also find that impugned O-I-O dated 14-09-2022 has not appreciated facts correctly that Appellant has provided services to the Government and local authorities and governmental authorities, which were

exempted under Exemption Notification No. 25/2012-ST dated 20-12-2012 [Sr.No. 12(d),12(e), 12A(a), 13(a) and 29(h)]. The Adjudicating Authority has confirmed the demand of Service Tax for FY 2015-16 to 2016-17 as shown in above Para. The O-I-O dated 14-09-2022 has confirmed the demand on incorrect findings. Appellant has given detailed clarification for the said services and submitted that they are eligible for exemption under the said Exemption Notification No. 25/2012-ST. The relevant Notification No. 25/2012-ST dated 20-6-2012, which has provided such exemption has been reproduced as under :-

“G.S.R. 467(E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012- Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

“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) ***

(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) ***

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or

(f) ***

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

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

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

(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act; under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date: provided that nothing contained in this entry shall apply on or after the 1st April, 2020;”Inserted vide Notification 9/2016- Service Tax to be in effect from 1 March 2016.

13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;

(b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv AwaasYojana;

“(ba) a civil structure or any other original works pertaining to the ‘In-situ rehabilitation of existing slum dwellers using land as a resource through private participation”under the Housing for All (Urban) Mission/Pradhan MantriAwasYojana, only for existing slum dwellers.”Inserted vide Notification 9/2016- Service Tax. To be in effect from 1 March 2016.

(bb) a civil structure or any other original works pertaining to the Beneficiaryled individual house construction / enhancement under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;”;Inserted vide Notification 9/2016- Service Tax to be in effect from 1 March 2016.

(c) a building owned by an entity registered under section 12 AA of the Income Tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;

(d) a pollution control or effluent treatment plant, except located as a part of a factory; or

(e) a structure meant for funeral, burial or cremation of deceased;”

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

Appellant has submitted details of services provided for F.Y.- 2015-16 and 2016-17 in tabulated format in synopsis which is reproduced hereunder :-

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Shree Kankeshwari Enterprise- Rajola FY 2015-16				
Name of Ledger	Total Income	Type of Work	Ledger Reconciliation statement	Service tax Payable
1. GSLDC Bhavnagar	85,69,162	DEEPENING OF PONDS AT VARIOUS VILLAGE	Amount of Income Matching With Ledger 180-198	No. Exempted by 25/2012-ST Sr No. 12(d)
2. Panchayat R & B Div Amreli	16,24,59,634	Road Work	199-200 As per Annexure 201-516	No. Exempted by 25/2012-ST Sr No. 13(a)
3. RELIANCE DEFFENCE	67,05,517	Construction Work Taxable Service	Gross Amt. 6899978 of ledger, less Service Tax Amt.194461, net sale value Amt. 6705517 517-524	YES/Print Service Tax already paid w Abetment/RCM
4. Project Construction Div No.4 Rajkot	7,18,629	DEEPENING OF PONDS AT VILLAGE KHAJELI	Amount of Income Matching With Ledger 525-522	No. Exempted by 25/2012-ST Sr No. 12(d)
5. R & B Div State Amreli	1,37,80,351	Road Work	Gross Amt. 14053099 of ledger, less Credit Note booked for rate difference Amt.272748, net sale value Amt. 13780351 536-657	No. Exempted by 25/2012-ST Sr No. 13(a)
6. Vijay Tank & Vessels Pvt Ltd	1,07,42,116	Road Work Taxable Service	Gross Amt. 11019897 of ledger, less Service Tax Amt.277781, net sale value Amt. 10742116 658-701	YES/Print Service Tax already paid w Abetment/RCM
7. Jaydeep Construction	29,12,791	Road Work Sub Contract	Gross Amt. 2934601 of ledger, less Opening balance Amt.11240, less sale of kapchi Amt. 10570 net sale value Amt. 2912791 711/713 702-719	No. Exempted by 25/2012-ST Sr No. 13(a) & 29(h)
8. Kunal Enterprise	7,55,291	Sales of Black Traps	Amount of Income Matching With Ledger 1471-1472	No. Negative list u/s Section 66I
9. Radhe Associated Mahesana	14,66,060	Bridge Const. Sub Contract	Amount of Income Matching With Ledger 723/725 729-735	No. Exempted by 25/2012-ST Sr No. 13(a) & 29(h)
10. Trishul Construction co	62,28,793	Bridge Const. Sub Contract	Amount of Income Matching With Ledger 742/756 736-756	No. Exempted by 25/2012-ST Sr No. 13(a) & 29(h)
11. Vijay Construction	8,37,936	Sale of Asphalt	Amount of Income Matching With Ledger 757-764	No. Negative list u/s Section 66I
12. CLASSIC NETWORK	3,90,480	Road Work Sub Contract	Amount of Income Matching With Ledger 771/772 765-776	No. Exempted by 25/2012-ST Sr No. 13(a) & 29(h)
21,55,66,760	21,55,66,760			

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Shree Kankeshwari Enterprise- Rajula - FY 2016-17					
Name of Ledger	Total Income	Type of Work	Ledger Reconciliation statement (As per ledger)	Service tax Payable	
1. Cash black trap sale	50,503	Sale of Black Trap	Total cash sale value Rs. 50503 as ledger 772-782	No	Negative list as Section 66D(e)
2. NAGARPALIKA UNA	44,46,047	Construction and repairing Work	Amount of Income Matching With Ledger 783-815	No	Exempted by 25/2012-ST Sr No. 12(c)
3. NATIONAL HIGHWAY DIVISION RAJKOT	1,67,05,194	Road Work	Gross Amt. 17659301 and CN booked for Rate difference Amt. 1458107 816-822	No	Exempted by 25/2012-ST Sr No. 13(a)
4. Panchayat R & B Div Amreli	14,17,73,620	Road Work	As per annexure A 823-824 823-1236	No	Exempted by 25/2012-ST Sr No. 13(a)
5. Panchayat R & B Div Bhavnagar	83,52,156	Road Work	Amount of Income Matching With Ledger 1237-1251	No	Exempted by 25/2012-ST Sr No. 13(a)
6. Panchayat R & B Div NAVSARI	1,02,80,508	Road Work	Amount of Income Matching With Ledger 1252-1268	No	Exempted by 25/2012-ST Sr No. 13(a)
7. PROJECT CONSTRUCTION DIVISION RAJKOT	2,20,00,000	DEEPENING OF PONDS AT VILLAGE RATADHER (A HALVAO)	Amount of Income Matching With Ledger 1269-1275	No	Exempted by 25/2012-ST Sr No. 12(d)
8. R & B STATE DIVISION AMRELI	82,16,757	Road Work	Gross Amt. 9168850 of ledger, less opening balance Amt. 952417, less booked Amt. 5676 for IDS difference, net sale value Amt. 8210757 1276-1279	No	Exempted by 25/2012-ST Sr No. 13(a)
9. VIJAY LANKS & VESSTLS PVT LTD	10,16,553	Road Work Taxable Service	Gross Amt. 1046034 of ledger, less Service Tax Amt. 29481, net sale value Amt. 1016553 1440-1453	YES/Paid	with abatement & RCM
10. R J CONSTRUCTION	2,19,000	Machinery Rent Taxable Service	Gross Amt. 251850 of ledger, less Service Tax Amt. 32850, net sale value Amt. 219000 1454-1458	YES/Paid	with abatement & RCM
11. KUNAL ENTERPRISE	2,74,066	Sale of Black Trap	Amount of Income Matching With Ledger 1459-1470	No	Negative list as Section 66D(e)
12. TRUPTI INFRASTRUCTURE PVT LTD	1,61,892	Sale of Asphalt	Amount of Income Matching With Ledger 1471-1475	No	Negative list as Section 66D(e)
13. MEP INFRASTRUCTURE DEVELOPERS LTD	2,14,821	Spreading of Asphalt on sites Taxable Service	Gross Amt. 221276 of ledger, less Service Tax Amt. 6445, net sale value Amt. 214831 1476-1478	YES/Paid	with abatement & RCM
14. SHREE KHODIYAR CONSTRUCTION	11,77,237	Spreading of Asphalt on sites Taxable Service	Gross Amt. 1247915 of ledger, less Service Tax Amt. 70638, net sale value Amt. 1177277 1479-1482	YES/Paid	with abatement & RCM
15. PRUTHVI BUILDERS	33,70,392	Bridge Work on Sub-Contract	Amount of Income Matching With Ledger 1483-1494	No	Exempted by 25/2012-ST Sr No. 13(a) & 29(h)
16. PARTH CONSTRUCTION	11,79,166	Spreading of Asphalt on sites Taxable Service	Gross Amt. 1249915 of ledger, less Service Tax Amt. 70749, net sale value Amt. 1179166 1495-1498	YES/Paid	with abatement & RCM
19,75,92,749	19,75,92,749				

5.9 We find that adjudicating authority has not disputed fact of services provided by the Appellant as a work contractor or sub-contractor; that incorrect finding are in O-I-O that Appellant has not submitted sufficient documentary evidences to substantiate their claim. The findings are mainly of general type and also contradictory in itself. For example, O-I-O has given incorrect findings that in transactions with M/s Jaydeep Construction and M/s Classic Network, where Appellant provided services as a sub-contractor, but not provided copies of their agreements executed as sub-contractor. However, Appellant has submitted copies of sub-contract agreements, which related to work on road and they are on record of Appeal. Sub-contractors are also exempted vide clause No 29(h) of the Notification No. 25/2012-ST. O-I-O has also erred in denial of exemption giving finding that the figures

shown in Annexure and ledger do not tally, However, such mis-match was explained by Appellant as due to reasons of opening balance of previous year and credit notes. However, this can not be reason to deny exemption, without disputing services provided by Appellant to Government/Agencies. O-I-O has also noted that Appellant had submitted copies of Balance Sheets, trading accounts, Sales Registers, work orders, Invoices, ST-3 Returns for FY 2015-16 to 2016-17 with Audit Report No. AUDIT-III/RJT/VI/32/1118/2016-17, which adjudicating authority has read, yet he passed such incorrect Order. Settled law is that the exemption should be interpreted strictly, but, when eligibility criteria of availing exemption is proved, liberal interpretation should be adopted to allow substantive benefit of an exemption for the assessee for whom exemption is intended to be allowed. Eligibility criteria in this case is providing services to Government Authorities in public work on Roads, Bridges etc, which is not denied in this O-I-O. Appellant has given detailed clarification and documents for services and submitted that they are eligible for exemption by clause No. 12(d), 12(e), 12A(a), 13(a) and 29(h) of Notification No. 25/2012-ST which allows the exemption in services provided to the Government, a local authority or a governmental authority. O-I-O has erred in confirming Service Tax demand on the sale transactions for FY 2015-16 with M/s kunal Enterprise for "sale of Black Trap" and with M/s Vijay Construction for "sale of Asphalt". These transactions are under Negative list u/s Section 66D(e) of the Finance Act 1994. Similarly, O-I-O has erred in confirming Service Tax demand for FY 2015-16 again on the taxable value on which service Tax has already been paid in transactions with M/s. Reliance Defence and M/s Vijay Tank & Vessels Pvt Ltd. Similarly, O-I-O has erred in confirming Service Tax demand on the sale transactions in FY 2016-17 with M/s Kunal Enterprise for "sale of Black Trap" and with M/s Trupti Infrastructure Pvt Ltd for "sale of Asphalt". These transactions are

under Negative list u/s Section 66D(e) of Finance Act 1994. Similarly, O-I-O has erred in confirming Service Tax demand for FY 2016-17 again on the taxable value on which service Tax has already been paid in transactions with M/s. RJ Construction, M/s Vijay Tank & Vessels Pvt Ltd, M/s MEP Infrastructure Developers Ltd and M/s Shree Khodiyar Construction and M/s Parth Construction. Appellant has provided all relevant documents to support their above transactions. Appellant has also reflected all these transactions in their Books of Account, paid appropriate VAT and Service Tax in respect of sale transactions and Taxable services. Services of Appellant were to Government agencies and even as a sub-contractor were exempted. We hold that Appellant is within four walls for eligibility of the exemption.

5.10 We observe that it is held in catena of cases that Tribunal being a final fact finding authority can admit any fresh evidence and argument. This issue was considered by the Hon'ble Supreme Court (3 Judges Bench), in 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. In case of 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 wide power to hear and consider new ground to 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 Ltdvs CCE, support this view.

5.11 On the question of Time Limitation for issuance of subject SCN, we find that Appellant was a Registered Service Provider and they had made payment of Service Tax and filed all Statutory ST-3 Returns timely intimating details of availing exemption, which are not objected by Revenue. Audit teams of Central Excise had audited Appellant's records on 30-09-2015 and on 16-01-2017 and have cleared Appellant without any audit objection. Department was fully aware of the facts that Appellant had paid Service Tax and filed ST-3 Returns for FY 2015-16 to 2016-17 intimating their claim of Exemption of Notification No. 25/2012-ST, department should have objected on availment of exemption within normal time limit, if revenue had any doubts on the availment of exemption. This being a case of interpretation of provisions, charge of suppression of facts, willful misstatement, fraud, etc., cannot be leveled, for initiation of SCN beyond the normal time limitation. It is settled law that there must be deliberate attempt by the Appellant to suppress the facts from Department with an intention to evade payment of Service Tax, which is not existing in this case. Show Cause Notice dated 19-04-2021 for demand of Service Tax for F.Y. 2015-16 to 2016-17 is issued beyond normal period, considering following decisions relied by Appellant are applicable :-

- Padmini Products v. CCE -1989(43)ELT-195(S.C.)
- CCE v. Chemphar Drugs & Liniments – 1986(43)ELT-276(S.C.)
- Gopal Zarda Udyog v. CCE -2005(188)ELT-251(S.C.)
- Lubri-Chem Industries Ltd. v. CCE -1994(73)ELT-257(S.C.)
- Anand Nishikawa Co. Ltd. v. CCE -2005(188)ELT-149(S.C.)

Therefore, the entire demand for FY 2015-16 to 2016-17 raised by the SCN dated 19-04-2021 confirmed by impugned O-I-O against Appellant deserves to be set aside on this ground of limitation and we do so.

5.12 When demand of Service Tax is not sustained on merits as well as on time limitation in the facts of this case and when we have examined case from all possible angles, we also do not find any necessity to go into details of other points raised against Order-in-Original by Appellant like computing "Cum-Tax-Value" for Service Tax demand, though such points may have substantial force in favour of Appellant.

5.13 Departmental Authorised Representative's oral submission to remand matter back to adjudicating authority for further verification does not deserve any consideration in this case to remand the case, in the interest of justice, specifically when the subject SCN and impugned O-I-O have been issued without having any sound basis for the demand of Service Tax. The decisions relied upon in the O-I-O for denial of exemption are on different facts and not applicable in the facts of this case.

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

6. As per our above discussions and findings, we are of considered view that the impugned order is unsustainable and liable to be set aside and we do so. Thus, impugned Order-in-Original is set aside on merits as well as on time limitation and the Appeal filed by Appellant is allowed, with the consequential relief, if any, in accordance with the law.

(Pronounced in the open court on 28.06.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)