

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.79067 of 2018

(Arising out of Order-in-Original No.COMMR/BBSR-ST/15/2018 dated 27 April 2018 passed by Commissioner of GST & Central Excise, Bhubaneswar.)

M/s. Gupta Power Infrastructure Limited

(Cuttack Road, Bhubaneswar-751006, Odisha.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bhubaneswar Commissionerate

.....Respondent

(CR Building, Rajaswa Vihar, Bhubaneswar-751007, Odisha.)

WITH

Service Tax Appeal No.78195 of 2018

(Arising out of Order-in-Original No.COMMR/BBSR-ST/15/2018 dated 27 April 2018 passed by Commissioner of GST & Central Excise, Bhubaneswar.)

Shri M.Gupta, (MD)

M/s. Gupta Power Infrastructure Limited

(Cuttack Road, Bhubaneswar-751006, Odisha.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bhubaneswar Commissionerate

.....Respondent

(CR Building, Rajaswa Vihar, Bhubaneswar-751007, Odisha.)

APPEARANCE

Shri K.K.Acharya, Advocate for the Appellant (s)

Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI BIJAY KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 76868-76869/2019

DATE OF HEARING : 24 October 2019

DATE OF DECISION : 11 December 2019

P.K.CHOUDHARY :

Appellant is a Service Tax Assessee having registration for manufacturing of Excisable goods as well as for the taxable services of (i) erection and Commissioning, (ii) Site formation, Clearance, Excavation & Earthmoving activities. The present appeal is filed by the

Assessee in relation to the dispute arising out of the Adjudication Order (Order-in-Original) passed by the Commissioner, Bhubaneswar Commissionerate wherein, a demand of Service Tax of Rs.22,98,33,478/- has been confirmed under the proviso to Section 73(1) of the Finance Act, 1994 invoking the extended period along with the imposition of Penalty under Section 78 and applicable Interest payable thereon, under Section 75, of the Act, *ibid*.

2.1 The Appellant has filed the Appeal before this Bench, on the ground that the services rendered by them during the period i.e. from Financial Year - 2010-11 to Financial Year -2012-13 (up-to June) were specifically excluded from the purview of taxable services and/or excluded from the scope of levy of Service Tax. The Original Authority vide Order-in-Original dated 27-04-2018 has unlawfully confirmed the demand of Tax proposed in the Show Cause Notice dated 19-04-2016 against the following remuneration received by them.

(a) "Site formation, and clearance, excavation and earthmoving and demolition" in relation to agriculture (consideration involved Rs.180,19,09,582/-)

(b) Construction of Raw Water Reservoir, Ash Pond etc. (consideration involved Rs. 38,74,83,404/-)

(c) Construction of Road (consideration involved Rs. 3,55,77,102/-)

2.2 The Appellant claims that the Services of "Site formation, and clearance, excavation and earthmoving and demolition", provided by them, were specifically in relation to the (a) Agriculture and (b) Construction activities relating to renovation and Maintenance of Water sources/bodies. Such activities clearly fall within the 'exclusion' clause of levy of Service Tax specified under Section 65(97a) of the Finance Act, 1994 and thus, no liability of Service tax accrues on them during the material period of time. The services of 'Construction of Road', stated above, (provided to M/s.Adhunik Infrastructures Pvt. Ltd) is

classified as “Construction service” falling under Section 65(105)(zzq) and read with Section 65(25b) of the Finance Act, 1994, is specifically excluded from the levy of Service tax as envisaged at Section 65(25b)(iii) of the Act and hence, do not attract any levy of service tax.

2.3 On the other hand, the Department in its Show Cause Notice dated 19.04.2016 ('SCN') issued to the Appellant, has alleged that the service undertaken by the Appellant for the 6-Nos of Parties (Ref. Sl. No. 1 to 6 of the Table at Para No. 2.4 of the SCN) is site levelling and grading works wherein, they have received a remuneration of Rs.180,19,09,582/-. They have also undertaken 'Site levelling and grading' works for the construction of Raw Water Reservoir Ash Pond, and Non-Plant Buildings against which the Appellant has received a remuneration of Rs.38,74,83,404/- from M/s.AMR Constructions Ltd, Hyderabad (Sl. No. 7 of the Table at Para 2.4 of the SCN). The said services rendered by the Appellant constitute the taxable services of “Site formation, and clearance, excavation and earthmoving and demolition” under Section 65(97a) of the Finance Act, 1994 and thus, attract the levy of Service tax on such remunerations received. The SCN also states that the Appellant has undertaken the services of Supply of Manpower and Equipment for Constructions against which the Appellant has received a remuneration of Rs.3,55,77,102/- from M/s.Adhunik Infrastructures (P) Ltd. As the said activities undertaken by the Appellant constitute the taxable services under the category of “Manpower Recruitment and Supply” and “Supply of Tangible Goods”, defined under Section 65(105)(k) and 65(105)(zzzz) of the Finance Act, 1994, the Appellant is liable to pay Service tax on such remuneration received. The said amount taken into consideration on the basis of the copies of 26-AS Statement, the Appellant *in toto* has received an amount of Rs.222,71,48,088/- during the period October-2010 to March-2013 (up-to June 2012) against the execution of Contractual Works on which they are liable to pay Service tax of

Rs.22,98,33,478/- (including Cess). The SCN alleged that it was statutory obligation on the part of the Appellant to declare all their incomes in their ST-3 Returns even if, the same are exempted from Service Tax. Such Non-declaration of the Income in the ST-3 Returns is an act of 'suppression of facts' with an intent to evade the payment of Service Tax and therefore, the extended period of Five years provided under the proviso to Section 73(1) of the Act is invokable in the case and accordingly the Appellant is liable to pay tax along with Interest under Section 75 and Penalty under Section 78 of the Act.

2.4 In its reply, the Appellant stated that various contracts/work orders undertaken and executed by them during the material period, were not levied with Service tax and hence, the SCN does not hold any basis to raise the demand of Service Tax. The grounds of the Appellant were as follows:

(a) The definition of the taxable services of "Site formation, and clearance, excavation and earthmoving and demolition" provided under Section 65(97a) of the Finance Act, 1994, clearly excludes from its ambit, if such services are rendered in relation to 'Agriculture'. Hence, the remuneration amount of Rs.180,19,09,582/- received by them from the Contractees, is excluded from the levy of Service Tax.

(b) As per the statutory definition of "Site formation, and clearance, excavation and earthmoving and demolition" envisaged under Section 65(97a) of the Finance Act, 1994, such activity undertaken in relation to Water sources and or Water bodies, is specifically excluded from the levy of Service tax. The activity undertaken by them for the Contractee (M/s. AMR Constructions Ltd, Hyderabad) in relation to Construction works for restoration of Raw Water Reservoir, Ash Pond etc. and thus, the remuneration amount of Rs.38,74,83,404/- received from the Contractee is excluded from the levy of Service Tax.

(c) The Work-Order dated 20.10.2011 relating to the Contract executed with M/s.Adhunik Infrastructures (P) Ltd, amounting to Rs.3,55,77,102/-, clearly specifies that the said activity undertaken is in relation to 'Construction of Road'. The activity of 'Construction of Road' is clearly classified as "commercial construction service" which is a Taxable service in terms of Section 65(105)(zzq) read with Section 65(25b) of the Finance Act, 1994. Any such activity i.e. "Commercial or Industrial construction" if, undertaken for the 'Construction of Roads' was specifically excluded from the levy of Service tax as envisaged at Section 65(25b)(iii) of the Finance Act, 1994. The SCN has supposedly mistook the various items of work mentioned in the individual Bills of Quantity given in the ANNEX-I(attached with Work Order dated 20.10.2011) and has incorrectly classified the service rendered by them as "Manpower Recruitment and Supply" and "Supply of Tangible Goods", defined under Section 65(105)(k) and 65(105)(zzzz) of the Finance Act, 1994. Their claim is that the activity of construction service undertaken towards the 'Construction of Road' is specifically excluded from the levy of Service tax. Hence, the remuneration amount of Rs.3,55,77,102/- allegedly received by them from the Contractee – M/s.Adhunik Infrastructures (P) Ltd does not attract any levy of Service Tax.

(d) The Appellant has categorically disputed the calculated value/amount of the remuneration received from M/s. PACL India Ltd in relation to the service rendered during the period 2011-12. While the SCN has considered the remuneration received by the Appellant as Rs.30,00,00,000/-(Thirty Crore), they claim the same to be Rs.3,00,00,000/- (Three Crores) only. They have submitted the statement of 26AS issued by the Income Tax Department stands as a testimony to such claim.

2.5 The Appellant refuted the allegation in the SCN about their indulgence in any 'Suppression of Facts' by virtue of which the extended period of limitation of five (5) Years has been invoked by the Department under the proviso to the Section 73(1) of the Act. It states that their unit was subjected to periodical Audit by the Audit Officers of the Department of Central Excise, Service Tax & Customs wherein, all the relevant documents and records of Business along with the Audited Balance sheet for the material period involved, had been duly scrutinized by the Departmental Officers. The Appellant has further submitted that for the Services not falling under the ambit of the levy of Service tax, they are not supposed to declare/disclose the same in any manner and hence, the non-disclosure of such events in the ST-3 returns for the relevant period does not by itself constitute as an act of 'Suppression of facts'. As such, the intention to evade the payment of tax is absent and therefore, the 'extended period of limitation of time' up-to five (5) years, cannot be invoked in the SCN.

2.6 Having recorded the allegations & propositions in the SCN as well as the submissions of the Appellant in the course of adjudication, the Original Authority, at Para 3.11 of its order dated 27-04-2018, have framed the issues for examination and determination thereof. (i) Whether the works undertaken by the Appellant could be **exempted** from levy of Service Tax; (ii) Whether such services were undertaken for agriculture purpose; and (iii) Whether onus lies on the Appellant to prove with documentary evidence that the services rendered were for agriculture only.

2.7 The Original Authority in its order held that the Appellant has failed to discharge the obligations cast upon them by the Statute and has suppressed the material facts from the knowledge of the Department by not declaring the correct taxable value in the ST-3 Returns, even if such income were exempted from the payment of Service tax. Adoption of such attempt to escape examination of the said income value with respect to taxability, and by not depositing

appropriate tax to the credit of the Government, the Appellant had the intention to evade such tax. The Appellant's indulgence in the act of 'suppression of facts' and wilful contraventions of the provisions of the Finance Act and Rules made there under, with the intention for evasion of payment of Services tax being established, the Original Authority confirmed the demand of Rs.22,98,33,478/- and ordered for its recovery under Section 73(1) of the Finance Act, 1994 read with the proviso of 'extended period of limitation up-to five years'. The Original Authority imposed a penalty equal to the demand of Tax under Section 78(1) along with appropriate interest under Section 75 of the Act *ibid*. At Para- 3.10 of the impugned Order the Original Authority has held that "*the plea of availing of **exemption***" without establishing their proof, cannot save the Appellant from its obligation to pay Service Tax. Further, the Original Authority has also imposed a penalty of Rs.1,00,000/- on Shri Mahendra Kumar Gupta, Managing Director of the Appellant-Assessee in terms of Section 78A of the Finance Act, 1994 for his involvement in the act of contravention of the provisions of the Act and the Rules made there under.

3.1 During the scheduled hearing of the case, Shri K. K. Acharya, Learned Advocate, pleading for the Appellant, reaffirmed their point of view as has been claimed in the Appeal Memorandum. Shree Acharya submitted that on a conjoint reading of the allegations in the SCN and findings in the Original Order, it is evident that the process of demand of Service Tax and the confirmation of the same has been initiated and concluded on the erroneous premise that the Appellant was seeking exemption from payment of Service Tax, on the services rendered by it, for the development of land for agricultural purposes. . This is more evident from paragraph 3.4 of the impugned Order wherein, it has been stated that the Appellant has.....

"neither charged nor paid any Service Tax on the aforesaid site-grading and levelling work, claiming the said works as

exempted, vide Circular No.B1/6/2005-TRU dated 27.05.2005, being rendered for agricultural purpose”.

3.2 Shri Acharya also stated that the services provided to the Contractee-M/s.AMR Constructions (P) Ltd, was in relation to the restoration and maintenance of Water Reservoir and Ash pond. Such activities are not taxable in terms of the exclusion clause specified under Section 65(97a) of the Finance Act, 1994. The services provided to M/s.Adhunik Infrastructures (P) Ltd was towards the ‘Construction of Roads’ which is classifiable as “Commercial Construction Service”, defined under Section 65(105)(zzq) of the Finance Act, 1994. As per the definition provided under Section 65(25b) of the Act, the “Commercial or Industrial Construction” does not include such services provided in respect of construction of roads. For the services provided to the rest of the Contractees, they have provided the service as per the terms and conditions of the Contracts executed thereto, which is clearly indicative of the fact that they had been entrusted with the works of “Site-formation, and Clearance, Excavation and Earthmoving”. Such works undertaken are incidental and ancillary activities for the Agricultural activities/purposes. The bills/invoices raised by them do clearly mention that the work undertaken were indeed in relation to agriculture. Such services fall within the exclusion clause specified under Section 65(97a) of the Act and thus, do not qualify for the levy of Service Tax. It is also submitted by Shri Acharya, Ld. Advocate for the Appellants that the entire Order dated 27-04-2018 is not legally sustainable in as much as the Department has failed to prove anything contrary to the above narratives made by them(Appellant).

3.3 The Ld. Advocate during argument stated that the Original Order has been initiated and concluded on the erroneous premise that the Appellant was seeking exemption from payment of Service Tax on the services rendered by it for agricultural land development. This is more evident from paragraph 3.4 of the impugned Order wherein, it has

been stated that the Appellant “*neither charged nor paid any Service Tax on the aforesaid site-grading and levelling work, claiming the said works as exempted, vide Circular No.B1/6/2005-TRU dated 27.05.2005, being rendered on agricultural land*”. In this connection Ld. Advocate submitted that when a particular activity has been expressly kept out of the purview of the tax net vide Section 65(97a) of the Act, there cannot be an occasion for an assessee to seek exemption from payment of Service Tax on such activity, inasmuch as ‘exclusion’ from the tax net is wholly different from ‘exemption’ from payment of tax. Further, on these fundamentally erroneous premises the impugned Order finds that the Appellant failed to discharge its obligation cast on it by the statute, which is contrary to settled law, inasmuch as, in cases where an assessee seeks exemption from tax, the onus lies on him to prove the eligibility to such exemption; But in cases where a particular activity is excluded from the levy of tax and taxability thereof is asserted by the Revenue, the onus shifts over to the Revenue to prove that the impugned activity is covered under taxing statute for being taxed.

3.4 Over and above, the Ld. Advocate stressed upon the points that (a) The provisions of Section 65(97a) of the Act does not cast any conditional obligation on the service provider to ensure that the specified land which are/were worked-upon to make it suitable for agricultural use or purpose, has to be indeed used for the intended purpose only. It is not incumbent on the Appellant (service provider) to ensure the use of the said land post- rendition of their services. The findings of the Original Authority as given at paragraph 4.12 of the Original Order that the Appellant “*must ensure with documentary support that such lands developed were used for agriculture purpose*”, shall tantamount to recreation of the statute of its own volition which is not permissible under law. [Ref. *Motibhai Fulabhai Patel And Co. V. R. Prasad, Collector of Central Excise - 1978 (2) E.L.T. 3370 (S.C.) – Paragraph 11*]. (b) The Circular No. B1/6/2005-TRU dated 27.5.2005,

nowhere speaks about any exemption from the payment of Service tax. On the contrary, it states all the activities relating to the Agriculture are kept out of the scope of levy of Service Tax. (c) The Original Authority has drawn inference from the prevalent provisions in/of the 'Negative list' regime brought into effect w.e.f. 01.07.2012 and has decided the impugned case/activities pertaining to the 'Pre-Negative List' regime i.e. prior to 01.07.2012.

3.5 Shri Acharya, Id. Advocate opposed the issuance of the SCN on the grounds of 'limitation of time' inasmuch as, the Original Authority indicting the Appellant with the act of 'suppression of facts' with an intent to evade the payment of Service tax is without placing any evidence 'beyond reasonable doubt', to prove such indictment. All the information relating to the Income generated by them (Appellant) and the Expenditures made thereon have been duly disclosed in the Audited Financial Statements which are easily available and/or accessible in the Public Domain. Moreover, the Department itself has conducted periodical Audits of their affairs of Business and their Books of Account along with other 'Financial Statements' wherein, such allegation have never been raised. The Appellant stated that neither, they are required to declare about their Non-taxable activities in the ST-3 Returns nor does the Statute prescribe anything to be complied with. Thus, the Original Authority indicting them with the act of "suppression of facts" with the intent to evade the payment of tax, being absent and/or unproved by the Department, the SCN invoking the 'extended period of limitation of 5-years' is not sustainable. Accordingly, the outcome of the Adjudication proceedings stands *void ab initio*. In support, they have cited the Tribunal's decision of Kirloskar Oil Engines Ltd. Vs. CCE, Nasik [2004 (178) ELT 998] wherein, it has been held that the 'Extended Period' is not invokable, if the demand has been made on the basis of audited Balance Sheet and Profit & Loss Account.

3.6 Opposing the appeal of the Appellant, the Learned Authorized Representative, representing the Respondent-Department, justified the findings of the Order-in-Original and stated that the Appellant are liable for the levy of Service Tax as the Appellant has failed to provide proper reasons/grounds for claiming the exemption from the payment of Service tax. Unless the Appellant proves its eligibility to avail the benefit of exemption from payment of Service Tax, they cannot be relieved of, from the imposition of Service Tax on the services rendered.

4.1 We have carefully heard the arguments put-forth by both the parties and perused the submissions made by them. On a careful assimilation of the subject matter of the Appeal preferred by the Appellant-Assessee before this Tribunal and the Original Order passed by the Original Adjudicating Authority, the following four issues need to be addressed so as to arrive at a decisive conclusion.

- a. Whether the service rendered by the Appellant-Assessee is correctly classified in the Show Cause Notice which has been duly upheld by the Adjudicating Authority in the Order-in-Original?
- b. Whether, the services rendered by the Appellant-Assessee is leviable with Service Tax or is specifically excluded from the ambit of the levy of Service Tax during the material period under dispute? Whether the Appellant Assessee has availed the benefit of any exemption notification under the provisions of Section 93(1)? If so, whether, the Appellant Assessee successfully qualifies to avail such benefit of Exemption Notifications.
- c. Whether the 'burden of proof' is cast upon the Revenue Department to prove the 'taxability' of the services, rendered by the Appellant or the 'burden of proof'

is the responsibility of the Appellant to prove the 'Non-taxability' or 'Exemption from Tax', as the case may be?

d. Whether, the entire SCN is barred by limitation of time for invoking the extended period of limitation of 5 years and as such, the penal provision imposed under Section 78 of the Act, is liable to be invoked?

4.2 The Original Authority has held the activities undertaken by the Appellant for the Contractee M/s.Adhunik Infrastructures Pvt. Ltd as the 'taxable service' of "Supply of Manpower" service and "Supply of tangible goods" service, classified under Section 65(105)(k) and Section 65(105)(zzzzj) respectively of the Act. On perusal of the Contract executed with M/s.Adhunik Infrastructures Pvt. Ltd (refer Annexure-11 of the Appeal Memorandum), it is found that the work order issued is principally for the construction of Road. Thus, we agree with the contention of the Appellant that the activities of 'construction of Road' gets covered under the statutory definition of "Commercial Construction Service" given under Section 65(105)(zzq) of the Finance Act, 1994 and is subjected to the levy of Service tax at appropriate rate. Based on the above, we hold the interpretation of the Original Authority in classifying the activities undertaken by the Appellant for M/s.Adhunik Infrastructures Pvt. Ltd. to be the taxable services under Section 65(105)(k) and 65(105)(zzzzj), to be erroneous and incorrect.

4.3 However, in this aspect, the Appellant has also drawn our attention to the provisions of 65(25b) of the Act wherein, the activity/service of 'Commercial or Industrial Construction' purposefully, excludes the services provided in respect of 'construction of roads' from the very definition of 'taxable service' given under section 65(105) of the Act *ibid*. We are in total agreement with the Appellant's contention that the taxable services defined under Section 65(25b) has categorically excluded the activities of 'construction of road' from the scope of levy of Service Tax. Even otherwise also, we find that the

Activities relating to the 'construction of road' has been placed under the exemption notification No.17/2005-ST dated 07-06-2005 so as to grant benefit to the service providers from being taxed. Thus, the Appellant qualifies in its claim for the non-levy of Service Tax on such activity of construction of Road, rendered to M/s.Adhunik Infrastructures Pvt. Ltd. and accordingly, the SCN fails on this aspect.

The issue as noted at 4.1(a) (supra) is answered accordingly.

4.4 Rest of the demand proposed in the SCN which has been duly upheld by the Original Authority in its order dated 27/04/2018 is related to the activities undertaken by the Appellant for 7-Nos of Contractees which include the services rendered to M/s.AMR Constructions Pvt. Ltd, Hyderabad. The Original Authority in its order has classified such services rendered by the Appellant under the taxable services of "Site formation, and clearance, excavation and earthmoving and demolition" service and upheld the demand of Service tax on the grounds that the Appellant-Assessee has failed to adduce necessary proof in their support of their claim in getting exempted from the payment of Service Tax. The Original Authority has held that the 'burden of proof' for availing the benefit of exemption from Service tax lies on the Appellant-Assessee which they have failed to comply with.

4.5 In contrast, the Appellant claimed that the activities undertaken under the Contract entered into and executed with M/s.AMR Constructions (P) Ltd, Hyderabad was in relation to the construction, renovation & maintenance of 'Water Reservoir' and 'Ash Pond'. This service is classifiable under Section 65(97a) of the Finance Act, 1994.

4.6 Further, the Appellant claims that the services rendered for the remaining 6-Nos of Contracts executed were for the purpose of Agriculture only. All of these services rendered were for Agriculture which gets covered under the exclusion clause of non-levy of Service Tax as specified under the very definition of the taxable service defined under Section 65(97a) of the Finance Act, 1994. They claim

that in the invoices issued by them against the service rendered clearly mentions the nature of service is covered under Section 65(97a) of the Finance Act, 1994 but for the exclusion clause, such services rendered in relation to agriculture are excluded from the very definition of being declared as a Taxable service under section 65(105) of the Act resulting which the scope of levy of Service tax is *sub silentio* on the activities undertaken by the Appellant.

4.7 On this front, we find that the SCN has not placed any conclusive evidence in putting the fact that the service rendered by the Appellant is something other-than related to agriculture so as to inflict the levy of tax on Appellant. No revelation to this effect has been recorded in the findings of the Original Authority either. On the other hand, the Original Authority in its order has been heavily dependent on the Appellant to prove its claim of getting itself exempted from the payment of Service Tax.

In the instant case, it is relevant to place here that first of all, there must be a 'levy of Tax' for anyone to claim the benefit of exemption from such 'levy of Tax'. The Department could have come up with sufficient cause to inflict the levy of Tax on the activities undertaken by the Appellant- rather than seeking the Appellant to prove the cause of non-levy of Service tax. Moreover, the cause placed by the Department for the imposition of levy of Service tax cannot be a mere assertion based on the assumptions or presumptions envisaged in the SCN and instead, such assertions should be 'beyond reasonable doubt' to inflict the levy of Tax upon the Appellant herein. In the present case, the tax imposed on the activities undertaken by the Appellant ceases to have the essence of a Taxable Service, and therefore the rational connection between the Tax imposed and the person on whom it is imposed, ceases to exist. The Revenue Department cannot absolve of its responsibility of *onus probandi* to prove the activity undertaken by the Appellant is indeed a taxable service under the statute. This issue is no more *res integra*, as there

are many judgements pronounced by various Court of Law wherein it is held the onus of proving the taxability in respect of any event/activity is solely incumbent upon the Statutory Authority. On this front, reliance is placed on the principle decided by the Hon'ble Supreme Court in the case of Union of India V. Garware Nylons Ltd. 1996 (87) E.L.T. 12 (S.C.). The relevant extract from Para 15, is reproduced hereunder:

“15.The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case a this, where the claim of the assessee is borne out by the trade inquiries received by them and also the affidavits filed by persons dealing with the subject matter, a heavy burden lay upon the revenue to disprove the said materials by adducing proper evidence.”

Emphasis Supplied

4.8 Further in the case of K. P. Varghese V. Income Tax Officer, Ernakulam & Ors. AIR 1981 SC 1922, the Hon'ble Supreme Court at Para 13 has noted that *“..... It is a well settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue....”*. Even this principle has been upheld by the Coordinate Bench of CESTAT Delhi in the case of **Raymonds Ltd. Vs. CCE, Bhopal** – 2016 (340) ELT 219 (Tri.-Del.) wherein, it was held that *“It is a settled principle of jurisprudence that the one who asserts has to establish, save when the statute expressly casts the burden on the accused”*. [Paragraph 5]

4.9 The Original Order does not boast any material evidence/facts 'beyond reasonable doubt' in the SCN which outweigh the averments made by the Appellant Assessee both in reply to the SCN as well as submissions made before us. Moreover, we have also been apprised by the Appellant that they had submitted a request before the Original Authority to conduct due diligence and survey of the work performed which was not given any heed thereto (refer Para 3.2 Supra). This very aspect stands a testimony to the fact that the Respondent Department, without conducting any inspection/verification of the work undertaken by the Appellant, has drawn its conclusion in haste thereby, confirming the Demand of tax proposed in the SCN. The foremost being the failure to distinguish between the 'Exclusion from Tax' and 'Exemption from Tax' which holds the vital key to the demand being confirmed or otherwise. The present case being confined to the admissibility of the 'Non-levy of Tax' under the exclusion clause as provided under Section 65(97a) of the Act, the Original Authority placing all its decision in relation to the availability of benefit of 'Exemption' from levy of Tax is held as erroneous. It is a settled position of law that under a taxing statute, the Jurors finding that the 'service is taxable' is a pre-requisite or "*sine qua non*" for the levy of tax. Thus, we find the SCN is bereft of any material facts to substantiate the claim made therein and the original Authority has simply went on to confirm the demand made in SCN without applying a judicious Application of mind. ***The issue as noted at 4.1(c) above is answered accordingly.***

4.10 Even otherwise, the Ld. Authorized Representative has failed to place anything substantial to counter the submissions placed by the Appellant before us. The Ld. Authorized Representative raked up alternative grounds of allegations to impose the levy of tax on the Appellant is deemed *cadit quaestio*, as the said accusations has neither been raised in the SCN nor has any reference in the Original Order dated 27-04-2018. Accordingly, we hold that the Original Order

lacks credibility and in the proceedings before us, the entire 'balance of convenience' shifts towards the Appellant Assessee.

4.11 We also take notice of the very proclamation of the Original Authority placed at Para 3.12/3.15 of the Original Order which is reproduced as under:

“3.12.This very logic and terms can also be applicable on the earlier period prior to Negative List based Taxation System, when works of similar nature had been undertaken by the service provider.”

3.15. I find that, the taxable services rendered by the Noticee rightly have been classified under the category of “Site Formation and clearance, Excavation and Earth Moving and Demolition Service”, under Section 65(97a) and the same is taxable under Section 65(105)(zzza) prior to 01.07.2012 and under Section 65B(51) Finance Act, 1994 when 'Negative List' based comprehensive approach to taxation of services came into effect from 01.07.2012. On a similar analogy I find it to be no different with respect to the work undertaken for M/s. AMR Constructions Ltd and For M/s. Adhunik Infrastructures Pvt. Ltd, which also constitute a taxable service under the respective head and the Noticee is thus liable to pay Service Tax at the appropriate rate, as the exemption is not available to the Noticee under such circumstances.

.....”

4.12 To sum up from the aforesaid referred Para 3.12/3.15 of the Order-in-Original, the original authority has relied on the provisions of taxation prevalent in the 'Negative List' regime (w.e.f. 01.07.2012 to 30.06.2017) and drew conclusion from the 'Negative List' regime so as to impose the taxability on the activities undertaken during the era of

'Pre-Negative List' or say the taxation on positive list regime. Such an interpretation of the Original Authority does not withstand the sanctity of the legal dictum in enforcing the provisions prevalent in the 'Negative List' regime to the disputes of the pre-negative list regime. The Original Authority cannot create a legal fiction of its own and dictate for garnering the revenue. Even otherwise, we agree to the contention of the Appellant before us that they have never claimed any exemption from payment of tax and instead what they are claiming is exclusion from the levy of tax. The averment of the Original Authority, that exemption is not available to the Appellant, does not hold any basis. Therefore, we are constrained to hold that the decision of the Original Authority is deemed to be *non compus mentis*. **The issue as noted at 4.1(b) is answered accordingly.**

4.13 Further to the above, the SCN invoking the extended period of limitation (of 5 years) is beyond the legal maxim inasmuch as the Department has failed to convince us that there was any suppression of facts as all the disclosures have been made by the Appellant in their Audited Financial Statement which are available in public domain. On this front, we stand convinced with the decision of **Kirloskar Oil Engines Ltd. Vs. CCE, Nasik** [2004 (178) ELT 998] which has been cited by the Appellant Assessee. Moreover, the Appellant being subjected to annual audit by the Revenue Officers of the Department all the relevant documents viz: audited Financial Statement including Profit & Loss Account, Income Tax returns etc. were submitted before them for scrutiny of the same. Hence, the Revenue Department alleging the Appellant of the act of Non-disclosure of the events/affairs of their business and income made there from, is not acceptable. The Original Authority holding the Act of the Appellant as a 'Suppression of Fact' with an intention to evade the payment of Service Tax sounds hollow and is not admissible. Accordingly, we hold that the Proviso to the Section 73(1) of the Act attracting the extended period of limitation of 5 years is inapplicable and the demand of Service Tax *in*

toto, proposed in the SCN and upheld in the Original Order is barred by limitation of time. ***The issue as noted at 4.1(d) above is answered herein.*** As a result the imposition of penalty on the Appellant in terms of Section 78 stands unwarranted and is therefore, set aside.

In view of the above, the Original Order dated 27-04-2018 is hereby quashed and the Appeal filed by the Appellant is allowed accordingly.

Further to the above, as the entire demand of tax confirmed in the Original order being quashed on merits as well as the SCN being construed as barred by limitation of time, the imposition of penalty of Rs. 1,00,000/- on Shri Mahendra Kumar Gupta, Managing Director of the Appellant-Assessee under Section 78A of the Act, bears no strength to stand on its own and is thus, quashed herewith.

Both the appeals are disposed of in the above terms.

(Order pronounced in the open court on 11 December 2019.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(BIJAY KUMAR)
MEMBER (TECHNICAL)