DIN- 20220355YJ000071287D

Spare 1

केंद्रीय सीमा शुल्क एवं केंद्रीय कर प्रधान आयुक्त का कार्यालय

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS & CENTRAL TAX

विशाखापट्टणम केन्द्रीय वस्तु एवं सेवाकर आयुक्तालय

VISAKHAPATNAM CENTRAL GST COMMISSIONERATE

पत्तन क्षेत्र, विशाखपट्टणम - 530035.

GST BHAVAN, PORT AREA, VISAKHAPATNAM - 530035.

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पत्र सं.C.No:V/15/34/2019-Adj. दिनांक Date:31.03.2022

ORDER-IN-ORIGINAL No.VSP-EXCUS-COM-13-21-22 dated 31.03.2022

Passed by Shri S.FAHEEM AHMED, I.R.S., Principal Commissioner.

प्रस्तावना / PREAMBLE

1. इसेजिस व्यक्ति को जारी किया गया है, यह प्रति निजी प्रयोग केलिए बिना मूल्य के दी जातीहै।

1. This copy is granted free of charge for the private use of the person to whom it is issued.

2. कोई भी व्यक्ति जोवित्तअधिनियम, 1994 की धारा 86 (1) के अन्तर्गतइस आदेशसेपीड़ित होताहो तोवहइसकेविरूद्ध **सीमा शुल्क, उत्पाद शुल्क एवंसेवा कर अपीलीय अधिकरण के क्षेत्रीय न्यायपीठ, प्रथम तल, एच एम डब्लू एस एस बी भवन, खैरताबाद, हैदराबाद-500004**के समक्ष अपील प्रस्तुत करसकताहै।

2. Under section 86 (1) of the Finance Act, 1994, any person aggrieved by this order can prefer an appeal before **the Customs, Excise and Service Tax Appellate Tribunal, Regional Bench, 1ST Floor, HMWSSB Building Rear Portion, Khairatabad, Hyderabad - 500004.**

3. इस आदेश केसूचितहोने के तीन माह के अन्दर निर्धारित प्रपत्र एस.टि.-5 में अपील दर्ज करसकताहै।

3. Appeals must be filed in the prescribed form S.T-5 as required within three months from the date of receipt of this order.

4. अपील चार प्रतियों में निम्नलिखित दस्तावेजों केसाथ दर्ज कीचाहिए :

4. Appeal must be filed in quadruplicate and must be accompanied by:

अ). चार प्रतियों में इस आदेश की प्रति (जिनमें कम से कम एक प्रमाणित प्रति होनीचाहिए) ।

a) A copy of this order in quadruplicate (one of which at least should be certified copy).

ब). सेवा करके रूप में वांछितराशि का राष्ट्रीयकृत बैंकसे लिया गया रेखित बैंक ड्राफ़्ट **सहायक रजिस्ट्रार, सीमा शुल्क, उत्पाद शुल्क एवंसेवा कर अपीलीय अधिकरण केक्षेत्रीय पीठ, हैदराबाद**के नाम पर **हैदराबाद** में देय होनाचाहिए।

b) A crossed Bank draft for amount as prescribed in Section 86 of the Finance Act, 1994 from a Nationalized Bank drawn in favour of **the Assistant Registrar of the Customs, Excise and Service Tax Appellate Tribunal, Hyderabad** payable at **Hyderabad** has to be paid as appeal fees.

स). यदि अपील अधिकृत प्रतिनिधि द्वाराहस्ताक्षरितहोताहै तोकेन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35(क्यू) के अन्तर्गतविनिर्दिष्ट अधिकृत प्रतिनिधि की अपीलकर्ता की ओरसेहस्ताक्षर करने एवं उपस्थित होनेसंबंधीअधिकृत करनेवाले दस्तावेज।

c) The documents authorizing the representative to sign and appear on behalf of the appellant if the appeal is signed by an authorised representative, specified under Section 35(Q) of the Central Excise Act, 1944.

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Brief Facts Of The Case:

M/s. B.G. Shirke Oil and Gas India Pvt. Ltd (Previous M/s. B.G. Shirke Construction Technology Pvt. Limited, a Multi Locational Service Provider (hereinafter called as "BGSCTPL") are holders of Service Tax Registration No.AAACB7293DSD005 for their premises at Plot No.22, D.No.73-22-01/A, A.V.A. Road, Near Gail Office, Datla Balaramakrishnam Raju Nagar, Rajahmahendravaram, East Godavari District, Andhra Pradesh - 533103 and having their Head-office at Pune. This Registration was obtained on 30.10.2012 and last got amended on 27.11.2015, for providing certain taxable services viz. Mining of Mineral, Oil or gas service and also for payment of Service Tax on the services received viz., Business Support Service (by foreign entity); Supply of Tangible Goods Service (by foreign entity): Works Contract service; Security/detective agency service; Manpower recruitment/supply agency service; Rent-a-Cab service; Transport of goods by Road service, Legal Consultancy Service & Other taxable services- Other than 119 listed, under Reverse Charge Mechanism (RCM) as per the Notification No.30/2012-S.T.,dated 20.06.2012 (effective from 01.07.2012) issued under sub-section (2) of Section 68 of Chapter V of the Finance Act, 1994 (*hereinafter referred* to as "*the Finance Act, 1994*"

2. Whereas, on verification of the records of 'the BGSCTPL', it was observed by the Departmental Officers that a Service Contract bearing No.MR/WOB/MM/NMFD/68/ 2005/EB-2130, dated 16.07.2007 for 'Development of Manepalli Field of KG Onshore" had been entered into between:

M/s. Oil and Natural Gas Corporation Limited (ONGC) having its Registered Office at New Delhi-110001; [Head Office at Dehradun]; and one of its Mumbai Region Office at Mumbai-400022 (referred to as 'The Corporation/ONGC);

and

A consortium of companies consisting of M/s. B.G. Shirke Construction Technology Pvt. Ltd., having its registered office at 72-76, Mundhwa, Pune-411036 (M/S. BGSCTPL) and M/s. Hydrocarbon Resources Development Co.(P) Ltd., its Registered Office at 4123/D Oberoi Garden Estate, Chanivlil Farms Road, Andheri (East), Mumbai-400072 and represented by its leader of M/s. B.G. Shirke Construction Technology Pvt. Ltd., with its Registered Office at 72-76, Mundhwa, Pune-411036 (referred to as 'The CONTRACTOR').

3. Whereas, the salient features of the above said Contract are reproduced below:

(i) Effective Date" means the date on which the service contract is awarded by ONGC i.e., 04/04/2007 or the date on which the field is handed over to the Contractor whichever is later [Refer Article 1.34 of the Contract].

(ii) The ownership of the field and products and marketing rights of produced oil and condensate from this contract would be with ONGC. However, Contractor will have marketing rights of CNG/Power beyond delivery point of gas.[Article 3.1 and 11.1 of Contract].

(iii) The Contract itself has classified and grouped together various activities required to be carried out by "BGSCTPL", under three Major Heads viz.,(1) Exploration Operations, (ii) Development Operations and (iii) Production Operations .[Ref: Article 5.6 of the Contract].

(iv) All the work, right from finding Oil/Gas up to producing and delivery of Oil/Gas to ONGC, has been awarded to 'BGSCTPL'. Till the commencement of production and delivery of the said goods, all the necessary expenditure is to be borne by "the BGSCTPL" only. [Ref: Article 5.7 & 5.8 of the Contract].

(v) There will be assessment period of 2 years from the "Effective Date". During assessment period of two years, CONTRACTOR will carry out all activities as per the work program put forth in the bid and CONTRACTOR shall be responsible to execute all works as prescribed in the bid within this assessment period [Ref: Article 5.9 of the Contract].

(vi) Role of the CONTRACTOR in pursuant to the said Service Contract [Ref: Article 7 of the Contract].

(vii) No Advance Payment whatsoever will be entertained by ONGC [Ref: Article 15.1 of the Contract]

(viii) As service charges, 'the BGSCTPL" is entitled to receive fixed % of price of Oil/Gas only on production and delivery of goods [Ref: Articles 15.11, 15.13 & 15.14 of the Contract].

(ix) The Contract shall be for the life period of the field. ONGC may terminate the Contract in certain circumstances as well as CONTRACTOR can exercise the option to quit the Contract at the end of the assessment period after completing the agreed work program for the assessment period [Ref: Articles 31.1 & 31.2 of the Contract].

4. "BGSCTPL" had filed ST-3 returns for the period April, 2015 to September, 2015; October, 2015 to March, 2016; April, 2016 to September, 2016; October, 2016 to March, 2017; April, 2017 to June, 2017. However, on verification of the ST-3 returns, it was observed that they had not declared/disclosed the transactions as a service

provider for the mining of mineral, oil or gas/taxable services provided. The respective/concerned columns of the returns were filled with '0' in all the returns. They also appeared to have taken credit on input services rendered towards outward/output service of mining services. In view of this, department had called for details/information i.e.,(i) Details of Expenditure incurred toward execution of the above referred Service Contract for the financial years 2015-16, 2016-17, 2017-18 (upto June, 2017), Service Tax payments on the services under Partial reverse/ Reverse charge mechanism ,(ii) Profit & Loss Account copies for the said periods and (iii) Details of Service Tax payments made, if any, on "Mining of Mineral, Oil or Gas/Taxable Services".

5. "BGSCTPL" had not furnished the information details called for. Hence, reminder letters vide O.C.No. 503/2018 dated 21.12.2018 & O.C.No.511/2018 dated 28.12.2018 were issued. After repeated reminders, they furnished details vide their letter dated 01.01.2019. As complete information was not given, they were again requested to furnish the month wise data and they furnished month-wise data vide e-mail dated 31.01.2019. However, it appeared from the information furnished, that though activity/services were provided for the said contract, the same were not declared in the ST-3 returns filed by them during the relevant period.

STATUTORY PROVISIONS

6.1 Effective 01.07.2012, under the provisions of the Finance Act, 1994, in terms of clause (51) of Section 65B of the Finance Act,1994 a *'taxable service means, any service on which Service Tax is leviable under Section 66B'. In terms of Section 66B ibid there shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of fourteen percent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

6.2 Education Cess @ 2% under the Finance (No.2) Act, 2004 and Secondary Higher Education Cess @ 1% under the Finance Act, 2007, shall be payable on the above said service for the relevant periods under Section 66 and Section 66B of the Finance Act, 1994. Swatch Bharat Cess and Krishi Kalyan Cess @ 0.5% are payable on the Taxable value of the services under Chapter VI of the Finance Act, 2015 and 2016 respectively.

6.3 As per clause (44) of Section 65B of the Finance Act, 1994, the term 'Service' has been defined as under:

"Service" means any activity carried out by a person for another for consideration and includes a declared service, but shall not include –

(a) an activity which constitutes merely,-

(i) *a transfer of title in goods or immovable property, by way of sale gift or in any other manner; or*

(ii) *such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*

(iii) *a transaction in money or actionable claim;*

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.-

Explanation 2.-

Explanation 3-

Explanation 4-

6.4.. As per clause (iii) of sub-section (1) of Section 67 of the Finance Act, 1994, the value shall "*in a case where the provision of Service Tax is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner*.

6.5 Rule 3 of the Service Tax (Determination of Value) Rules, 2006 is reproduced below:

" *Subject to the provisions of section 67, the value of taxable service, where the consideration received is not wholly or partly consisting of money, shall be determined by the service provider in the following manner:-*

(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;

(b) *where the value cannot be determined in accordance with clause (a) , the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service."*

7. As per clause (a) of rule 3 of the Point of Taxation Rules, 2011, "Point of taxation", shall be the time when the invoice for the service provided or agreed to be provided is issued. As defined in clause (e) of Rule 2 ibid, "Point of Taxation: means, the point in time when a service shall be deemed to have been provided. As defined in clause (d) of Rule 2 ibid, "invoice" means the invoice referred to in Rule 4A of the Service Tax Rules, 1994 and shall include any document as referred to in the said rule. As per sub-rule (1) under Rule 4A of the Service Tax Rules, 1994, "Every person

providing taxable service, not later than thirty days (from 01.04.2012 onwards) from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service, or receipt of any payment towards the value of such taxable service, whichever is earlier, shall issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him in respect of such taxable service provided or agreed to be provided and such invoice, bill or, as the case may be, challan shall be serially numbered.

8. It appeared that the contract scope included assessment, exploration and development, creation of facilities, production and supply of oil and gas as well as exploration in the identified field area. All the work, right from finding Oil/Gas up to producing and delivery of Oil/Gas to ONGC, has been awarded to "BGSCTPL". It appeared that the Contract itself had classified and grouped together various activities required to be carried out, under three Major Heads viz., (i) Exploration Operations, (ii) Development Operations and (iii) Production Operations. Hence, the services provided in connection with (i) Exploration Operations, (ii) Development Operations and (iii) Production Operations appeared to be / are incidental to the main service i.e., "Mining of Mineral, Oil or gas service" provided by "BSGSCTPL".

9. It appeared that the date of completion of each event as specified in the contract shall be deemed to the date of completion of provision of service as specified in the contract and the Contractor shall be responsible to execute all works as provided.. Whereas, it appeared that month & year wise expenditure incurred by "BGSCTPL" towards rendering of the activities/services of "Exploration Operations" and "Development Operations" during the relevant period in relation to providing of main service i.e., appeared to be considered a particular work/job in relation to the above said activities carried/completed in terms of Articles 5.6, 5.7 & 5.8 of the above said Service Contract. It appeared that there was no legal document to arrive at the actual value of the service carried / rendered. Further, it appeared that being Service Provider "BGSCTPL" had not furnished/declared the said details in the relevant columns of the S.T-3 returns.

10. Whereas it appeared that "BGSCTPL" had carried out all activities as per the work schedule of the said Service Contract within the assessment period of 2 years from the above said effective date in terms of the above said Articl-5.9 of the Service Contract. It further appeared that "BGSCTPL", in terms of Article-5.9 of the said Service Contract, had completed/carried out the assigned activities of (i) Exploration Operations and (ii) Development Operations during the relevant period in connection with providing of the main service i.e. "Mining of Mineral, Oil or Gas Service/ Taxable service not falling under negative list". It appeared that the above said main service and any service rendered in relation to main service appeared to be neither covered under the excluding categories mentioned in sub-clauses (a) to (c) of clause (44) of Section 65B of the

Finance Act, 1994 nor in the negative list of services given under Section 66D ibid and thus is "service' and further, is a taxable service not falling negative list" in terms of clause (51) of Section 65B of the Finance Act, 1994 and hence appeared to be liable for Service Tax.

11. Hence, in view of the statutory provisions cited, it appeared that "BGSCTPL" were required to discharge their Service Tax liability on the expenditure incurred by them (cost of provision of service), during the period from April, 2015 to June, 2017 for the said activities carried out by them. Following the principles of the cited statutory provisions of Finance Act, 1994 & rules made there under, service tax for the relevant period, the total Service Tax liability of "BGSCTPL" for the "**taxable service**" rendered by them during the period from April, 2015 to June, 2017, was worked out to be Rs.8,67,39,750/- as per the ANNEXURE enclosed to Show Cause Notice. The same was payable under the provisions of Rule 6 of Service Tax Rules, 1994 read with Sections 68 and 66B of Finance Act, 1994. It appeared that the liability was not declared in ST-3 returns filed in contravention of Rule 7 of Service Tax Rules, 1994 read with Section 70 of Finance Act, 1994. In view of the foregoing, it appeared that BGSCTPL had failed to assess, declare and pay the service tax and appeared to have contravened the provisions of Sections 67; 68; 66B & 70 of the Finance Act, 1994 read with Rules 6 & 7 of the Service Tax Rules, 1994 and POT Rules, 2011 & Service Tax (Determination of Value) Rules, 2006.

12. The issue of non-payment of Service Tax by "BGSCTPL" had come to light only due to the efforts of the Departmental Officers, who had called for the information not declared in the Service Tax returns filed for relevant periods. Had the Department not called for and verified the information/accounts of 'BGSCTPL', the matter would have gone unnoticed and escaped payment of Service Tax. It appeared that "BGSCTPL" had never declared or informed the fact of provision of activity/service under the said Service Contract during the relevant in spite period of they being taxable services not falling under negative list. Further, it also appeared that they had taken input credit on input services rendered towards outward/output service of mining services in respect of the said Contract. Whereas, it appeared that the Self–assessment memorandum declared by them in the ST-3 return was not true in as much as the information in the returns did not reflect details of output service provided in respect of the said contract. Hence, it appeared that 'BGSCTPL' had mis-stated and willfully suppressed the facts and contravened the provision of the Finance Act 1994, with an intention to evade payment of Service Tax in view of non-assessment of taxable service and non-payment of Service Tax & cess thereof, by them. Thus, it appeared that the proviso to sub-section (1) of Section 73 of the Finance Act, 1994 was invokable in the present case for demanding Service Tax & Cess for the extended period.

13.. In view of the above said contraventions, it appeared that "BGSCTPL", were liable for payment of an amount of Rs. 8,67,39,750/- (*Service Tax-Rs.8,48,52,930/-+*

*Education Cess – Rs.2,27,630/- + S.H. Education Cess – Rs.1,13,815/- + Swatch Bharat Cess Rs.11,32,873/- and Krishi Kalyan Cess Rs.4,12,502/-*_which is recoverable along with interest under proviso to Section 73(1) & Section 75 of the Finance Act,1994 for the value of taxable services provided by them during 01.04.2015 to 30.06.2017. In view of the contravention of the provisions of the Finance Act, 1994 and rules made there under, they appeared liable for Penalty under Sub-Section (2) of Section 77 of the Finance Act, 1994. For their failure to pay Service Tax by the specified date contravening the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 as amended, penalty under Section 76 of the Finance Act, 1994. For suppression of taxable value with intent to evade payment of Service Tax and failure to pay service tax thereof, they appeared to be liable for penalty under sub-section (1) of Section 78 of the Finance Act, 1944.

14. In view of the above, B.G.Shirke Oil and Gas India Pvt. Ltd., Plot No.22, D.No.73-22-01/A, A.V.A. Road, Near Gail Office, Datla BalakrishnamRaju Nagar, Rajamahendravaram, East Godavari District, Andhra Pradesh-533103 were issued with a notice C.No.V15/34/2019-Adj. dated 16.04.2019 requiring them to show cause as to why:

A) The activities of "Exploration Operations" and "Development Operations" provided by "BGSCTPL" in terms of Service Contract entered into with ONGC, should not be considered as '**Taxable services (Mining of mineral, oil or gas service) not falling under the negative list**', in terms of under clause (51) read with clause (44) of Section 65B of the Finance Act, 1994 for the period April, 2015 to June, 2017;

B) The value of the above said taxable service provided by them should not be determined under clause (iii) of sub-section (1) of section 67 of the Finance Act, 1994 read with clause (b) of Rule 3 of the Service Tax (Determination of Value) Rules, 2006, as consideration of the taxable service was not ascertainable for the above mentioned period;

C) An amount of **Rs.8,67,39,750**/- (*Rupees Eight Crores, Sixty Seven lakhs thirty nine thousand seven hundred and fifty only*) as per Annexure enclosed to the Show Cause Notice, should not be demanded from them being the Service Tax & cess payable on value of taxable service for the period from April, 2015 to June, 2017, under proviso to the sub-section (1) of Section 73 of the Finance Act, 1994;

D) Interest amount at the appropriate rates should not be paid by them on the amount mentioned at (3) above, under Section 75 of the Finance Act, 1944 read with the Notifications issued under from time to time;

E) Penalty under Section76 of the Finance Act, 1994 should not be imposed on them;

F) Penalty under Section 77(2) of the Finance Act, 1994 should not be imposed on them;

G) Penalty under sub-section (1) of Section 78 of the Finance Act, 1994 should not be imposed on them.

REPLY TO THE SHOW CAUSE NOTICE::

15.1 The assessee furnished reply to the show cause notice vide their letter dated 12.06.2019 wherein they inter alia stated that they were a company duly registered under the Companies Act, 1956. They have their office premises at Plot No.22, D.No.73-22-01/A, A.V.A. Road, Near GAIL Office, Datla Balakrishnam Raju Nagar, Rajamahendravaram, East Godavari District, Andhra Pradesh-533103. Their above mentioned premises was registered with the Service Tax Department vide registration No.AAACB7293DSD005 since October, 2012. They were paying service tax, wherever applicable, and filing ST-3 returns in terms of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994.

15.2 They submitted that they had entered in to contact dated 16.07.2007 (Annexure 3) with ONGC for exploration/production of mineral/gas. The relevant clauses of the contract were extracted below for ready reference:

"Contract No.MR/WOB/MM/NMFD/68/2005/EB-2130
For
Development of Manepalli Field of KG Onshore
This Service Contract made and entered in to this 16th day of July Two Thousand Seven between:
OIL AND NATURAL GAS CORPORATION LIMITED….. of the One Part

A consortium of companies consisting of M/s B G Shirke Construction Pvt. Ltd…. As the other part

DEFINITIONS

1.18 *"Commercial Production" means production of Crude oil or condensate or Natural Gas or any combination of these from the Contract Area and delivery of the same at the relevant Delivery Point under a program of regular production and sale.*

1.20 "Considerate" means those low vapor pressure hydrocarbons obtained from Natural Gas through condensation or extraction and refers solely to those hydrocarbons that are liquid at normal surface temperature and pressure conditions provided that in the event Condensate is produced from Contract Area and is segregated and transported separately to the Delivery Point, then the provisions of this

Service Contract shall apply to such Condensate as if it were Crude Oil.

1.25 "Crude Oil" or "Oil" or "Crude" means all kinds of hydrocarbons and bitumen, both in solid and in liquid form, in their natural state or obtained from Natural Gas by condensation or extraction, including distillate and Condensate when commingled with the heavier hydrocarbons and delivered as a blend at the Delivery Point but excluding verified Natural Gas.

1.30 "Development Operations" means operations conducted in accordance with the Development, Plan and shall include, but not be limited to the purchase, shipment or storage of equipment and materials used in developing petroleum accumulations, the drilling, completion and testing of development wells, the drilling and completion of wells for gas or water injection, the laying of gathering lines, the installation of installations, installation of separators, tankages, pumps, artificial lift and other producing and injection facilities required to produce, process and transport petroleum into main oil storage or gas processing facilities, either onshore or offshore, including the laying of pipelines within or outside the Contract Area, storage at Delivery Point(s), the installation of said storage or gas processing facilities, the installation of export and loading facilities and other facilities required for the development and production of the said Petroleum accumulations and for the delivery of Crude Oil and/or Gas at the Delivery Point and also including incidental operations not specifically referred to herein but required for the most efficient and economic development and production of the said Petroleum accumulations in accordance with GIPIP.

*1.34 "**Effective Date**" means the date on which the service contract is awarded by ONGC i.e., 4/4/2007 or the field is handed over to the CONTRACTOR whichever is later.*

*1.37 "**Exploration Operations**" means operations conducted in the Contract Area pursuant to this Service Contract in searching for Petroleum and in the course of an Appraisal Program and shall include but not be limited to aerial, geological, geophysical, geochemical, paleontological, palynological, topographical and seismic surveys, analysis, studies and their interpretation, investigations relating to the subsurfact geology including structural test drilling, statigraphic test drilling. Drilling of Exploration Wells and Appraisal Wells and other related activities such as surveying, drill site preparation and all work necessarily connected therewith that is conducted in connection with Petroleum exploration.*

*1.60 "**Petroleum Operations**" means, as the context may require, Exploration Operations, Development Operations or Production Operations or any combination of two or more of such operations, including construction operation and maintenance of all necessary facilities, plugging and abandonment of wells, safety, environmental protection, transportation, storage, sale or desposition of Petroleum to the Delivery point, Site Restoration and any or all other incidental operations or activities as may be necessary.*

ARTICLE 5

5.6 The scope includes assessment, exploration and development, creation of facilities, production and supply of oil and gas as well as exploration in the identified filed area.

5.7. It is not our intention to specify and define each and every component, parameter, activity, rights and obligations of the CONTRACTOR, which may be necessary for fulfillment of scope of work of CONTRACTOR under this contract.

CONTRACTOR has to include all such activities, inputs and costs as may be necessary for complete and successful completion of scope of contract.

5.8. The broad scope of work identified for each filed tendered under this contract but not limited to, are as under::

- *Review, survey, analyse and assess all the wells and well information, well completions, well equipments of wells already drilled, completed and available with ONGC within the defined surface area of this field and use in the assessment and development plan.*
- *Survey, assess &analyse the location of the field and he locations of delivery points including the delivery points of ONGC for both crude oil al gas and use in assessment and development plan.*

Prepare a detailed assessment plan and program giving full details of type of assessments, methodology with break-up of activities and starting and completion date of each activity, proposed executing agencies for each activities, listing of all major inputs and equipments, estimated costs with break-up of major components of costs and means of financing, expected results of each activity and assessment plan. All the assessment must be based upon Good International Industry Practices and time bound.

- *Carry out additional assessment, including seismic, logging, exploratory drilling and establishment of additional discovery/upgradation of reserves etc within the defined contract area.*

- *Carry out all necessary drilling both exploratory and development either upgradation of reserves or development of field including procurement, provisioning, fabrication, constructions, installation of all necessary facilities and systems including well drilling and completion materials and equipments both down hole and surface equipment (X-mass tree, well heads, flow arm etc), facilities, pipelines and their hook-up with surface facilities for gathering & transportation.*

- *Preparation of development plan including year wise production profile of oil, gas and water, injection water profile and pressure, reservoir pressure profile, planned number of wells, scheme of gathering, filed processing, storage, measurement, loading, transportation, unloading, scheme of arrangement at delivery point including storage, sampling, testing, measurement, custody transfer, manning operations and supervision, security etc for field production & delivery of products to ONGC Consumer.*

- *Design and engineering, purchase, acquisition, lease/hire, installations, commissioning of all facilities &equipments, pipeline & flow lines, storages, custody transfers, building, infrastructure, site preparation, transport, communication etc necessary for operation of field.*

- *Operation including production, processing, treatment and disposition o fall kinds of effluents/vents, well and reservoir surveillance monitoring and management, application of suitable new technology, techniques, pressure maintenance, EOR, IOR,*

artificial lift, stimulation, logging, zone transfer, water and gas shutoff, sand control or any other techniques & tools etc which may be necessary and desired for efficient and optimum exploitation of reservoir/well / fields.

- *Obtaining/ acquiring/provisioning of all necessary utilities, power fuel, water , chemicals and other inputs as may be necessary for exploration, drilling and efficient, optium, regular operation, production, transport ad transfer of produced hydrocarbon to the custody ONGC.*

- *Recruitment, hiring/ provision of all necessary qualified and experienced, skilled/semi skilled manpower in different required functional areas and expertise necessary for operation, maintenance and management of contract provisions while adhering to all existing rules & regulations on the subject.*

- *Providing, arranging, obtaining all amount to meet the total requirements of and during development and operation phase which will include but not limited to al capital and operating expenditure including working capital on its own/by its own arrangement. It is to be noted that securitization of any ONGC assets/reservoirs/fields for arranging finance will not be permitted. The cost estimates of each major equipments and annual operating expenses with annual cash flow projections in conjunction with financing arrangements will form the part of assessment and development plan.*

- *Acquisition and obtaining all necessary consents, approvals, licenses, registrations, permissions etc from all concerned agencies and ONGC that may be necessary for completion of assessment and further development, production and operation of field covered under this contract.*

- *Payment of all necessary statutory payments including but not limited to all taxes, fees, duties including customs, excise, income tax, corporate tax, service tax as may be necessary and required as per the contract. Payments of all such compensations, damages, lease rents etc., for land, property, ROU, men and material including displacement thereof as may be required for and arise out of during execution of contract.*

- *Management, monitoring, maintenance of all data & records, documentations, reporting, reviewing, management and communication with concerned agencies, Asset Manager and contract co-coordinator of ONGC (herein referred to Head, NMFD).*

- *De-commissioning, abandonment (if required) of all wells and facilities, removal clearing and restoration of site to its original conditions after closure/termination of contract with approval of ONGC.*

- *Adopting and application of all necessary and desirable measures, practices, equipments and systems to ensure and prevent environmental damage (sub surface, land air) and adopting all other suitable means to maintain industrial and social harmony in the contract area including making payments on such activities.*

5.9 There will be assessment period of 2 years from the "Effective Date." During assessment period of two years, CONTRACTOR will carry out all activities as per the work program put forth in the bid and CONTRACTOR shall be responsible to execute all works as proposed in the bid within this assessment period. The assessment plan must commence within six months from the Effective Date or else the contract may be terminated. The CONTRACTOR shall complete assessment plan execution within 2 years from the "Effective Date".

ARTICLE 15

PAYMENTS TO THE CONTRACTOR

15.` No advance payment of whatsoever will be entertained by ONGC.

15.3 CONTRACTOR will raise monthly bill of Service charges based on percent of CONTRACTOR share as per this Service contract to the concerned Asset Manager. The payment therefore shall be effected to the designed bank of the CONTRACTOR as stated in the invoice. Similarly, ONGC will raise monthly bill t the Contractor based on sale of gas to Contractor.

15.8 All payments in respect of delivering crude Oil or Condensate to ONGC pursuant to provisions of thie Article 19 shall be made by the ONGC within the period of 30 days from the date of delivery of invoice by CONTRACTOR as per the terms and conditions of payment.

15.11 .....

All costs under the Contract except costs explicitly indicated herein to be payable by ONGC, shall be borne by CONTRATOR

...

....

Payment will be made by ONGC for services of CONTRACTOR on delivery of Oil and Gas as the case may be.

15.12 Payment to CONTRACTOR will be based on %(fixed) share price of Oil and gas quoted by CONTRACTOR for his services.

Payment will be made to the CONTRACTOR only on delivery of Oil/Condensate (if any)...

15.13 Payment for delivery of Oil: The CONTRACTOR will produce and deliver net oil condensate to ONGC at pre-determined delivery point. The CONTRACTOR will be paid by ONGC as a percentage of price of OIL for the services rendered by it for delivery on net OIL/condensate to ONGC as per Article 13/elsewhere.....

15.3 They stated that from the perusal of the above clauses of the contract it become clear that:

(i) The contract was for exploration, production and supply of oil/gas to ONGC;

(ii) They had not received any consideration for the activities undertaken by them in relation to the scope of the contract;

(iii) They had not raised any invoice/bill on ONGC towards the activities undertaken by them; and

(iv) The entire activity was ongoing and no part of the same had been completed.

15.4 The assessee submitted a detailed chronology of the previous proceedings that at the time of applying for registration in October, 2012, they informed the Department that they had a contract with ONGC against which they had not received any consideration. Thus, in 2012 itself, the Department was aware that they had a contract

with ONGC and they had not received any consideration from ONGC. Therefore, there cannot be any allegation of suppression of facts.

15.5 They submitted that vide letter dated 31.10.2014, the Office of the Assistant Commissioner, Visakhapatnam had called upon for various information/ documentation from them. Vide letter dated 15.11.2014, they replied to the above letter and among other documents they submitted a copy of the above contract entered with ONGC. An observation sheet dated 19.11.2014 was issued to them which contained the observations of the department and their response. Through the said observation sheet, they were called upon to submit data regarding the contract entered with ONGC for Service Tax calculation to which they replied stating that there was no income received by them from ONGC. Pursuant to the above observation sheet, Final Audit Report No.50/DIV-RJY/2014-15 dated 06.01.2015 was issued to them for the period up to 31.03.2014. In the said audit report, there was no observation/ allegation regarding non-payment of Service Tax on the activity undertaken by them for ONGC.

15.6 They further stated that vide letter dated 28.08.2015 another audit was proposed to be undertaken by the Departmental Officers and various data/information was called upon to be submitted for the period 01.04.2014 to 31.03.2015. Audit Report dated 29.09.2015 was issued to them. Objection No.(iv) was with regard to reversal of Cenvat credit on input services alleging that the same was inadmissible in as much as they had not paid output tax under 'mining service'. In the said audit report as well, there was no observation/allegation regarding non-payment of Service Tax on the activity undertaken by them for ONGC. Vide letter dated 20.11.2015, they replied to the above audit report submitting that they had undertaken contract for development of onshore marginal gas field at Manepalli, Rajahmundry and accordingly, they were eligible for input service credit in as much as the contract was under operation.

15.7 In continuation to the above, once again scrutiny of their Service Tax records was undertaken. Various correspondences were exchanged between them and the Department from 24.11.2015 to 02.03.2016. Pursuant to the above correspondences /exchanges, Final Audit Report No.40/2015-16, ST/Group-V dated 03.05.2016 was issued to them for the period April 2014 to March 2015. Among other issues, the audit report alleged that they were liable to pay Service Tax on the activities of "exploration operation" and "development operations" in connection with provision of output service viz. 'mining of mineral, oil and gas service". They had replied to the said audit observation, wherein they inter alia submitted that they were not liable to pay service tax as alleged in the audit report. Subsequent to filing of the above reply, various communications were exchanged between them and the Department pertaining to the transaction between them and ONGC from 31.05.2016 to 19.04.2017.

15.8 They stated that vide letter dated 08.05.2017, they filed a RTI application, inter alia, seeking internal notings/communications within the Commissionerate in relation to

the transaction under dispute. In the monthly monitoring meeting of Kakinada Audit Circle for the month of August 2016 held on 23.09.2016 at Para 7 thereof, their reply filed against audit report dated 03.05.2016 referred supra was acknowledged and it was, inter alia, concluded that

"(a) Contract entered in to between parties cannot be vivisected for the purpose of levy of Service Tax;

(b) As no consideration has been received or no invoice has been issued for service has not been completed as per the conditions stipulated in the contract by the service provider, SCN can't be issued as per the provisions of Rule 3(a) of the POT Rules, 2011:

Copy of the letter dated 29.09.2016 capturing the above was enclosed.

15.9 In letter dated 17.10.2016 written by the Ld. Commissioner to the Principal Additional Director General (Audit) Mumbai after referring to the communication exchanged with them, it was inter alia, concluded as under:

.....

"(ii) *Further, it appears that this service contract is a risk sharing/profit sharing contract unlike a regular contract where a fixed amount with or without escalation clause will be provided for each stage of completion of service towards consideration without giving scope for sharing risk/profit.*

(iii) Since the assessee has not commenced production and supply of oil and gas as per the terms of the service contract dated 16.07.2007, 'completion of service' as per the provisions of Rule 4 A(1) of Service Tax Rules, 1994 or as per the provisions of Rule 3 of Point of Taxation Rules, 2011 read with Board's Circular No.144/13/2011-ST dated 18.07.2011 has not been fulfilled to determine Service Tax liability;

(iv) The said service contract cannot be vivisected as the contract had provided for periodical determination of provision of whole or part of the service only after commencement of commercial production of oil and gas as per the provisions of Rule 3 of Point of Taxation Rules, 2011 and in terms of Rule 4 A(1) of the Service Tax Rules, 1994;

(v) Consideration in money or otherwise is essential for determination of taxable value for the purpose of Service Tax liability as per sub-section (1) of section 67 of Finance Act, 1994 and in this case it will be received on completion of service, i.e. the stage where production and supply of oil and gas commences. In this present issue, the consideration very much exists and also ascertainable and in such a situation, resorting to valuation under Rule 3(b) of the Service Tax (Determination of Value) Rules, 2006 appears to be not tenable.

(vi) In case a show cause notice is issued on the basis of cost of provision of service plus notional profit, the department cannot issue demand for differential duty at a later stage, in case the assessee receives higher consideration. Thus, it is opined that a valid show cause notice can't be issued to the assessee at this point of time."

15.10 They stated that from the above internal exchanges, it was clear that the department had been of the view that there cannot be any demand of Service Tax on them in the transaction under dispute for the reasons explained above. Once this was the case, there was no question of suppression of facts by them when the Department was fully aware of all facts and was itself convinced that there was no tax liability in the instant case. However, solely based on the final audit report dated 03.05.2016, the show cause notice dated 19.04.2017 had been issued to them.

15.11 At para 11 thereof, the show cause notice alleged that the assesses had carried out all activities as per the work schedule of the service contract within the assessment period of two years from the above said effective date in terms of Article 5.9 of the contract. In terms of the said article, the assesses had completed the assigned activities of exploration operations and development operations during the relevant period in connection with providing the main service of 'mining'. The main and the ancillary services were not covered under the negative list of services of exemption notification.

15.12 They submitted that the above show cause notice was liable to be dropped on the following amongst other grounds which were urged herewith without prejudice to one another. At the outset, they deny and counter each and every allegation contained in the show cause notice and entire case of the revenue was incorrect, unsubstantiated and unsustainable and hence liable to be dropped.

15.13 They submitted the following points on the issues raised in the show cause notice:

i) The Show Cause notice proceeded on assumptions and presumptions and there was not a single piece of evidence produced on record by the department in support of the allegations and is liable to be dropped;

ii) The contract had been entered in to between the parties for production and supply of oil/gas. The said activity involved various processes which, inter alia , required assessment, exploration and development, creation of facilities etc. The said processes are a means to achieve the end viz., produce mineral/oil. The same by no stretch of imagination should be construed to be an activity independent of the end to be achieved and be taxed;

iii) The show cause notice cannot and should not have cherry picked clauses form the contract and raised demand of Tax. The show cause notice ought to have understood and appreciated the entire transaction between the assesses and ONGC. Failure to do so vitiates the present proceedings.

iv) If the interpretations canvassed in the show cause notice is accepted then it would lead to absurd results. If one goes by the understanding of the show cause notice then, every contract would become taxable mid-way wherein, the end result for which the contract has been entered in to is yet to be achieved. For instance, a contract for construction of road would involve digging of the road, transportation of stones, laying of construction of cement/bitumen etc. In such a scenario, if anyone process has been completed then there could be or rather according to the show cause notice there would be liability to pay tax irrespective of the other clauses of the contract and even irrespective of the fact whether the assessee has received any consideration towards such activity. As another illustration, where a contractor is constructing an office for his customer and the contract specified that payment will be

made only on completion of complete office premises, in such a case, there would be civil work schedule and thereafter there would be paneling, painting etc. In such a case, the Department cannot demand tax on completion of civil works without considering the fact that no payment was by the contractor and that the customer was concerned with the office premises and not finishing of some civil jobs.

v) they submitted that It was important to bear in mind the principle of reading agreements and interpretation thereof in order to ascertain the true intention of the parties to the agreement. The contract is to be read as a whole.

The Honorable Supreme Court in **Ishikawajma-Harima Heavy Industries Limited (2007(6)STR 3 (SC))** held as under:

> "*76. In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions.*"

In Commissioner of Income Tax vs. Bhojraj Harichand ((1946) 14 ITR 277) while interpreting true nature of amounts spent on leasing of land for obtaining saltpeter, whether towards purchase of lease rights or obtaining raw materials , it was observed on page 286 as under:

"It *is a well-known canon of the construction of documents that intention generally prevails over the words used, and that such a construction should be placed on the words in a deed as is most agreeable to the intention of the granter.*"

Further, **in W.T. Suren & Co (P) Ltd vs. CIT(1971) 80 ITR 602,** the Hon'ble Bombay High Court, while interpreting amounts spent on separation of certain employees of business acquired as a going concern, observed on page 618 as under:

"*These business agreements and must be read a business man would read them unless there is some contrary indication in the agreement itself.*"

Similarly, in **CIT vs. Kolhia Hirdajarh Co.Ltd (1971) 80 ITR 602** while determining the nature of commission paid to the vendor of Collieries for indefinite period, it was observed by the Hon'ble Bombay High Court as under:

".... *in taxation matters it is not necessary to construe documents from their purely legal aspect. It is open to us not merely to look at the documents themselves, but also to consider the surrounding circumstances so as to arrive at a conclusion as to what was the real nature of the transaction from the point of view of two businessmen who were carrying out this transaction. In all taxation matters more emphasis must be placed upon the business aspect of the transaction rather than on the purely legal and technical aspect*"

15.14 They submitted that the show cause notice was on allegations identical to those contained in the show cause notice dated 19.04.2017. At para 2 of thereof, the show cause notice states that the noticee had filed ST-3 returns for the period April 2015 to June 2017. Upon verification, it had been observed that they had not declared/disclosed

the transactions as a service provider on mining/mineral, oil or gas. The notices had taken input tax credit on input services received towards outward/output supply However the noticee had declared the figure 'o' in the ST-3 returns in relation to the transaction under dispute. At para 4 &5 thereof, the show cause notice had reproduced relevant clauses of the contract entered by the noticee with ONGC. At para 7 & 8 thereof, the show cause notice had reproduced the provisions of the Finance Act, 1994 relevant according to the facts and circumstances of the present case. At para 9 thereof, the show cause notice alleged that the contract had grouped the activities under three major heads (i) exploration operations; (ii) development operations and (iii) production operations. Hence, the services provided in connection with the said heads appeared to be incidental to the main service i.e. 'mining of mineral, oil or gas'. At para 10 of thereof, the show cause noticed alleged that the date of completion of each event was specified in the contract. Month and year wise expenditure incurred by the noticee towards rendering of the activities during the relevant period appeared to be considered as particular work/job in relation to the above said service contract.

15.15 **CONTRACT CANNOT ARTIFICIALLY SPLIT/BIFURCATED**

(i) They submitted that there is no basis either in law or under the contract to artificially split the activities and seek to levy service tax on some activities on standalone basis. They submitted that if several activities were undertaken by a service provider in a composite manner in the sense that the activities were interdependent and the customer was interested in enjoying the effect of these together, then the whole composite arrangement was to be given a single taxable agreement. If only one of the activities is liable to tax under a specific description if provided on standalone basis, the conglomeration of services provided as a composite service would not fall in that category.

(ii) In the past, the above contention of the Department had been negative by the Tribunal in Daelim Industrial Co.Ltd V. CCE reported at 2003(155) ELT 457. In that case, Indian Oil Corporation Ltd., awarded a contract to Daelim Industrial Co.Ltd. for construction of a diesel hydro-desulphurisation plant and utilities/offsite at Gujarat Refineries. The contract was on lumspum turnkey basis and the lump sum price had an Indian rupees payment of approximately Rs.184 crores. The contract involved "residual process design and detailed engineering, procurement, supply, construction, fabrication, erection, installation, testing, commissioning and mechanical guarantee". The Department issued a show cause notice asking the assesses to pay Service Tax on residual design process and detailed engineering under the category of consulting engineering. This demand was contested by the assesses but the challenge was unsuccessful and therefore, the matter was carried in appeal to the Tribunal which, after examining the terms and conditions of the contract, held that the assessee's contract with IOC was a works contract on turnkey basis and not a consultancy

contract, and further held that a works contract could not be vivisected for a part of it to be subjected to Service Tax. The Special Leave Petition filed y the Department against the decision was dismissed by the Apex Court as reported in [2004(170)E.L.T.A181 (S.C.)]. The facts in the present case were similar to that of Daelim Industrial Co. Ltd.

(iii) Further, the Tribunal had consistently held that lump sum indivisible contract cannot be vivisected and part of it cannot be subjected to Service Tax. See; (a) Larsen & Toubro Ltd. Ltd. Vs. CCE[2006 (3)STR 223], (b) Ircon International Ltd v.CCE [2006(1) STR 46], (c) Shapoorji Pollanji & Co . ([2006 (1) STR 164], (d) CCE v. Larsen & Toubro Ltd. [2006 (4) STR 63] and (e) Diebold Systems Pvt. Ltd. V. CCE [2008 (9) STR 546)] In view of the above legal position, the notice must be dropped.

(iv) In Sultan Brothers Pvt. Ltd. Vs. CIT, Bombay ((1964) 5 SCR 807; AIR 1964 SC 1389; (1994) 5` UTR 353), the question was whether an arrangement for leasing of building along with furniture and fixtures would be taxable under a category "income from house property'. The Honourable Supreme Court held that the facility of renting the building and the facilities of furniture and fixtures were intended to be enjoyed together and the composite arrangement cannot be described as merely from house property. The Honourable Supreme Court held that the facility of renting the building and the facilities of furniture and fixtures were intended to be enjoyed together and the composite arrangement cannot be described as merely income from house property. It had to be taxed under the residuary head (income from other sources). In view of the above submissions, the show cause notice must be dropped.

15.16 **THE NATURE AND SUBSTANCE OF THE CONTRACT HAS TO BE SEEN**.

The asessee contended that the nature and substance of transaction had to be seen. The transaction in question, at the cost of repetition, was explained in brief:

(i) Vide the contract dated 16.07.2007, they had undertaken to produce and supply oil/gas to ONGC. This was the purpose proposed to be achieved through the contract. This was the purpose proposed to be achieved through the production of the same in as much as their consideration was entirely dependent on production and sale of oil/gas. This was the clear and unambiguous intention between the parties:

(ii) As per the terms of the contract, no advance had been paid to him. No consideration had been paid to them by ONGC for any activity carried out by them in furtherance of achieving the end result of supply of oil/gas to ONGC. This fact was not under dispute. The show cause notice acknowledges this fact;

(iii) They had not raised any invoice/bill on ONGC. This fact was not under dispute. The show cause notice acknowledges this fact:

(iv) They had not completed the activity of exploration/production of oil/gas.

They submitted that the above, in substance, was the transaction in question. The above facts were supported by documentation on record. They submitted that the present show cause notice had not understood and appreciated the above factual position. The notice had proceeded on an incorrect understanding of facts coupled with incorrect interpretation of documents. They submitted that it was well settled that it was the substance and not the form of the contract that should be regarded. It was not necessary that the contract should be construed purely from the legal aspect only. In this regard, they relied on the decision of the Honourable Supreme Court in the case of **Delhi Stock Exchange Association Ltd. V. Commissioner of Income Tax, Delhi ((19961) 41 ITR 496 (SC)),** wherein it was held that:

"it was not how the assessee treated any monies received but what was the nature of the receipts in question that was decisive of their taxability; and, therefore, the fact that the appellant company showed the admission fees as capital in its books was not decisive on thei question of their taxability."

The Hon'ble Apex Court in **Sutlej Cotton Mills Ltd. V.CIT((1979)116 UTR1 (SC))** held that:

"it is now well settled that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. The assessee may, by making entries, which are not in conformity with the proper principles of accountancy, conceal profit or show loss and the entries made by him cannot therefore be regarded as conclusive one way or the other. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee."

In V. Lakshmanan v. B.R. Mangalagiri and Ors.[1995 Supp.(2) SCC 33], the Honorable Supreme Court in regard to interpretation of the clause stipulating the payment of money as advance and not earnest money provided for in the Sale Deed opined:

"The nomenclature or label given in the agreement as advance is not either decisive or immutable."

Therefore, the show cause notice was liable to be dropped.

15.17 **THEY HAVE NOT RECEIVED ANY CONSIDERATION FROM ONGC**.

They submitted that they had not received any consideration form ONGC. Once this was the case, there cannot be any demand of tax. Hence, the show cause notice was liable to be dropped. They submitted that Service Tax was a value added tax. Section 64 provides that Service Tax shall apply to the whole of India (except the state of Jammu and Kashmir). As it stood prior to July, 2012, Section 65 provides for the definition clause. Section 65 (105) defines the term "taxable service". Taxable service has been defined any service provided (or to be provided) by one person to another. Section 66 was the charging Section (up to 30.06.2012). Section 66 provided that there shall be levied a tax at the rate of (xx) percentage of the value of taxable services referred to in sub-clauses of clause (105) of section 65 and collected in such manner as may be prescribed. Section 67 provides that the value of taxable service would be the gross amount charged by the service provide for such service provided by him. Section

68 provides that every person providing taxable service shall pay Service Tax at the rate specified under Section 66 and in the manner prescribed.

Thus, on a cumulative reading of the above provisions and having regard to the scheme of Act, it becomes clear that Service Tax was a tax on provision of taxable service in India on the value of taxable service charged by the service provider. The taxable event was the provision of the service. This has also been held by the Hon'ble Supreme Court in the case of All India Federation of Tax Practitioners &Ors. V/s. Union of India reported at ((2007)7 SCC 527 (Para 7)). Hence Service Tax shall be attracted only when taxable service has been provided by the service provider. To the above effect were the decisions in the case CCE Vs. Reliance Industries 2010(19) STR 807 and CCE Vs. Consulting Engineers Services (I) Private Limited 2013 (30) STR 586.

Section 66 of the Finance Act, 1994 (as it existed under the positive list of taxation) provided that there shall be levied a tax at the rate of twelve percent on the value of taxable services referred to in sub-clauses of clause (105) of Section 65 and collected in such manner as may be prescribed. Section 66B of the Finance Act (with effect from 01.07.2012) was the new charging section (under the negative list of taxation) provides that all services were leviable to tax at the rate of 12% except those specified in the negative list of services. Section 67 of the Finance Act stipulated that the value of any taxable service shall be the gross amount charged by service provider for such services provided or to be provided by him. Thus, it sets out the manner of valuation of taxable services for charging service tax. The said section has undergone amendments, from time to time. With effect from 19th April, 2006, Service Tax (Determination of Value) Rules, 2006 were enacted. They reproduced extract of Section 67 as amended w.e.f. 18.04.2006.

On a close and cumulative perusal of the above statutory provisions, it becomes clear that Service Tax was to be levied only on the value of taxable services provided by the service provider. The term "charged" under section 67 coupled with "such service" has to be read in context and in tandem with each other. The term "charged" has to be construed having regard to the subject matter and the context in which it was used. (See: CIT Vis M K Kirtikar AIR 1960 SC 186). Moreover, it was well settled that the term "charge" means any amount demanded as a price for rendering some service or as price for goods. (See: Gajanana Motor Transport Co. Limited V/s. The State of Karnataka AIR 1977 SC 418).

Thus the term "charged" under Section 67 means the sum collected or demanded by the service provider for the service provided by him. The said interpretation was obvious, logical and in line with the legislative competence. A service provider cannot "charge" for anything which was not provided by him. In the instant case, no sum has been charged or collected or recovered by the notice. Consequently,

they would not be liable to pay Service Tax in as much as no consideration has been paid for the service.

They stated that Section 67(1) provides that where the provision of service was for a consideration in money, the value shall be the gross amount charged by the service provider. Section 67(3) provides that the gross amount charged for the taxable service shall include any amount received towards the taxable service. The definition of "consideration" includes an amount that is payable for the taxable services provided. The definition of "gross amount charged" includes payment in various forms. Having regard to the language of the statute, in the peculiar facts of the present case, there was no "consideration" for provision of the service by them. During the period of dispute, no money / amount had been paid by ONGC to them. They rely on the decision of the Larger Bench of the CESTAT in the case of Bhayana Builders [2013-TIOL-1331-CESTAT-DEL-LB], wherein the Larger Bench relied upon judgment of the Supreme Court in the case of Moriroku vs. State of UP (2008(24) EL 365 (SC)) and held as under:

"for the purposes of levy of sales tax, it is the consideration for the transfer of the property in goods from the seller to the buyer, that has to be taken into consideration and tax must be levied on the consideration for the transfer of property, unlike in the case of excise duty where the levy is event based and irrespective of whether goods are sold or captive consumed, the liability inheres even where the manufacturer is not the owner of the raw material or finished goods. This principle is equally applicable to the levy of Service Tax under the provisions of the Act and in particular in the context of the specific language in Section 67 of the Act."

In view of the above, they were not liable to pay Service Tax in as much as there was no consideration for provision of the taxable service.

15.18 The assesses further submitted that they had raised the first invoice in May, 2018 for the share of their consideration as agreed under the contract with applicable central and state tax under GST provisions in as much as they had completed the contract/provision of service in April, 2018 and enclosed copy of the invoice. They submitted that it was clear from the above cited invoice that when the provision of service got completed and they became eligible for consideration, invoice was raised on ONGC and ONGC had also raised invoice on them towards sale of natural gas produced by them on behalf of ONGC. The natural gas was sold by them to their customer under the cover of invoice with applicable tax. This fact shows that prior to raising of the invoices, the service was not completed, no consideration/advance was received and no invoice was raised and hence no tax was paid by them. Hence this fact demolishes the argument of the Revenue and it is a clear case of pre-mature assessment and demand of tax and therefore, the show cause notice should be dropped.

15.19 **POINT OF TAXATION RULES, 2011 ARE NOT APPLICABLE IN THE PRESENT FACTS**.

The assesses submitted that at para 8 thereof, the Show Cause Notice had reproduced the Point of Taxation Rules, 2011 and at para 10.1 thereof, the show cause notice had concluded that during the assessment period of two years, they had carried out activities as per the work program and should be responsible to execute all works as prescribed within the assessment period. However they submit that the above allegations are incorrect on facts as well as in law in view of the following reasons:

i) Section 68 of the Finance Act, 1994 provides that every person providing taxable service shall pay Service Tax at the rate specified under Section 66 and in the manner prescribed. The Service Tax Rules, 1994 have been framed under Section 94(2) of the Finance Act, 1994 for the purpose of assessment and collection of Service Tax.

ii) Rule 6 of the Service Tax Rules, 1994 provides that Service Tax shall be paid to the credit of the Central Government by the 5th/6th of the month, as the case may be, immediately following the calendar month in which the service is deemed tobe provided as per the rules framed in this regard.

The Point of Taxation Rules, 2011 have been enacted under Section 94(2) of the Finance Act, 1994 for the purpose of collection of Service Tax and determination of rate of Service Tax. In terms of Rule 2(e) of the Point of Taxation Rules, 2011, "point of taxation" means the point in time when a service shall be deemed to have been provided. Under Rule 3 of the Point of Taxation Rules, 2011, point of taxation shall be:

(a) Time when the invoice for the services provided or agreed to be provided is issued
(b) Where the invoice is not issued within 30 days (time period specified in Rule 4A of the Service Tax Rules, 1994) point of taxation shall be the date of completion of service (the proviso to the said Rule)
(c) In a case where the person providing the service receives a payment before raising an invoice, the point of taxation would be the date of receipt of such payment, to the extent of such payment.

From a cohesive reading of the above provisions, it appeared that for Service Tax purposes, services were deemed to have been provided at the time of issue of invoice or receipt of payment towards the same, whichever was earlier. Consequently, the liability to pay Service Tax statutorily arises once the services were deemed to have been provided. The Point of Taxation Rules, 2011 was a piece of subordinate legislation. The same, in no manner can, nor do, override the parent statute. The limited purpose for framing the said rules was to determine the point of taxation for collection of service tax and determine what should be the rate of Service Tax. The said rules, do not, in their view, alter the scheme of the Finance Act and the taxable event, which continues to remain the provision of the taxable service.

They submitted that the provision of the said rules would come into play, only when the taxable service had been provided by the service provider to the service recipient for a consideration in terms of section 66/66B read with section 67 of the Finance Act, 1994. Having not crossed the said threshold, the liability to pay Service Tax would not arise in terms of the said rules. The rules limit themselves to answer the only question viz. "when" Service Tax has to be paid. The rules go no further. As a principle of interpretation, it was well settled that while the charging provision of a taxing statute are to be construed strictly, provisions which lay down a machinery have to be construed so as to make it workable. Machinery provisions have to be read in a reasonable, practicable and liberal manner. The same cannot be read in isolation or out of context. The same cannot be read in a manner so as to create a liability. This principle has been elucidated in Justice G.P. Singh's treatise on Interpretation of Statutes which read thus:

"it must also be borne in mind that the rule of strict construction in the sense explained above applies primarily to charging provisions in a taxing statute and has no application to a provision not creating a but laying down machinery for its calculation or procedure for its collection, and such machinery provisions have to be construed by the ordinary rule of construction (Gursahaiv.CIT, AIR 1963 SC 1062, p.1064). One important consideration in construing a machinery section is that it should be so construed as to effectuate the liability imposed by the charging section and to make the machinery workable ut res magisvaleat quam pereat [NB Sanjana v. Elphinston Spinning & Weaving Mills – AIR 1971 SC 2039, p.204]). Similarly a machinery provision which enables the assessee to avail of a concession or benefit conferred by a substantive provision in the act is liberally construed [C.I.Tv.Kulu Valley Transport Co. Pvt. Ltd- AIR 1970 SC 1734]. And on the same principle statutory provisions touching and conferring a right of appeal have to be read in a reasonable, practical and liberal manner [Commissioner of Income-Tax, A.P. v. Ashoka Engineering Co. AIR 1993 S.C. 858, p.860]."

In the light of the above, the show cause must be dropped forthwith.

15.20 **THE SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006 ARE NOT APPLICABLE IN THE FACTS OF THE PRESENT CASE.**

The show cause notice, at Para 7.5 thereof, had reproduced Rule 3 of the Service Tax (Determination of Value) Rules, 2006 and alleged that they were liable to pay Service Tax.They submitted that the above findings were incorrect on facts as well as in law for the following reasons:

i) Rule 3 of the Service Tax (Determination of Value) Rules, 2006 as amended with effect from 01.07.2012 provides that

"subject to the provisions of section 67, the value of taxable service where

the consideration received is not wholly or partly consisting of money shall be determined in manner prescribed in the above Rule".

However, in the instant case, there is no dispute about the quantum of consideration to be received by them. Hence, there is no question of resorting to valuation rules.

ii) assuming whilst denying Rule 3 of the Service Tax (Determination of Value) Rules, 2006 were to apply, clause (b) of the above Rule provides that " where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service". Rule 3(b) of the Service Tax (Determination of Value) Rules, 2006 requires determination of the equivalent money value of the alleged consideration for services and thereafter it was to be seen whether it was more/less than the cost of provision of the taxable service. In the instant case, there is no evidence of consideration as they have not received any consideration upon which such valuation provisions could be applied.

iii) Assuming whilst denying Rule 3 of the Service Tax (Determination of Value) Rules, 2006 were to apply, clause (b) of the above Rule provide that "where value cannot be determined in accordance with clause (a), the service provider shall the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service". Rule 3(b) of the Service Tax (Determination of Value) Rules, 2006 require determination of the equivalent money value of the alleged consideration. In the instant case, the show cause notice had not bothered to determined the equivalent money value of the alleged consideration to be received for the alleged taxable service provided to ONGC and demanded tax on the cost of provision of service on which 10% notional profit had been added. Such action is bad in law and therefore, the show cause notice is liable to be dropped.

iv) Service Tax cannot be demanded on the expenditure in creating the infrastructure for undertaking the activity of producing the oil/gas.

15.21 **WORKS CONTRACT:**

They submitted that the service, if any, provided by them qualifies as a 'works contract'. Hence, liability, if any, to the extent of fifty percent lies on the service recipient.

15.22 **ACTIVITY AMOUNTS TO MANUFACTURE**:

Without prejudice to the other submissions, they submit that the activity of production of oil/gas amounted to manufacture and there cannot be any demand of service tax on such activity.

15.23 **NO SERVICE TAX ON MATERIAL PORTION**:

They further submitted that that the quantification of demand is not correct. No service tax can be demanded on material portion. Service Tax is a levy on provision of

service by a service provider. Excise duty is a levy on the act of manufacture or production. Sales tax is a levy on the sale of the goods. Customs duty is a levy on the act of importation of the goods into India. In other words, service tax and sales tax are mutually exclusive levies. Hence service tax cannot be levied on the value of the goods supplied by the service provider to the service receiver during the course of provision of such services. However, the said benefit had not been extended to them. Further, it is a settled legal position that even if the material is consumed during the course of provision of service, there is an indeed transfer of property in those goods from the service provider to the customer.(See: Commissioner of Sales Tax V/s Matoshri Textile Limited 2003 (132) STC 539 (Bom.), Livetole V/s State of Tripura 2001 STC 115(Gau) and Zerox Modi Corporation Limited V/s State of Karnataka 2005 (7) SCC 380).Hence, there can be no levy of service tax on the said material portion as well. Further, CBEC vide Clarification dated 07.04.2004 has also clarified to similar effect. They have also enclosed annexure showing the value of material supplied/used by them for provision of the said service. In view of this, the Show Cause Notice may be dropped.

15.24 **DEMAND OF SERVICE TAX ON NOTIONAL VALUE IS BAD IN LAW**:

i) The assesses submit that no service tax can be demanded on the notional value. There is no such concept under the Finance Act or the rules made there under. The Service Tax (Determination of Value) Rules, 2006 is a complete code in itself. It provides for value of services in specific circumstances. Therefore, the demand to this extent needs to be set aside.

ii) There is no requirement to add notional profit to the alleged cost of service in as much as in indirect taxes like Central Excise, Customs, Service Tax, leviability/ chargeability is unconnected with profit or loss. So long as the taxable service is provided and received and the taxable value is collected and paid, the Service Tax is collectable. **[RPG Enterprises Ltd vs. Commissioner of Service Tax – 2008 (11) STR 488]**

15.25 **BEST JUDGMENT NOT APPLICABLE**:

i) The assesses submitted that they had not paid service tax in view of the reasons already explained and there was no violation of any provisions of law and accordingly, section 72 cannot be invoked in the facts of the present case.

ii) assuming whilst denying that they were liable to pay service tax, there was an amount agreed between the parties as per the terms of contract. Once this was the case, provisions of section 72 of the Finance Act, 1994 cannot be invoked.

iii) they relied on apex court judgment in the case of Wipro Ltd. Vs. Assistant Collector of Customs -2015 (319) ELT 177 (SC) wherein it was held that "wherever actual cost of the goods or the services is available, that would be determinant factor. Only in the absence of actual cost, fictionalized cost is to be adopted....."

iv) there is no basis for resorting to best judgment assessment under section 72 of the Finance Act, 1994 in the instant case. The consideration to be received by them from ONGC upon completion of service is fixed.

15.26 **NO SERVICE IS PROVIDED BY THEM:**

They submitted that at para 7.3 of the show cause notice, section 65 B(44) of the Finance Act, 1994 was reproduced suggesting that the activity undertaken by them was a service. On a cumulative and co-joint reading of the provisions of 66B and 65 B(44), it becomes clear that in order to attract service tax, service provider has to undertake an activity for another person (service recipient) for a consideration. Thus, the said supply of service has to flow pursuant to a contract of service. In the instant case, all the above ingredients were not present. They had not received any consideration for the activity undertaken by them and hence, no service tax can be levied on the present transaction. In the light of the same, the show cause notice is liable to be dropped.

15.27 **OTHER SUBMISSIONS:**

i) They submitted that Section 173 of the CGST Act, 2017 provides that save and otherwise provided in the Act, Chapter V of the Finance Act, 1994 shall be omitted. Section 174 of the CGST Act contains Repeal and Saving Clauses. Sub-section (1) thereof provided that save and otherwise provided, on and from the date of commencement of the said Act, several Acts mentioned therein would stand repealed. Sub-section (2) of Section 174 is a Saving Clause and it, inter alia, provides that the amendment of the Finance Act, 1994 to the extent mentioned in Sub-section (1) of Section 173, shall not revive anything not in force or existing at the time of such amendment or repeal. A perusal of the said clause of Subsection (2) of Section174 and other clauses show that there was no saving of provisions in such manner that fresh proceedings could be initiated in exercise of powers under the erstwhile provisions. The constitutional Bench of Supreme Court in the case of Kolhapur Canesugar Works Ltd Vs Union of India Reported at 2000 (119) ELT 257 (SC) held that " if a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission find them..". From the above it can be construed that saving clause in the Act, is only to "save" pending proceedings and without said saving clause, all pending proceedings would have to stop, (See: Recent judgment in the case **of OWS Warehouse Services LLP vs. UOI – 2018-TIOL-2194-HC-AHM-ST**. Identical issue was examined in the case of and **Infinity Bnke Infocity Pvt Ltd vs.Union of India & Ors – 2018-TIOL-1789-HC-KOL-ST**. In view of the same, the show cause notice is liable to be dropped.

ii) They submitted the show cause notice does not explain as to how the services provided by them are liable to service tax and that failure to identify the nature of the activity undertaken by them vitiates the show cause notice and hence the show

cause notice is absolutely cryptic and therefore, is liable to be dropped. (Amrit Foods V/s CCE 2005 (190) ELT 433 (SC))

iii) They further submitted that for argument sake, even if it is assumed that the service tax as alleged is payable, the manner of calculation of liability is not correct. The consideration they have paid is inclusive of service tax payable. In the case of excise duty also, it has been held that the amount received should be taken as cum – duty – price and the value should be derived there from, by excluding the duty alleged to be payable as required under Section 4(4)(d) (ii) of the Central Excise Act, 1944. They relied on the Larger Bench decision in the case of Sri Chakra Tyres 1999 (108) ELT 361. The said decision of the Larger Bench has been affirmed by the Supreme Court. They also relied on the Apex Court Judgment in the case of CCE vs. Maruti Udyog Limited 2002 (49(RLT 1 (SC) . They also relied on Trade Notice No.20/2002 dated 23.5.2002 of Delhi Commissionerate and stated that the above settled legal position as clarified by the circular was given legal recognition with Explanation 2 which was added to Section 67 of the Finance Act, 1994 with effect from 10.09.2004. They submitted that in view of the same, the show cause notice should be dropped forthwith.

ENTIRE EXERCISE IS REVENUE NEUTRAL:

iv) They stated that assuming while denying that they are liable to pay service tax, even then, service tax paid by them would be available as credit to ONGC for payment of excise duty/service tax in terms of Rule 3(1) read with Rule 3(4) of the Cenvat Credit Rules, 2004. Therefore, the entire exercise is revenue neutral and hence, no demand can be made against them. Hence, the show cause notice is liable to dropped. They placed reliance on the following case-laws:

(i) CCE vs. Textile Corporation of Marathawada 2008 (231)ELT 195(SC)
(ii) CCE vs. Narayan Polyplast 2005(179) ELT 20 (SC)
(iii) CCE vs. Coca-Cola India 2007 (213) ELT 490 (SC)
(iv) CCE vs. Narmada Chematur 2005 (179) ELT 276 (SC).

15.28 **EXTENDED PERIOD OF LIMITATION CANNOT BE INVOKED IN THE PRESENT CASE:**

i) They submitted that extended period of limitation for raising demand was not invokable in the instant case as there was no suppression of facts with intent to evade payment of tax by them. They were under the *bonafide* belief that they were not liable to pay any Service Tax for the reasons mentioned hereinabove. The show cause notice dated 23.04.2019 covers the period from April, 2015 to June, 2017. Hence the demand for the period from April, 2015 to March, 2016 (considering the normal period of limitation as thirty months) was time barred.

ii) First, at the outset, at the time of applying for registration in 2012, they informed the Department that they had a contract with ONGC against which they had not received any consideration. Thus, in 2012 itself, the department was aware that

they had a contract with ONGC and they had not received any consideration from ONGC. Copy of letter dated 30.10.2012 was enclosed. Therefore, there cannot be allegation of suppression of facts.

iii) Second, there was a chain of communication exchanges between them and the department time and again. There were in total three audits which were conducted by the department. The first two audits stated that the activity undertaken by them was not subject to service tax. It was only at the time of third audit wherein it was alleged that they were liable to pay service tax. This clearly proves that the factual position of the instant case by no stretch of imagination was suppressed by them.

iv) They were a private limited company and they were maintaining regular books of accounts.

v) They had been filing periodical ST-3 returns. They were under the bonafide belief that they were not liable to pay service tax;

vi) Fifth: There is no column in the ST-3 returns to declare sales turnover;

vii) issue is purely interpretational in nature.

viii) Present issue is pursuant to audit. Regular audits were conducted. It was only during the course of third audit the objection was raised.

ix) they furnished all the information required, as and when sought by the department;

They relied upon the decision of the Hon'ble Supreme Court in the case of **Continental Foundation V/s CCE 2007 (216) ELT 177 (SC)** in this regard. They further submitted that omission to inform the department cannot be equated with suppression of facts. They submitted that the decision of the Supreme Court in the case of Padmini Products (cited supra) would squarely apply to their case and therefore, the entire demand of service tax , being beyond the normal period of limitation, is not sustainable. They also relied upon the decision of the Supreme Court in the case of **Tamil Nadu Housing Board Vs Collector 1994 (74) ELT 9(SC)**. They also submitted that being a periodical/subsequent show cause notice, no allegation of suppression can be made by the department: (Nizam Sugar Factory)

15.29 **SECTION 76 & 78 OF THE FINANCE ACT, 1994 CANNOT BE IMPOSED SIMULTANEOUSLY**.

i) They submitted that it is well settled that penalty cannot be imposed under Section 76 and 7988 simultaneously. Once penalty is imposed under Section 78 of the Finance Act, 1994, no penalty can be imposed under Section 76 of the Act. In

as much as the failure to pay tax cannot once again be subjected to penalty under Section 78 of the Act which is specifically in respect of penalty for intention to evade payment of service tax or suppression or concealment of the value of taxable services or for furnishing inaccurate value of services.

ii) Finance Act, 2007 had inserted a proviso in Section 78 w.e.f.10.05.2008 to the effect that if the penalty is payable under Section 78, the provision of Section 76 shall not apply. Penalty under Section 76 is attracted for failure to discharge the service tax liability by the due date and penalty under Section 78 is attracted when any service tax has not been paid or has been short paid, short levied or erroneously refunded by the reason of fraud, collusion, willful misstatement or suppression of fact or contravention of any of the provisions of Chapter V and VA of the Finance Act,1994 or the rules made there under with intent to evade the payment of service tax. Therefore, there was no scope for imposing double penalty, both under Section 76 and 78 for the same offence. They relied upon the following case laws:

a) CCE vs. First Flight Couriers Ltd 2011 (22) STR 622 (P&H)
b) Opus Media and entertainment vs. CCE, Jaipur, 2008 (9) STR 284(Tri.Del)
c) Commissioner vs. Bajaj Travels Ltd ., 2015 (37)STR j29 (S.C.)
d) ACCE vs. Krishna Poduval,2006 (1) STR 185 (Ker)
e) Commissioner of CGST &C.Ex. vs Sai Consulting Engineering Pvt. Ltd., 2018 (15) GSTL 708 (Guj.)

15.30 They submitted that they are not liable to pay service tax and hence no question of imposing penalty on them and similarly, no interest can be demanded from them.

i) It is a well settled principle that where there is no demand of duty, penalty cannot be imposed. [Coolade Beverages Limited (2004) 172 ELT 451]

ii) in a case involving interpretation of law, no penalty can be imposed. In this connection, they relied upon the decisions in support of the above submission.

a) CCE V/s Sarup Tanneries Limited 2005 (184) ELT 217 (T)
b) CCE V/s Explicit Trading 2004 (169) ELT 205 (T)
c) Goyal M.G Gases Ltd V.s CCE 204 (168) ELT 369 (T)
d) Kanthuria Portfolios V.s CCE 2003 (158) ELT 355 (%)
e) Goenka Woolen Mills V/s CCE 2001 (135) ELT 873 (T).

iii) they were under the bonafide belief that they were not required to pay service tax for the reasons stated above. The question involved in the present case is purely one of interpretation. This is a reasonable cause of non payment of service tax. Therefore, no penalty can be imposed on them.

iv) Bombay High Court has held that penalty under Section 76, 77 and 78 is not mandatory in view of section 80 of the Finance Act,1994 in the following cases:

a. Vinay Bele & Associates 2008 (9) STR 350 (Bom)

b. Ashish Patil 2008 (10) STR 8 (Bom)

They also cited judgment of the Hon'ble Apex Court in the matter of Hindustan Steel Ltd. V/s The State of Orissa (1969(2) SCC 627).

15.31. **No Interest**:

They submitted that once no tax is payable, no interest can be demanded from them. They prayed that the proceedings initiated in the Show Cause Notice be dropped forthwith in toto and requested for personal hearing before any decision is taken.

They further submitted that they re-iterate all the submissions made in the reply to the previous show cause notice and the submissions made in the correspondence with the department, submissions made in the personal hearing and the additional submissions and grounds of appeal before CESTAT, Hyderabad. The same shall be treated as part and parcel of the present appeal. The prayed that proceedings initiated in the above Show Cause Notice be dropped in the light of the above submissions and personal hearing be granted before any decision is taken in the matter.

RECORD OF PERSONAL HEARING:

16. Personal Hearing was held on 14.02.2022, wherein the assesses were represented by their Advocate Shri Bharat Raichandani and Shri Sandeep Gund, Manager. During the personal hearing they have agreed that there is no denial of service rendered to M/s. ONG, but objected to the demand on the issue of point of taxation, as no consideration had been received and no invoice issued. They also disputed the valuation and sought 15 days time for submission of verifiable documents.

ADDITIONAL WRITTEN SUBMISSIONS:

17. The assesses submitted their additional written submission vide their letter dated 28.02.2022 wherein they had reiterated the submissions already made in reply to the show cause notice and submissions made during the course of e-hearing. It is observed that all the additional submissions are a repetition of the submissions made in reply to the show cause notice.

DISCUSSION AND FINDINGS:

18. I have carefully considered the case records as well as the written and oral submissions made by the assessee. I now propose to adjudicate the case in terms of Section 174 of the Central Goods and Services Tax Act, 2017. The issues to be decided in the present case are:

(i) Whether the activities of "Exploration Operations" and "Development Operations" provided by the assessee in terms of Service Contract entered into with ONGC, are classifiable as 'taxable service' under clause (51) read with clause (44) of Section 65 B of the Finance Act, 1994 for the period from April, 2015 to June, 2017.

(ii) Whether the value of the above said taxable service can be determined under clause (iii) of sub-section 67 of the Finance Act, 1994 read with clause (b) of Rule 3 of the Service Tax (Determination of Value) Rules,

2006, as consideration of the taxable service was not ascertainable for the period mentioned in (i) above.

(iii) Whether Service Tax of Rs.8,67,39,750/- (Rupees Eight Crore Sixty Seven Lakh Thirty Nine Thousand Seven Hundred and Fifty Only) as per Annexure enclosed to the show cause notice, on the value of taxable service determined as mentioned in (ii) above for the period from April, 2015 to June, 2017, is recoverable under proviso to sub-section (1) of Section 73 of the Finance Act, 1994.

(iv) Whether they are liable to pay interest as applicable, under the provisions of Section 75 of the Finance Act, 1994? And whether penalty is liable to be imposed on them under Section 76, 77(2) and 78 of the Finance Act, 1994?

(i) Whether the activities of "Exploration Operations" and "Development Operations" provided by the assessee in terms of Service Contract entered into with ONGC, are classifiable as 'taxable service' under clause (51) read with clause (44) of Section 65 B of the Finance Act, 1994 for the period from April, 2015 to June, 2017

19. M/s. B.G. Shirke Construction Technology Pvt. Limited, Rajamahendravaram, entered into a service contract with M/s. Oil and Natural Gas Corporation Limited (ONGC) vide contract bearing No.MR/WOB/MM/NMFD/68/2005/EB-2130, dated 16.07.2007 for "Development of Manepalli Field of KG Onshore". An audit was conducted by the officers of Visakhapatnam Audit Commissionerate and consequently the Commissioner, Audit Commissionerate, Visakhapatnam issued the show cause notice dated 19.04.2017 to the assesses demanding Service Tax of Rs.24,63,96,836/- for the services rendered under the said contract during the period October, 2011 to March, 2015. The present show cause notice dated 16.04.2019 is issued for the services rendered under the said contract for the period from April, 2015 to June, 2017.

20. ONGC had applied for a Lease to carry out Exploration Operations, Development Operations and Production Operations in onshore area identified as Field Manepalli. ONGC desired that the petroleum resources which may exist may be discovered and exploited. The assessee were awarded a contract for development of oil field vide contract bearing No.MR/WOB/MMNMFD/68/2005/EB-2130, dt.16.07.2007. The title of the contract reads as "Service Contract for Development of Onshore Marginal Field Manepalli Onshore Marginal Gas Field Rajahmundry Asset". The scope included assessment, exploration and development, creation of facilities, production and supply of oil and gas as well as exploration in the identified field area. All the work, right from finding Oil/Gas up to producing and delivery of Oil/Gas to ONGC, has been awarded to the assessee. The Contract itself has classified and grouped together various activities required to be carried out, under three Major Heads viz., (i) Exploration Operations, (ii) Development Operations and (iii) Production Operations.

21. Thus the *trend was to outsource part or whole of the mining activities. Since exploration and mining, oil or gas was comprehensively brought under the service tax, field formations may undertake necessary action.*

22. The contract envisaged exploration development and production operations for Oil and Gas. In other words, it speaks of the process of taking minerals, oil and gas from the underneath the surface of the earth. Therefore, I hold that the services rendered by assessee under the said contract during the period October, 2011 to 01.07.2012 are classifiable under "Mining Service" as defined under section 65(105) (zzzy) of the Finance Act, 1944. In this regard, I rely on the judgment of the Hon'ble CESTAT in the case of Atwood Oceanics Pacific Ltd. Vs. Commissioner of Service Tax, Ahmedabad [2013 (32) STR 756 (Tri.-Ahmd.)] The relevant extracts of the case law are reproduced hereunder:

> "13.7 *As per the Mines Act, 1952, the word 'mines' is defined as 'Mine' means, any excavation where any operation for the purpose of searching for obtaining minerals has been or is being carried on and includes-*
>
> *(i) all borings, bore holes, oil wells and accessory crude conditioning plants, including the pipe conveying mineral oil within the oil fields;*
>
> *(ii) all shafts, in or adjacent to and belonging to a mine, where in the course of being sunk or not;*
>
> *(iii) all levels and inclined planes in the course of being driven;*
>
> *(iv) all opencast workings*
>
> *(v) al conveyors or aerial ropeways provided for the bringing into or removal from a mine or minerals or other articles or for the removal of refuse there from;*
>
> *(vi) all adits, levels, planes, machinery works, railways, tramways and sidings in or adjacent to and belonging to a mine;*
>
> *(vii) all protective works being carried out in or adjacent to a mine;*
>
> *(viii) all workshop and store situated within the precincts of a mine and the same management and used primarily for the purposes connected with that mine or a number of mines under the same management;*
>
> *(ix) all power stations, transformer sub-stations, converter stations, rectifier stations and accumulator storage stations for supplying electricity solely or mainly for the purpose of working the mine or a number of mines under the same management;*
>
> *(x) any premises for the time being used for depositing sand or other material for use in a mine or for depositing refuse from a mine on in which any operations in connection such and refuse andor other material is being carried on, being premises exclusively occupied by the owner of the mine;*
>
> *(xi) any premises in or adjacent to and belonging of a mine or which any process ancillary to the getting, dressing or operation for a sale of minerals or of coke is being carried on;*
>
> *Thus, it will be seen that the word 'mine' has been very extensively defined to include infrastructure created for mining of minerals, oil or gas. In short, the word 'mining' must be understood as the process of taking minerals, gas or oil from the underneath the surface of the earth.*"

23. Further, after introduction of the negative list of services with effect from 01.07.2012, clause (51) of Section 65B of the Finance Act, 1994 defines taxable services as follows:

> *"taxable service" means any service on which service tax is leviable under Section 66B;"*

In terms of Section 66 B of the Finance Act, 1994;

> *"there shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of twelve percent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."*

As per clause (44) of Section 65B of the Finance Act, 1994, the term 'service' has been defined as under:

"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include_____

(a) an activity which constitutes merely,
(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or (iii) a transaction in money or actionable claim;
(b) a provision of service by an employee to the employer in the course of or in relation to his employment;
(c) fees taken in any Court or tribunal established under any law for the time being in force.
Explanation 1___
Explanation 2___
Explanation 3___
Explanation 4___"

As per clause (34) of Section 65 B of the Finance Act, 1944, negative list means services which are listed in Section 66D.

24. I find that the services of exploration, development and production operations for oil and gas are neither covered under the excluding categories mentioned in the sub-clauses (a) to (c) of clause (44) of Section 65 B of the Finance Act, 1994 nor in the negative list of services given under Section 66 D ibid. Hence, I hold that the services rendered by the assessee from 01.07.2012 onwards are classifiable as "taxable service" under clause (51) read with clause (44) of section 65 B of the Finance Act, 1994.

25. The assessee contended that without prejudice, the service if any provided by them, qualified "Works Contract" and hence liability, if any, to the extent of fifty percent lies on the service recipient.

26. The taxable service "Works Contract Service" was defined under clause (54) of Section 65B which reads

> *"works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection,*

commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;"

27. From the definition of works contract service, for a service to be classified under this service has to satisfy the following conditions:

(a) There should be a contract.
(b) It should be a contract for the purpose of carrying out the services
(c) The transfer of property involved should be liable to sales Tax.

28. In the present case, as per para 28.3 of the contract, the assets, infrastructure, facilities, equipments, pipelines, software's etc. purchased by the assessee for use in Petroleum Operations shall be owned by the assessee. In terms of para 28.4 of the contract, the assessee themselves were responsible for maintenance, insurance and safety of all the assets and as per para 28.5 of the contract, the assessee could sell those assets. Para 28.3, 28.4 and 28.5 of the contract are reproduced hereunder:

" 28.3 Assets, infrastructure, facilities, equipments, pipelines, software's etc. purchased by the CONTRACTOR for use in Petroleum Operations shall be owned by the CONTRACTOR, Provided that ONGC shall have the right to acquire with vesting of full title and ownership in it, free of encumbrances, of any or all assets, whether fixed or movable, acquired and owned by CONTRACTOR for use in Petroleum Operations inside or outside the Contract area at mutually agreed price arrived based on salvage value and if so desired by ONGC. Such right to be exercisable at ONGC's option upon expiry or earlier termination of the Contract.

28.4 CONTRACTOR shall be responsible for proper maintenance, insurance and safety of all assets acquired for Petroleum Operations and for keeping them in good repair, order and working condition at all times.

28.5 Equipment and assets no longer required for Petroleum Operations during the tenure of the Contract shall be sold, exchanged or otherwise disposed of by the CONTRACTOR, provided ONGC agree for such sale."

29. It can be seen from the above paragraphs of the contract that there is no transfer of material involved in execution of the contract. Hence, the claim of the assessee that supply of material was involved in execution of the contract is not true. Therefore, since transfer of property leviable to sales Tax was not involved, the services rendered by the assessee do not merit classification under "Works Contract Service".

30. They submitted that quantification of demand was not correct. It was submitted that no Service Tax can be demanded on material portion. Service Tax was a levy on provision of service by service provider. Excise duty was a levy on the act of manufacture, sales tax was a levy on the sale of the goods. Customs duty was a levy on the act of importation of the goods into India. In other words, service tax and sales tax are mutually exclusive levies. Hence service tax cannot be levied on the value of the goods supplied by the service provider to the service receiver during the course of provision of such services. However, the said benefit had not been extended to them.

As already discussed, there was no transfer of material involved in execution of the contract and hence, no deductions on value of supplies as claimed can be extended.

31. They further contended that as per clause (44) of Section 65 B of the Finance Act, 1944, "service" means any activity carried out by a person for another for consideration. They argued that as they had not received any consideration till now, it cannot be held that they had rendered service as envisaged in clause (44) of Section 65 B of the Finance Act, 1944. Clause (44) talks of only 'consideration. It does not differentiate between consideration received or receivable. The assessee cannot deny the fact that they have taken up this service contract for a consideration because Article 15 of the contract discusses different payments to be received by them for execution of this contract. As there is an activity and there is a consideration involved in this contract, I find that the conditions stipulated in clause (44) of Section 65 B of the Finance Act, 1944 are satisfied.

32. Further, the assessee contended that the activity of production of oil/gas amounts to "manufacture" as defined under section 2(f) of the Central Excise Act. However, the assessee did not elaborate the argument. They did not explain as to the specific nature of the product produced and under which Chapter Heading of the Central Excise Tariff would the products fall. This argument of the assessee is too vague and hence I do not consider the same.

33. In view of the above discussions, I find that the activities of "Exploration Operations" and "Development Operations" provided by the assessee in terms of Service Contract entered into with ONGC the period from April, 2015 to June, 2017, were classifiable as 'taxable service' under clause (51) read with clause (44) of Section 65 B of the Finance Act, 1994.

(ii) Whether the value of the above said taxable service tax can be determined under clause (iii) of sub-section (1) of Section 67 of the Finance Act, 1994 read with clause (b) of Rule 3 of the Service Tax (Determination of Value) Rules, 2006, as consideration of the taxable service was not ascertainable for both the periods mentioned in (i) above.

34. Section 66 B is charging Section and reads as follows:

"**SECTION 66B.Charge of service tax on and after Finance Act, 2012**. --- *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of (fourteen per cent) on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such matter as may be prescribed.*"

I the present case, the assessee agreed to provide the services of mining of oil and gas to M/s. ONGC. Since all the conditions stipulated in Section 65B are satisfied, the assessee are liable to pay service tax.

35. As per Rule 3 of the Point of Taxation Rules, 2011, the Point of taxation would be earliest of the three events listed below:

(a) The date of receipt of advance. or
(b) The date of issue of invoice or
(c) The date of completion of service.

The provisions of Rule 3 of Point of Taxation Rules, 2011are reproduced hereunder:

"**RULE.3. Determination of point of taxation**.- For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be –

*(a) the time when the invoice for the service [provided or agreed to be provided) is issued:: (**Provided** that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.)*

(b) In a case, where the person providing the service, receives a payment before the time specified, in clause (a), the time, when he receives such payment, to the extent of such payment;

(Provided that for the purposes of clauses (a) and (b),-

(i) In case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such even as specified in the contract shall be deemed the date of completion of provision of service;

(ii) Wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the optionof the provider of taxable service, shall be determined in accordance with the provisions of clause (a).)

***Explanation** – For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of service, the point of taxation shall be the date of receipt of each such advance.)*

36. In the present case, the assessee had neither received any advance not issued any invoice and so the first two options are out of question. As proviso (i) to Rule (3) where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, the date of completion of each such event as specified in the contract shall be deemed to be date of completion of provision of service. In the present case as per Article – 5.9 of the said Service Contract, there will be assessment period of 2 years from the "Effective Date". During the assessment period of two years, Contractor will carry out all activities as per the work program put forth in the bid and Contractor shall be responsible to execute all works as prescribed in the bid within this assessment period. The assessee, vide their letter dt. 15.02.2017 had informed that the "Effective Date" of Contract was the 19th day of September, 2007. The assessee would have carried out all activities as per the work program put forth in the bid within the assessment period of 2 years from the above said effective date. Hence, the point of taxation in the present case is 19.09.2009, which was two years from the effective date of 19.09.2007.

37. Since, the assessee had failed to assess the tax liability in respect of the services rendered to M/s. ONGC, the taxable value has to be arrived at by adopting best judgment assessment in terms of Section 72 of the Finance Act, 1994. In this regard, I rely on the judgment of the Hon'ble High Court in the case of ICICI Bank Ltd. Vs. Union of India [2015(38) STR 907) Bom.)]. The relevant extracts of the case law are reproduced hereunder:

> *"33. It would thus be abundantly clear that the Statute casts a duty upon a person who is providing taxable to any person, to pay Service Tax at the rate as prescribed as specified in Section 66. The Statute mandates every person who is liable to pay Service Tax, to assess the tax himself, due on the services provided by him. The Statute casts a duty upon a person who is liable to pay Service Tax, to himself assess the tax due on the services provided him and submit to the Superintendent of Central Excise, a return in such form as prescribed. Section72 enables the Central Excise Officer in case of person who fails to furnish return under Section 70 or having made a return, fails to assess the tax in accordance with the provisions of the said chapter or rule made therein, to require the person to produce such accounts, documents or other evidence, as may be deemed necessary. It further enables the said officer to pass an order after taking into account all the relevant material which is available or which he has gathered and after giving an opportunity to the person concerned of being heard, to make the assessment of the value of taxable service to be best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. It can thus be seen that the scheme provides that a person who is liable to pay the Service Tax is required to pay Service Tax himself on the basis of assessment made by him and furnish a return to the Superintendent of Central Excise. The Central Excise Officer in case such a return is filed or even if when no such return is filed, is empowered to assess the value of taxable services rendered by such person, to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. It can thus be clearly seen that when an assessee is liable to pay tax in either of the situations, i.e., filing a return or not filing a return, the Central Excise Officer is empowered to assess the value of taxable services, to best of his judgment and determine the sum payable by assessee or refundable to the assessee."*

38. Hence, the details of expenditure incurred, month & year wise, for the period from April, 2015 to June, 2017 furnished by the assessee vide their letter dated 01.01.2019 was adopted to arrive at the taxable value. As per clause (iii) of sub-section (1) of Section 67 of the Finance Act, 1994, the value shall "in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner". Rule 3 of the Service Tax (Determination of Value) Rules, 2006 is reproduced below:

> "**RULE 3. Manner of determination of value-----***Subject to the provisions of section 67, the value of taxable service, where such value is not ascertainable, shall be determined by the service provider in the following manner :-*
> *(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;*
> *(b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such service."*

39. Therefore, I hold that the value of the above said taxable service has to be determined on the expenditure incurred (cost of provision of service) as per clause (iii) of sub-section (1) of Section 67 of the Finance Act, 1994 read with clause (b) of Rule 3 of the Service Tax (Determination of Value) Rules, 2006. I find that while following the best judgment assessment adopting a profit of 10% on the cost of provision of service was reasonable. Hence, the cost of provision of service plus notional profit of 10% has been taken into consideration to arrive at the taxable value. In this regard, I rely on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Meerut Vs. Hyundai Heavy Indus. Co. Ltd (2007(7) STR 257 (SC)). The relevant extracts of the case law are reproduced hereunder:

> *"13. Now coming to the question of the quantum of taxable profits attributable to the India PE of the assessee relating to the work of Installation and commissioning of the platform in Bombay High, we are of the view that, for the reasons mentioned hereinafter, profits arising from the activities of installation and commissioning were taxable at 10% of the payments relating to the said services/facilities carried out in Bombay High. Firstly, in the present case, it is important to note that the accounts submitted by the assessee were rejected and the A.O. had to revoke the provisions of the Act by way of best judgment assessment. Secondly, in the present case, the assessee themselves contended in the assessment proceedings that the A.O. should have computed the income relating to Indian Operations under Section 44BB or under Instruction No. 1767 issued by CBDT dated 1-7-1987. Thirdly, it is important to note that Chapter IV of the Act contains provisions for presumptive taxation of business income in certain cases as prescribed in Sections 44B, 44BB, 44BBA and 44BBB of the Act. In the scheme of presumptive taxation, the assessee is presumed to have earned income at the rate of a certain percentage of his total turnover of gross receipts. If the assessee agrees to be taxed on presumed income, he is not required to maintain books of accounts. If, however, he claims that his income is less than the presumed figure, he is required to support his claim by producing books of accounts. In the present, as indicated above, the A.O. has rejected the rejected the accounts submitted by the assessee. This has not been challenged. Moreover, the assessee appeared before the Department and submitted that its income from Indian Operations be computed under Section 44BB or under Instruction No. 1767 issued by CBDT. Under the said instruction, in cases where the sales take place outside, as in this case, only 10% of the gross receipts in respect of the activities of installation, commissioning etc. performed in India will be taxable. In view of the stand taken taken by the assessee, we are of the view that the CIT(A) was right in computing the taxable profits sat 10% of the gross receipts in respect of the activities of installation, commissioning etc., performed in India. In the present case, no reasons have been given by the Tribunal for reducing the rate from 10% to 3%. Fourthly, it is important to note the scope of Section 44B of the Act. Once that section applies then two conclusions follow. The first is that 10% of the receipts by the foreign resident is chargeable to tax and the other conclusion is that 90% of the receipts of that foreign resident as well as receipts/gains, other than those mentioned in Section 44BB, is also not chargeable to tax. Lastly, there is a concept in accounts which called as the concept of Contract Accounts. Under that concept, two methods exist for ascertaining profit for contracts, namely, "Completed Contract Method" and "Percentage of Completion Method". To know the results of his operations, the contractor prepares what is called as Contract Account which is debited with various costs and which is credited with revenue associated with a particular contract. However, the rules of recognition of cost and revenue depend on the method of accounting. Two methods are prescribed in Accounting Standard No. 7. They are – "Completed Contract Method" and "Percentage of Completion Method". In the present case, the A.O. has rejected*

the completed contract Method which is not challenged. Therefore, we have to fall back on Percentage of Completion Method under which reasonable profit is calculated on the basis of the value of the work certified and the profit attributable to the work certified. For example, if the value of the work certified is ¼ or more but less than ½ of the contract price, than a certain percentage of the profit accruing to the certified work is taken to the profit and loss account. In the present case, the assessee has not given these details, particularly, regarding the value of the work duly certified. If the contract is almost complete, then profit is normally estimated by charging the actual cost and the costs estimated for completing the remaining contract to the Contract Account. This procedure is called as procedure of Contract Costing. When the assessee does not give particulars above-mentioned then CIT(A) was right in estimating the profits of the assessee at 10% of the gross receipts in respect of the activities of installation, hook-up and commissioning performed by the Indian PE in Bombay High. To this extent, we set aside the impugned decision of the Tribunal."

(iii) Whether Service Tax of Rs. 8,67,39,750/-(Rupees Eight crores, Sixty Seven lakhs Thirty Nine Thousand Seven Hundred and Fifty Only) as per the Annexure enclosed to the show cause notice, on the value of taxable service determined as mentioned in (ii) above for the period from April, 2015 to June, 2017,is recoverable under proviso to sub-section (1) of Section 73 of the Finance Act, 1994.

40. In view of the above, holding that the value of above said taxable service has to be determined under clause (iii) of sub-section (1) of Section 67 of the Finance Act, 1994 read with clause (b) of Rule 3 of the Service Tax (Determination of Value) Rules, 2006, the total taxable value for the period from April, 2015 to June, 2017 was correctly worked out to Rs.61,96,41,781/-. In terms of sub-section (2) of Section 73 of the Finance Act, 1994, I hold that the assessee are liable to pay Service Tax of Rs. 8,67,39,750/- (Rupees Eight crores, Sixty Seven lakhs Thirty Nine Thousand Seven Hundred and Fifty Only) towards the services rendered to M/s.ONGC during the period from April, 2015 to June, 2017.

41. The assessee claimed that, if at all Service Tax was to be paid they would be eligible for Cenvat credit on inputs, input services and capital goods used for providing the above alleged taxable service and requested to stop the demand to such extent. I hold that they would be eligible for Cenvat credit on inputs, input services and capital goods used for providing the above alleged taxable service subject to the provisions of Cenvat Credit Rules, 2004 as amended. The demand of Service Tax need not be reduced to the extent of Cenvat credit but the credit availed can be used to discharge the tax liability to that extent.

(iv) Whether they are liable to pay interest as applicable, under the provisions of Section 75 of the Finance Act, 1994 ? And whether penalty is liable to be imposed on them imposable under Section 76, 77 (2) and 78 of the Finance Act, 1994?

42. As per Section 75 of the Finance Act, 1994, every person, liable to pay the tax in accordance with the provisions of Section 68 or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest for the period by which such crediting of the tax or any part thereof is delayed. In the present case, as the assessee had not paid

the Service Tax payable within the prescribed period, I hold that they are liable to pay the interest at the applicable rate.

43. I find that the jurisdictional Range officer verified the periodical ST-3 pertaining to the disputed period and observed that the assessee did not declare/disclose the transactions as a service provider for the mining of mineral, oil or gas/taxable services provided by declaring ZERO values in the relevant columns of the returns in spited of taking input credit on input services rendered towards out word/output services of mining. Accordingly, the jurisdictional Range officer addressed several letters dated 14.12.2018, 21.12.2018, 28.12.2018, 01.01.2019 and 31.01.2019. I also find that the assessee kept avoiding the submission of the data/information called for by the Range officer and it was only after persistence efforts and continuous insistence by the Range officer that the assessee had submitted the information. But for the detailed verification caused by the Range officer the willfully suppressed facts of non-payment of service tax would not have seen light. Thus it is evident from the ST-3 returns filed that the assessee had not declared the value of taxable services rendered by them by way of not disclosing the taxable value in ST-3 returns Department with intent to evade payment of Service Tax. Hence, invoking extended period of limitation in terms of proviso to Section 73(1) of the Finance Act, 1994 is justified. In view of the discussions above, I also find that they are liable for penalty equivalent to the Service Tax not paid, in terms of Section 78 of the Finance Act, 1994.

44. The assessee's contention that the fact of availing of credit by the appellant was known to the Department in view of the audit of the records of the appellant cannot be accepted. All the excisable units and service tax payers are audited by the Department from time to time, if the assessee' interpretation is to be accepted, it would render the relevant legal provision regarding application of extended period of time totally redundant and hence cannot be accepted. In view of the above, invocation of extended period of time cannot be faulted. In this regard, I rely on the judgment of the Hon'ble CESTAT in the case of Chemfab Alkalis Ltd. Vs. Commissioner of C.Ex., Pondicherry [(2010 (251) ELT 264 (Tri. – Chennai)]. The relevant extract of the judgment is reproduced hereunder:

"6. It is seen from the above that the Tribunal took into account several factors while waiving the requirement of pre-deposit. The Tribunal also observed that it was prima facie satisfied that there did not appear to be suppression or willful misstatement in view of the two audits, more so when, the 4 charts annexed to the appeal were not refuted or rebutted in the order-in-original. It is well settled that a prima facie view taken in an interim order such as a stay order, cannot be taken as a binding precedent. Moreover, it was not only the visit of the audit party but also the presence of other additional factors in the case of Hindustan Coca Cola (supra) which appear to have persuaded the Tribunal Bench to take a particular prima facie view in the said case. The present case is different where such attendant additional factors are not

present. Besides, it is well known that the department has a regular programme of audit, under which different units are audited according to the frequency laid down, for example, a bigger unit having more transactions and paying more revenue is audited more frequently, say, once in 6 months. It cannot be a case of anybody that since all the excisable units are being audited by the department from time to time, the extended period of limitation will not apply in respect of any unit. Such an interpretation would render the relevant legal provision regarding application of extended period of time totally redundant and hence cannot be accepted."

45. I do not agree with the contention of the assessee that the facts were within the knowledge of department and hence extended period cannot be invoked. As per Section 73, the only requirement for Revenue to be able to invoke the extended period of five years is to establish suppression, collusion or willful mis-statement with intent to evade service tax and the date on which Revenue discovered or became aware is not a matter of concern. In this regard, I rely on the judgment of **the Hon'ble CESTAT in the case of NGK Infrastructure Ltd. Vs. Commissioner of C.Ex. & S.T., Ghaziabad (2016(41)STR 299 (Tri.-Del.)** wherein it was held that :

"5. We have considered the contentions of both sides. At the very outset, it needs to be stated that the payment was made by cheques dated 17-6-2006 and 21-6-2006 for the services rendered as per the work order dated 17-6-2006 and the bill in respect thereof was issued by the appellant on 18-8-2006. Thus, there is no doubt that the show cause notice dated 5-5-2011 was issued within a period of five years, which is the extended period available for issuing the same in case of willful mis-statement/suppression of facts on the part of the appellant with intent to evade payment of Service Tax. One of the contentions regarding time bar raised by the appellant is that the enquiry began sometime in the year 2008 and therefore the Show Cause Notice was required to be issued within a period of one year of the commencement of the enquiry and various High Court and CESTAT judgments were cited in that regard Perusal of Section 73 ibid makes it clear that the only requirement for revenue to be able to invoke extended period of five years is to establish suppression, collusion or willful mis-statement with intent to evade service tax and the date on which Revenue discovered or became aware is not a variable in this equation. As regards the judgments on this issued cited by the appellant, suffice to say that each of these judgments were given in the context of the facts and circumstances of each case. The need to individually take up those cases and distinguish to show their inapplicability to the present case is however obviated by the judgment of the Supreme Court which in the case of ***Tejas Network India Ltd. V. Commissioner [2015(316) E.L.T A157 (S.C.]),*** *in effect, held that extended period is invokable when clandestine removal for evasion of duty is established and date on which Revenue became aware of it is not relevant."*

46. The assessee contended that copies of the balance sheets, along with profit and loss account, for the period in dispute, were public documents and hence, in such circumstances, the allegation of suppression of facts was unsustainable. I find that theory of universal knowledge cannot be attributed to the Department in the absence of any declaration. In this regard, I rely on the judgment of the Hon'ble CESTAT in the case of **Noble Detective & Security Service P. Ltd. Vs. CST Ahmedabad (2014(34)STR 289 (Tri.-Ahmd.)** wherein it was held that :

"4. *Heard both sides and perused the case records. The case was agitated by the appellant only on the issue that demand in the present proceedings is time-barred. First argument taken by the appellant is that their balance sheets are public documents as being filed with the Registrar of Companies under Companies Act and extended period will not be applicable. It is observed from the judgment of Bangalore Bench in the case of CCE, Calicut v. Steel Industries Kerala Ltd. (supra) that the issue is no more res integra. In Para 3 of this decision, after relying upon the case law of M/s. Maruti Udyog Ltd. V. CCE, New Delhi (2001 (134) E.L.T. 269), the following was held*:

" *We find that in the case of Maruti Udyog Ltd. V. CCE, New Delhi, 2001 (134) E.L.T. 269, the Tribunal has upheld the invocation of the extended period of limitation when the assesses did not declare waste and scrap of iron and steel and aluminium and availment of credit thereon either in their classification list or Modvat declaration or in the statutory records. The Tribunal held that the theory of universal knowledge cannot be attributed to the department in the absence of any declaration. In the light of this decision, we agree with the learned DR that the demand could not have been held to be barred by limitation and accordingly set aside the finding of the Commissioner (Appeals). Since no decision on merits has been recorded by the lower authority, we set aside the impugned order and remand the case for fresh decision on merits to the Commissioner (Appeals) who shall pass fresh orders after extending a reasonable opportunity to the assesses of being heard in their defence.*"

4.1 *In view of the above position of law, appellant's argument, that demand is time-barred, as balance sheets were regularly filed with Registrar of Companies is required to be rejected and detailed findings of Commr (A) in Paras 7 & 8 of his OIA, dated 27-2-2009/5-3-2009 are required to be uphe*ld"

47. The assessee had claimed that the Service Tax paid by them would be eligible as Cenvat Credit for their service recipient and hence the whole situation was revenue neutral. I do not accept assessee' argument as revenue neutral situation comes about only when credit is available to the assessee himself and not by way of availability of credit to the service recipient. In this regard, I rely on the judgment of the assessee in the case Jay Yushin Ltd. Vs. Commissioner of Central Excise, New Delhi (2000 (119) ELT 718 (Tribunal-LB)). The relevant extracts are reproduced hereunder:

"13. *In the light of the above discussion, we answer the reference as under:*

Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme;

(a) Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence;

(b) With particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods;

(c) *We express our opinion in favour of the view taken in the case of M/s. International Auto Products (P) Ltd. (supra) and endorse the proposition that once an assessee has chosen to pay duty, he has to take all the consequences of payment of duty."*

48. I find that effective provisions of Chapter V of the Finance Act, 1994, as omitted vide Section 173 of the CGST Act, 2017, and the then effective provisions of the Cenvat Credit Rules, 2004, as superseded vide notification No. 20/2017-CE (NT) dated 30.06.2017, have been saved vide Section 174 (2) of the CGST Act, 2017 and notification No.20/2017-CE(NT) dated 30.06.2017. Therefore, the provisions of the said repealed / amended Acts and Rules made there under are rightly enforceable for the purpose of demand of duty/tax, interest, etc. and imposition of penalty under this notice. I do not accept the assesses's contention that there was no saving of provisions in such manner that fresh proceedings could not be initiated in exercise of powers under the erstwhile provisions.

49. In view of the above discussion and findings, I pass the following order:

ORDER

i. I hold that the activities of "Exploration Operations" and "Development Operations" provided by M/s. B.G.Shirke Constuction Technology Pvt Ltd., Rajamahendravaram in terms of Service Contract entered into with ONGC, are classifiable as 'taxable service' in terms of clause (51) read with clause (44) of Section 65B of the Finance Act, 1994 for the period from April, 2015 to June, 2017.

ii. I hold that the value of above said taxable service is to be determined under clause (iii) of sub-section (1) of Section 67 of the Finance Act, 1994 read with clause (b) of Rule 3 of the Service Tax (Determination of Value) Rules, 2006, as consideration of the taxable service was not ascertainable for the period mentioned in (i) above.

iii. I confirm the demand of an amount of Rs.8,67,39,750/- (Rupees Eight Crores Sixty Seven Lakhs Thirty Nine Thousand Seven Hundred and Fifty Only) (including Education Cess an Secondary & Higher Education Cess) being the total Service Tax payable on the value of taxable service determined as mentioned in (ii) above for the period from April, 2015 to June, 2017 in terms of Section 73(2) of the Finance Act, 1994.

iv. I order for payment of appropriate interest on the service tax confirmed at (iii) above, In terms of Section 75 of the Finance Act, 1994.

v. I impose a penalty of Rs. 8,67,39,750/- (Rupees Eight Crores Sixty Seven Lakhs Thirty Nine Thousand Seven Hundred and Fifty Only) on M/s. B.G. Shirke Construction Technology Pvt. Limited, Rajamahendravaram, being equivalent to the Service Tax payable as mentioned at Sl. No. (iii) above, in terms of Section 78 of the Finance Act, 1994. However, in terms of clause (ii) of the second proviso to Section 78 ibid, where the Service Tax

and interest is paid within thirty days of the date of receipt of this order, the penalty payable shall be twenty-five percent of the Service Tax payable, only if such reduced penalty is also paid within such period.

vi. I restrain from imposing penalty under Section 76 of the Finance Act 1994, as mandatory penalty equivalent to the Service Tax not paid for the same contraventions and supersession of the facts, is already imposed under Section 78 of the Finance act 1994.

vii. I impose a penalty of Rs.10,000/- (Rupees Ten Thousand Only) on M/s. B.G. Shirke Construction Technology Pvt. Limited, Rajamahendravaram, for improper filing of ST-3 Returns, under Section 77(2) of the Finance Act, 1994.

(S. Faheem Ahmed)
Principal Commissioner

To
M/s. B.G. Shirke Construction Technology Pvt. Ltd.,
Multi Locational Service Provider,
Plot No.22, D.No. 73-22-01/A, A.V.A. Road, Near GAIL Office,
Datla Balaramakrishnam Raju Nagar, Rajamahendravaram,
East Godavari District, Andhra Pradesh – 533 103.

Copy submitted to the Chief Commissioner of Central Tax and Customs, Visakhapatnam Zone. (By name to Superintendent (Review), CCO)

Copy to:
1. The Assistant Commissioner of Central Tax, Rajamahendravaram CGST Division.
2. The Superintendent of Central Tax, Danavaipeta CGST Range.
3. The Superintendent of Central Tax, ARC, Visakhapatnam.
4. Spare Copy.