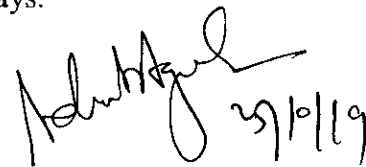




Seventy Two Only) in terms of the provisions of Section 78 of the Finance Act, 1994. However, in view of clause (ii) of the second proviso to Section 78 (1), if the amount of Service Tax confirmed and interest thereon is paid within period of thirty days from the date of receipt of this Order, the penalty shall be twenty five percent of the said amount, subject to the condition that the amount of such reduced penalty is also paid within the said period of thirty days.

 29/10/19

(MOHIT AGRAWAL)
Additional Commissioner of CGST,
Ahmedabad South

F.No. STC/04-46/SPX/OA-I/2018-19

Date: - 25.10.2019

BY REGD POST A.D.

To
M/S. SPX Flow Technology (India) Pvt. Ltd.,
Survey No. 275, Odhav Road,
Odhav, Ahmedabad-382415

Copy to :

- (1) The Principal Commissioner, CGST, Ahmedabad South.
- (2) The Assistant/Deputy Commissioner (RRA), Central GST, Ahmedabad South.
- (3) The Assistant/Deputy Commissioner, Central GST, Division-V/Odhav, Ahmedabad South.
- (4) The Superintendent, Central GST, Range-II, Division-V/Odhav, Ahmedabad South.
- (5) The Superintendent (System), Central GST, Ahmedabad South.
- (6) Guard File.

Enterprises v CST Chennai, it is held that extended period is evocable when department came to know of Service charges received by appellant on verification of his accounts. Interest at the appropriate rate is also required to be recovered from them under Section 75 of the Act *ibid*.

18.19 The discussions hereinabove amply demonstrate that the assessee has suppressed the facts and contravened the provisions of the Finance Act, 1994 or the rules made there under as specified above and as such the consequences shall automatically follow. The Hon'ble Supreme Court has settled this issue in the case of U.O.I Vs. Dharmendra Textile Processors reported in 2008 (231) E.L.T. 3 (S.C.) and further clarified in the case of U.O.I. Vs. R. S. W. M. reported in 2009 (238) E.L.T. 3 (S.C). Hon'ble Supreme Court has said that the presence of malafide intention is not relevant for imposing penalty and *mensrea* is not an essential ingredient for penalty for tax delinquency which is a civil obligation. I, therefore, conclude that the assessee have rendered themselves liable to penalty in terms of the provisions of Section 78 of the Finance Act, 1994.

19. Further, I find that the provisions of the omitted Chapter V of the Finance Act, 1994 have been saved vide Section 174(2) of the CGST Act, 2017 and therefore, the provisions of the said amended Acts and Rules made thereunder are applicable for the purpose of demand of duty, interest, etc. and imposition of penalty in the instant case.

20. In view of foregoing discussions and findings, I pass the following order.

ORDER

- (a) Service tax should be charged on 40% of the gross amount of Rs. 11,36,01,200/- charged and received from M/s Emami Agrotech Ltd. for supplying, erection, commissioning and installation of SPX GS Processing Equipments for Margarine and Shortening plant and various other equipments related to plant (Imported and Indigenous) for the period from September 2015 to March 2017, in terms of the provisions of Section 67 of the Finance Act, 1994 read with Rule 2A (ii)(A) of Service Tax (Determination of Value) Rules, 2006;
- (b) I confirm the demand of Service tax amounting to be Rs. 68,16,072/- (Sixty Eight Lakhs Sixteen Thousand And Seventy Two Only) and order recovery of the same from them under proviso to Section 73(1) of the Finance Act, 1994, by invoking extended period of limitation. The service tax amounting to Rs.6,00,000/- paid by them on gross taxable value of RS.40,00,000/- stands appropriated towards their service tax liability;
- c) Interest at appropriate rate should be charged and recovered on the confirmed demands at b) above in terms of the provisions of Section 75 of the Finance Act, 1994;
- d) I impose penalty of Rs. 68,16,072/- (Rs. *Sixty Eight Lakhs Sixteen Thousand And*

proviso to **Section 73(1)** of the Act is correctly invocable in the instant case for recovery of unpaid Service Tax alongwith interest u/s 75 of the Finance Act 1994.

18.16 The assessee have also contended that penalty under Section 78 would not be imposable by placing reliance on various case laws. In this regard, I find that the assessee have failed to disclose the full, true and correct taxable value for the service provided by them on provision of works contract service, in the ST-3 returns filed by them for the period 2015-16 and 2016-17. By resorting to such omissions, the assessee have failed to discharge the onus of self-assessment cast upon them under Sec. 70 of the Finance Act, 1994 and the material information has been concealed from department deliberately, consciously and purposefully resulting in such non-payment of service tax. The non-payment of service tax by the assessee has come to the notice of the department only during the course of audit by the officers of the Central Tax, Audit Commissionerate, Ahmedabad. Had it not been for the audit, the said facts would never have seen the light of the day. Thus, I find that the assessee have resorted to evasion of payment of service tax by way of suppression of facts and contravention of provisions of law with an intent to evade payment of tax. Thus, the assessee is liable for penal action under Section 78(1) of the Act, *ibid*.

18.17 The Government has from the very beginning placed full trust on the service providers and accordingly measures like Self-assessments, *etc.*, based on mutual trust and confidence are in place. Further, a service provider is not required to maintain any statutory or separate records under the provisions of Finance Act and Rules made there under, as considerable amount of trust is placed on them and private records maintained by them, for normal business purposes are accepted, practically for all purposes. All these operate on the basis of honesty of the assessee; therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. From the evidences, I find that the assessee has knowingly suppressed the value of taxable services provided by them with intent to evade payment of service tax. The deliberate suppression of value is in utter disregard to the requirements of law and breach of trust deposed on them and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime. Such outright act in defiance of law appears to have rendered them liable for penal action as per the provisions Section 78 of the Finance Act, for suppression of material facts and, with intent to evade payment of tax.

18.18 Moreover in the present regime of liberalization, self-assessment and filing of returns online, no documents whatsoever are submitted by the assessee to the department and therefore the department would come to know about such suppression only during audit or preventive/other checks. As the assessee has evaded payment of service tax by suppressing the value of services provided, the same is therefore required to be recovered under proviso to Section 73(1) of the Finance Act, 1994, by invoking extended period. In the case of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 (23) STT 275, in case of Lalit

provisions of Rule 2A (ii) (A) of Service tax (Determination of Value) Rules, 2006 in as much as the value of goods is not specified in the agreement entered into by both the parties. Accordingly, in case of works contracts entered into for execution of original works, service tax shall be payable on 40 per cent of the total amount charged for the works contract and the demand has been correctly raised.

18.14 It has been further contended by the assessee that the extended period of limitation is not applicable in the present case since mere failure in giving correct information would not be a case where the Revenue can invoke extended period of limitation. In this regard, I find that Section 70 of the Finance Act, 1994 stipulates that every person liable to pay the service tax shall himself assess the tax due. The Government has introduced self-assessment system under a trust based regime which casts the onus of proper assessment and discharging of the service tax on the assessee. The definition of "assessment" available in Rule 2(b) of Service Tax Rules, 1994 is reproduced as under:

"assessment" includes self assessment of service tax by the assessee, re-assessment, provisional assessment, best judgment assessment and any order of assessment in which the tax assessed is nil; determination of the interest on the tax assessed or re-assessed.

18.15 In the instant case the assessee has failed to properly assess the service tax liability. I also find that the agreement had been entered into by the assessee with M/s. Emami Agrotech Ltd., Kolkata and who other than the assessee would be in a better position to understand the sum and substance of the contract entered into and the obligations cast on them under the said contract. The above discussions clearly bring out the facts that the assessee and M/s. Emami Agrotech Ltd., Kolkata were jointly and severally liable, responsible for the obligations cast under the entire contract comprising of Supply, installation, commissioning, training, technical support etc for the machinery. Further, the contracts entered into by the assessee clearly mentioned that all the taxes viz. sales tax, service tax, excise duty will be extra as applicable which clearly indicate that the assessee and M/s Emami Agrotech Ltd., Kolkata were aware of the applicable taxes but have deliberately chose not to abide by the law and discharge their tax liability. Thus, I find that the assessee have knowingly suppressed the facts which has resulted in revenue loss to the exchequer. Thus, the extended period of limitation is applicable to the facts of the present case and the assessee's arguments are not tenable. They have suppressed the facts and resorted to mis-statement by way of filing returns not disclosing full facts with intent to evade payment of Service Tax rendering them liable for penalty. In view of the above discussion, I find that the ratio of the case laws cited by the assessee is not applicable to the facts of the case in as much as there is a clear involvement of suppression of facts and contravention of law with intent to evade payment of duty. Therefore, I come to the conclusion that the extended period of limitation is correctly applicable to the facts of the case. Thus, I find that the assessee has short-paid/ not-paid service tax by resorting to suppression of facts and contravention of the provisions of law with intent to evade payment of tax. Therefore, extended period of limitation as envisaged in the

(i) *the CENVAT Credit of duty paid on inputs or capital goods or the CENVAT Credit of service tax on input services, used for providing such taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004;*

(ii) *the service provider has not availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503(E), dated the 20th June, 2003].*

Explanation. - For the purposes of this sub-rule, the gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider.]

18.13 The principles of the above valuation rule provide that the service tax is to be charged on the gross amount of works contract less the value of property in goods transferred. In the event that such vivisection is not possible, recourse is to be taken to sub-rule (ii) which provides for charge of service tax on 40% of the gross amount of Works Contract. In the instant case, it is observed that the agreements entered into by the assessee with M/s. Emami Agrotech Limited nowhere provide for separate values in respect of supply of goods and supply of services. On the contrary clause 5 of the agreement (as reproduced hereinabove) clearly indicates that a price has been fixed for the entire contract and such price is inclusive of the supply of goods portion as well as the activity of Installation & Commissioning and also the technical support to the staff of the customer subsequent to the activity of Installation & Commissioning. Thus, it is seen that at the time of entering into the agreement there was no vivisection in the agreement regarding separate amount towards supply of goods and amount towards supply of services. All that the agreement suggests is that the assessee and customer entered into an agreement whereby the assessee was required to hand over the complete operational machinery and the customer was required to make the agreed upon payment against receipt of such complete machinery in an Installed and Operational mode. In other words the assessee has entered into an indivisible contract which nowhere segregates the value of service portion in the execution of the said works contract referred to in clause (h) of section 66E of the Act. It is only while issuing the invoices that the assessee have resorted to segregate the value towards supply and value towards services. Such segregation was never a part of the contract and once the agreement has been entered into, the customer is not concerned with the segregation. All that the customer is concerned with is that the payment would be made only to the extent of that agreed upon in the contract and the heads of the payment would not make any difference to the customer. Thus, it is clear that the assessee has artificially vivisected the value towards supply and services in the invoices issued by them and such segregation was never a part of the agreement. Thus, the assessee's argument regarding charging of service tax on the value of services as vivisected by them in the invoices is devoid of merits. Had it been the intention that the assessee is entitled to Rs. 40,00,000/- towards the services rendered by them, it would inevitably have been a part of the contract between the two parties. Accordingly, I hold that the valuation in the instant case would be governed by the

[Provided that where the amount charged for works contract includes the value of goods as well as land or undivided share of land, the service tax shall be payable on thirty per cent. of the total amount charged for the works contract.]

[(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property, service tax shall be payable on seventy per cent of the total amount charged for the works contract.]

Explanation 1. - For the purposes of this rule,-

(a) "original works" means-

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(b) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any; and

(ii) the value added tax or sales tax, if any, levied thereon :

Provided that the fair market value of goods and services so supplied may be determined in accordance with the accepted accounting principles.

Explanation 2. - For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.]

[(2) Where the value has not been determined under sub-rule (1) and the gross amount charged includes the value of goods as well as land or undivided share of land, the service tax shall be payable on twenty-five per cent. of the gross amount charged for the works contract, subject to the following conditions, namely :—

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Explanation.- For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, –

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent. of the total amount charged for the works contract;”

contract entered into by the buyer and the assessee is not merely supply of machinery and installation commissioning but is a composite works contract order for goods and services, i.e., supply of the entire plant, i.e., "SPX GS Processing Equipments for Margarine and Shortening" (imported and indigenous equipments) and complete installation and commissioning of the said equipments and support services subsequent to installation & commissioning.

18.8 Another plea of the assessee is that the project is in the nature of turnkey project and the same would not qualify as Works Contract. In this regard it is observed that the assessee's own submissions indicate that the contract was for supply of machinery in ready to use condition. It is a well known principle that machinery is required to be installed and commissioned as per the pre-determined layout and only then the machinery can achieve the status of 'ready to use'. Thus, the term 'supply of machinery in ready to use condition' in itself indicates that the requisite machinery has to be procured and then installed and commissioned at the site of client as per the agreed upon layout. Only after performing both the actions of placing the machinery at site and its subsequent action of installation and commissioning can the machinery be handed over in a ready to use condition. In a nutshell, the phrase 'supply of machinery in a ready to use condition' implies that the actual handing over/ transfer of ownership would be effected only on completion of the installation and commissioning of the same. In other words, during the course of execution of the contract, the action of transfer of property in goods which are leviable to tax as sale of goods is involved.

18.9 In view of the above, I find that the assessee's contentions are devoid of merits in as much as they have entered into a composite contract wherein they were required to hand over the complete machinery in an operational condition alongwith the technical support to the staff of the customer after the completion of installation and commissioning job. Further, it is observed that the assessee has discharged the applicable CST/ VAT on the goods viz. machinery of which the transfer is involved in the execution of the contract/ agreement with the customer. Thus, I find that the activity undertaken by the assessee is squarely covered under the 'Works Contract' as defined at Sec. 65B(44) of the Finance Act, 1994.

18.10 The second issue under contention is the manner of valuation for the purpose of levy of service tax on the service portion of the Works Contract. It is the contention of the assessee that they have charged Rs. 40,00,000/- towards the activity of Installation & Commissioning and the rest of the contract amount is towards supply of the goods and as such service tax should be charged on such amount of Rs. 40,00,000/-. The manner of valuation in case of service portion of Works Contract has been stipulated under Rule 2A of the Service Tax (Determination of Value) Rules, 2006 which reads as under:-

Subject to the provisions of Section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

PO EAL/KP/PO/SPX/03/2015-16 dated 2.2.2016 which for the buyer i.e M/s. Emami Agrotech Ltd., Kolkata is equally important.

18.5 I find that the contention of the assessee to the effect that the primary object of the transaction was selling and supplying machinery and equipments for margarine and shortening plant, the installation & commissioning of the plant was only incidental to the primary object of sale and supply of machinery is in itself contradictory in as much as the assessee have also put forth contentions to the effect that their contract was in the nature of a turnkey project. It is common knowledge that a turnkey project does not consist of a primary and incidental objective but is a composite indivisible task entrusted for execution. This is amply demonstrated from the fact that the recipient has entered into a composite contract with the assessee for procurement of complete operational machinery which also includes the component of training to the staff of the buyer amongst the other tasks to be undertaken, which is evident from clause 8 "Shipment, Delivery and Installation & Commissioning" of the Purchase Order No. EAL/KP/PO/SPX/01/2015-16/RI dated 23.09.2015 which stipulates that "*Installation, Commissioning, Training of our Plant Operators and Handing over should be completed as per the schedule given below*". The schedule has fixed time frame for supply of hardware, transit time (shipping time), Port Clearance & Transport, Installation and Commissioning. This clearly indicates that the obligation of the assessee was total handing over of the plant which is inclusive of all the above components. Thus, it is clear that prime objective of the contract was not supply of goods but the contract comprised of a composite objective of handing over a complete functional plant to the customer.

18.6 Further, it is worth mentioning that Para 5 of Purchase Order No. EAL/KP/PO/SPX/01/2015-16/RI dated 23.09.2015 and contract made on 16/11/2015 stipulates that "*price is inclusive of packing and forwarding, loading, freight, installation and commissioning of total system(including imported and indigenous equipment both), training of technicians during startup & commissioning, any spares or components (which might be required for satisfactory running of machine, but not mentioned in the offer or in order), mechanical, electrical diagrams*" This clause clearly indicates that the price offered towards the contract was also a composite price comprising of supply, installation & commissioning, training of technicians, mechanical & electrical diagrams, etc. Clause para 7 of the Purchase Order also indicates that the assessee has not only provided machine, its installation, commissioning and training but also provided Technology support in their innovation center located at Soeborg, Denmark for 3 days.

18.7 In view of the above, it is clear that the argument of the assessee to the effect that the contract was with a primary objective of supply of goods is not tenable in as much as the various clauses as discussed above indicate that the contract was a composite contract for procurement of completely functional plant along with the technical support required. In other words, the

that the proposal to charge of interest and imposition of penalty be vacated as there was no justification in demand of service tax leveled against them. They requested an opportunity of personal hearing in the interest of justice.

PERSONAL HEARING:

17. An opportunity for personal hearing was granted on 18.10.2019, when Shri Aditya S. Tripathi, Advocate appeared on behalf of the assessee and re-iterated the written submissions dated 31.10.2018 and requested to drop the proceedings.

Discussion & Findings

18.1 I have carefully gone through the Show Cause Notice, the Relevant Relied Upon Documents and the assessee's submissions both, in written and in person.

18.2 The issue for consideration revolves around dual matters viz. 1) Whether the activity is covered under the category of Works Contract and 2) The manner of valuation for the purpose of levy of service tax. I will proceed to decide the issues individually.

18.3 The assessee has contended the matter of classification on two counts viz. 1) their contract was primarily for supply of goods and was not a contract for erection, commissioning or installation and 2) The contract was in the nature of a turnkey project. For the purpose of deciding whether the activity would be covered under Works Contract, it is of vital importance that the definition of the said term as per the statute be analyzed. The term, 'works contract' has been defined at Sec. 65B(54) of the Finance Act, 1994 as under:

(54) "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;

The above definition indicates that the term 'works contract' comprises of 3 fundamental elements viz. 1) existence of a contract; 2) transfer of property in goods should be involved which is leviable to tax as sale of goods; AND 3) the purpose of the contract should be for the activities stipulated in the definition.

18.4 I find that the Purchase Orders and the Contract entered into between the assessee and M/s. Emami Agrotech Ltd., Kolkata, clearly mention that installation, commissioning, training of technicians during startup & commissioning are integral parts of the contract. The contract clearly lays down the procedure/details for the installation, commissioning, training of technicians, mentioned in para 2 and para 3 of the contract, and in para 5 and para 8 of the Purchase Order No. EAL/KP/PO/SPX/01/2015-16/RI dated 23.09.2015 and para 4 of PO EAL/KP/PO/SPX/02/2015-16 dated 2.2.2016, PO EAL/KP/PO/SPX/04/2015-16 dated 2.2.2016,

spares or components(which might be required for satisfactory running of machine, but not mentioned in the offer or in order), mechanical electrical diagrams”, and it was suggestive that the Price of Rs.11,36,01,200/- as per the purchase orders was for the supply of goods as well as installation and commissioning service.

They further quoted the definition of Works Contract defined under Section 65B(54) of the Finance Act and again emphasized that the installation and commissioning of the entire plant was only an incidental part of the entire project because the customer did not desire any other agency to install and commission the Plant, but activity of installation and commissioning was also desired by the customer to be undertaken by them while supplying the whole Plant and that the value of installation and commissioning for Margarine & Shortening Plant was also only Rs.40,00,000/-; which was just .03 % of the entire project cost. They submitted that the entire contract was for sale and delivery of equipment, machinery etc. of a Plant, and only incidentally the installation and commissioning of the whole plant was also entrusted to them and therefore, the contract and P.O. were not “works contract”, but the contract and P.O. were for sale and delivery of the Plant, and sale and supply of the Plant was the primary and principal object of the whole project; that it was an error to consider the whole project as “works contract”, whereas the contract was for a turnkey project on which tax demand could not be made on the entire value of turnkey project, for which they relied on the following judgements:

- i) Commissioner of Central Excise, Raipur V/s BSBK PVT. LTD. reported in **2010 (253) E.L.T. 522 (Tri. - LB).**
- ii) Bharat Heavy Electricals Ltd. V/s. Commissioner of S.T., Chennai reported in **2013 (30) S.T.R. 269 (Tri. - Chennai),**

16.4 They therefore requested to consider the above referred explanation, and also the true object and the principal purpose of the contract made between us and M/s. Emami Agrotech Ltd. However, only because a sum of Rs.40 lakhs is shown against installation and commissioning of Margarine & Shortening Plant under the project heading of “Services” in the breakup of the total value of the contract, it would be erroneous to consider the whole contract as one for providing services, thereby ignoring the principal purpose of the project, which is on face of it sale and delivery of equipment, machinery etc. for the above Plant. They also stated that the contract is not essentially for carrying out installation and commissioning of the Plant; but such installation and commissioning is only an incidental and ancillary activity covered under the Contract, which is essentially for selling and supplying machinery, equipment etc. for the Plant. The contract and P.O. are not in the nature of “works contract”, and therefore the suggestion made to us that service tax on an abated value of the contract was chargeable was incorrect, requiring it to be dropped.

16.5 Thereafter they submitted that there being no contravention by way of suppression of facts with intent to evade payment of service tax on their part, the invocation of extended period of limitation against them was illegal and unjustified in the facts of the case. They also requested

that the department raised an audit objection on the basis of the audit conducted for the period from **January, 2015 to March, 2017**, and demanded service tax amounting to Rs. 68,16,072/- not paid on the works contract service allegedly provided by them; that they filed a detailed reply to the Audit report vide a letter dated 30.06.2018 and submitted that the transaction with M/s. Emami Agrotech Limited would not fall within the definition and scope of the works contract under Finance Act,1994 and the value of installation and commissioning service for margarine and shortening plant was only Rs.40,00,000/- on which they had already discharged service tax; that since the primary object of the transaction was selling and supplying machinery and equipments for margarine and shortening plant, the installation and commissioning of the plant was only incidental to the primary object of sale and supply of machinery and equipments and therefore they rightly paid service tax on the value of the installation and commissioning being only Rs. 40,00,000/- .

16.2 They submitted that the detailed reply tendered by them during the course of audit objection was not considered by the Revenue and deserves to be set aside .They submitted that they were engaged in the supply of imported and indigenous machinery of plant i.e. SPX GS Processing Equipments for margarine and shortening for which they entered into an agreement with M/s Emami Agrotech Limited for the supply of imported and indigenous machinery of plant i.e. SPX GS Processing Equipments for margarine and shortening plant; that for the order received by them they received a Purchase Order No.EAL/KP/PO/SPX/01/2015-16/RI dated 23.09.2015 as per which they received Rs 7,11,01,200/- for the supply of margarine and shortening Equipments which were imported by them and they were also required to supply indigenous machinery of the value of Rs. 3,25,00,000/-, and for the installation and commissioning of the margarine and shortening plant they received Rs. 40,00,000/-. They submitted that they also received purchase order no. EAL/KP/PO/SPX/02/2015-16 for the supply of Emulsifier Mixing Tanks type volume 4000 liter for a total value of Rs.20,00,000/- ,Purchase Order No. EAL/KP/PO/SPX/03/2015-16/ for the supply of Scrap tank of a total value of Rs17,00,000/-, and purchase order no. EAL/KP/PO/SPX/04/2015 for the supply of Additional Feed Line, etc of a total value of Rs. 23,00,000/- totaling to 4 purchase orders of a total value of Rs 11,36,01,200/- pertaining to the sale of margarine and shortening Equipments which were indigenous as well as imported and as per the purchase orders they were required to complete installation and commissioning also. They submitted the total price break-up of the order received by them and therefore out of the gross amount of Rs, 11,36,01,200/- charged and received by them they had only charged Rs. 40,00,000/- for installation and commissioning services and paid service tax on the same by raising proper invoices and submitted copies of invoices and challans.

16.3 They emphasized on para 5 of the purchase order no. EAL/KP/PO/SPX/01/2015-16/RI dated 23.09.2015 (para 4.3) wherein it was mentioned that “ price is inclusive of packing and forwarding, loading, freight, installation and commissioning of total system (including imported and indigenous equipment both), training of technicians during startup & commissioning, any

- (i) 40% of the gross amount of Rs. 11,36,01,200/- charged and received from M/s EmamiAgrotech ltd. for supplying, erection, commissioning and installation of SPX GS Processing Equipments for Margarine and Shortening plant and various other equipments related to plant (Imported and Indigenous) during the period September 2015 to March 2017 should not be considered as taxable value under the category of **Works Contract Service** as per provisions of Section 67 of the Finance Act, 1994 read with Rule 2A (ii)(A) of Service Tax (Determination of Value) Rules, 2006;
- (ii) Service tax amounting to be Rs. 68,16,072/- not paid on Works Contract Service provided by them classified as a taxable service under provisions of sub clause (zzzza) of the Section 65 (105) of the Finance Act, 1994 and leviable to Service Tax under the provision of the Section 66B of the Finance Act, 1994, should not be recovered from them under proviso to Section 73(1) of the Finance Act, 1994, by invoking extended period of limitation;
- (iii) Service tax amounting to Rs. 6,00,000/- already paid by them on the gross taxable value of RS. 40,00,000/- should not be appropriated and adjusted against the total service tax liability of Rs. 68,16,072/-;
- (iv) Interest should not be charged & recovered from them under Section 75 of the Finance Act, 1994, on the amount to be recovered at (ii) above;
- (v) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for suppressing the value of taxable service on which Service Tax is payable by them before the Department with intent to evade payment of Service Tax as discussed hereinabove at (ii).

15.1 The provisions of the repealed Central Excise Act, 1944, the Central Excise Tariff Act, 1985 and amendments of the Finance Act, 1994 have been saved vide Section 174(2) of the CGST Act, 2017 and therefore, the provisions of the said repealed/amended Acts and Rules made thereunder were enforced for the purpose of demand of duty, interest, etc. and imposition of penalty under the impugned show cause notice.

DEFENSE REPLY

16.1 The assessee vide their letter dated 31/10/2018 submitted their reply to the SCN. They inter-alia submitted reply wherein they submitted that the proposals of the show cause notice were based on their transaction with one M/s. Emami Agrotech Limited, with whom they had entered into a contract to supply imported and indigenous machinery i.e. SPX GS Processing Equipments for margarine and shortening for which they had also received purchase orders from the buyer. They submitted that since the purchase orders were for supply of machinery as well as commissioning and installation of the same, the department was of the view that the whole transaction would fall under works contract service, and therefore service tax would be leviable on 40 % of the entire price of the project as per notification no. 24/2012-ST dated 06.06.2012;

i.e. for supply and installation and commissioning of SPX GS Processing Equipments for Margarine and Shortening and the value of service portion in the execution of works contract could not be separated thereby. Moreover, it was not possible to determine the charges related to labour, sub contractor, hiring machinery, cost of consumables, cost of establishment, etc., as required under Rule 2A(i)(b) of Service Tax (Determination of Value) Rules, 2006 from the Purchase Orders and Contract as the same were not shown separately in the order and therefore the value of service portion was not determinable as per (i) of Rule 2A and the same was not applicable in this case.

13.2 Besides, the assessee had split a single composite order involving both supply of imported and indigenous equipments and installation and commissioning of the total system into two parts, on his own. The contract itself did not indicate the value of service portion in the execution of the contract and the value of property in goods transferred in the execution of the said works contract, separately, but only mentioned the gross amount charged for the entire works contract. Hence, it appeared that the contract was split into two parts with an intention to evade Service tax on gross amount charged for the works contract.

13.3 As regards imported equipment supplied to M/s Emami Agrotech Ltd, the goods have been imported from the assessee's parent company, viz., SPX Flow Technology, Copenhagen, Denmark and supplied to M/s Emami Agrotech Ltd, as mentioned in the Purchase Order. As per Purchase Order the assessee was responsible for entire supervision of installation of the plant and equipment which also included installation of equipment, pipes, fittings, instruments and others not specifically mentioned in the agreement. Further, the taxable value of service portion on which the assessee has paid service tax on his own is nowhere mentioned in the Original Purchase Order or in subsequent orders.

14. Since the contract entered into between the assessee and M/s. Emami Agrotech Ltd was a composite works contract order and since the value of service portion could not be determined as per Rule 2A(i) of Service Tax (Determination of Value) Rules, 2006, the person liable to pay tax on the service portion involved in the execution of the works contract would have to determine the service tax payable in case of works contracts entered into for execution of **original works**, under Rule 2A (ii) of Service Tax (Determination of Value) Rules, 2006. Therefore, service tax would be payable on 40 % of total amount charged for the works contract under the provisions of 2A (ii) (A) of Service Tax (Determination of Value) Rules, 2006.

15. The assessee had not paid service tax of Rs.68,16,072- on 40% of the gross taxable value contravening provisions of Section 67, 68, & 70 of the Finance Act, 1994 and Rule 6 and Rule 7 of the Service Tax Rules, 1994, which was liable to be recovered from the assessee under the proviso to Section 73 of the Finance Act, 1994 along with applicable interest under the provisions of Section 75 of the Act, *ibid* and therefore a Show Cause notice was issued to M/s SPX Flow Technology (India) Pvt. Ltd, Survey No. 275, Odhav Road, Odhav, Ahmedabadare, vide SCN no. VI/1(b)/CTA/Tech-18/SCN/SPX/2018-19 dated 15.10.2018 asking them to show cause as to why:-

comprising imported as well as indigenous equipment, was Rs.113601200.00. The price/value of the imported equipment sold on high-seas basis was Rs. 71101200.00 and the price/value of the equipment and machinery of domestically procured has been Rs.38500000.00. The installation and commissioning of the entire plant was only an incidental part of the entire project because the customer did not desire any other agency to install and commission the Plant, but activity of installation and commissioning was also desired by the customer to be undertaken by us while supplying the whole Plant. **The value of installation and commissioning for Margarine & Shortening Plant was also only Rs.40,00,000/- ; which is just .03% of the entire project cost.**

The above facts and figures and also the details fully described in Annexure- "A" to the contract made between us and M/s. EmamiAgrotech Ltd. clearly show that the primary object of the contract was selling and supplying machinery and equipment for Margarine & Shortening Plant. The installation and commissioning for the Plant was only incidental to the above primary object of sale and supply of machinery and equipment.

Therefore, the contract and P.O. are not "works contract", that is to say, a contract for the purpose of carrying out installation and commissioning of an immovable property and transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods. The contract and P.O. are for sale and delivery of the Plant, and sale and supply of the Plant is the primary and principal object of the whole project.

The contract entered into between us and M/s. EmamiAgrotech Ltd. is essentially a contract for supply of goods (supply of production plant i.e. SPX GS processing equipments for margarine and shortening). It is also to be noted that the contract has been signed between both the parties for the supply of entire machinery in "ready to use" condition. Such projects are generally known as turnkey projects in the trade. "Turnkey" is not defined anywhere in the statutory provisions of the Act but it refers to a project that is constructed in such manner that it can be sold to any buyer as a completed product. Therefore, a turnkey project includes entire work stretching from designing, manufacturing, supplying, operation of equipments till the entire machinery is available for immediate use. It is obvious that when the entire work is handled by the supplier of the machinery, some services are also used during the entire manufacturing and supply process. But merely because certain services are used during the supply of complete machinery in ready to use condition, it would not mean that the nature of the contract would become a "works contract". In the present contract, buyer's intent is to receive a "product" and not services. Services are only incidental to the supply of machinery. Therefore, it is an error to consider the whole project as "works contract", whereas the contract is for a turnkey project.

13.1 The assessee claimed that the installation and commissioning of the entire plant was only an incidental part of the entire project. However, contrary to the claim of assessee, the Order was found to be a composite order involving both transfer of property in goods and provision of service

during startup & commissioning, supply of any spares or components, mechanical and electrical diagrams.

9. The contract entered into between the assessee and M/s. Emami Agrotech Limited was an indivisible contract and it was not possible to segregate the value of service portion in the execution of the said works contract referred to in clause (h) of section 66E of the Act. Thus the supply of equipments, installation and commissioning of the plant would attract provisions of Rule 2A (ii) (A) of Service tax (Determination of Value) Rules, 2006. As per rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules, 2006, in case of works contracts entered into for execution of original works, service tax shall be payable on 40 per cent of the total amount charged for the works contract. As per explanation (b) thereunder, for the purpose of determination of value of works contract "total amount" shall include sum total of the gross amount charged for the works contract and the fair market value of all the goods and services supplied in or in relation to the execution of the works contract, whether for consideration or otherwise, in a case where the value of service portion cannot be determined under Rule 2A(i).

9.5 Accordingly, in view of the above provision the assessee was required to pay Service tax on 40 % of the total amount charged for the entire works contract. The total amount charged for the entire works contract is Rs.11,36,01,200/- (as shown in para 4.5) and hence 40% of the taxable value would come to Rs.4,54,40,480/-, on which the service tax liability under Section 66B of the Finance Act, 1944 would be Rs. 68,16,072/-.

10. Verification of the particulars of service tax payments made during the period from January 2015 to March 2017 revealed that the assessee split the combined work contract on his own volition; arrived at the taxable value of service portion involved in the execution of the works contract as Rs.40,00,000/- and accordingly, issued three invoices for a total taxable value of Rs.40,00,000/- and paid total Service tax amounting to Rs. 6,00,000/-..

11. Due to the observation, that the gross amount charged by the assessee for "**Supply and installations and commissioning of SPX GS Processing Equipments for Margarine and Shortening**" was Rs. 11,36,01,200/-, but the Service Tax discharged by notice was Rs.6,00,000/- only on the taxable amount of Rs.40,00,000/-charged from their customer. Thus service tax on 40% of the gross taxable value charged from their customer as required was not paid by them under the provision of the Section 67 of the Finance Act, 1994 read with Rule 2A (ii) (A) of Service tax (Determination of Value) Rules, 2006. There was short payment of service tax of Rs.62,16,072/- on the taxable value of Rs.4,54,40,480/-, charged for the works contract.

12. A query memo vide F.No.VI/1(b)-57/Circle-III/AP-19/17-18 dated 21.12.2017 was issued to the assessee. The assessee, vide letter dated 22.01.2018, submitted a detailed reply. The gist of their reply is as under:-

The P.O. placed by M/s. Emami Agrotech Ltd. is available with you, and it is clear from this P.O. that the value of the supplies portion, which included the total system

dated 2.2.2016	23,00,000
As per PO EAL/KP/PO/SPX/03/2015-16	
dated 2.2.2016	17,00,000
Total	11,36,01,200

5. From the above terms, it could be seen that the Order entered into between the assessee and M/s. Emami Agrotech Ltd., Kolkata, was a composite works contract order for goods and services, *i.e.*, supply of the entire plant, *i.e.*, “*SPX GS Processing Equipments for Margarine and Shortening*” (imported and indigenous equipments) and complete installation and commissioning of the said equipments and support services.

6. On an analysis of definition of Works Contract as per Clause (54) of Section 65B of the Finance Act 1994 w.e.f. 1.7.2012, the following components are required for the contract to be termed as Works Contract:

1. *There is a transfer of property in goods involved in the execution of such contract, and*
2. *Such transfer of property in goods is leviable to tax as sale of goods;*
3. *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:*

Thus, work contract is a composite/single contract for providing:-

- a) transfer of property in goods *and*
- b) provision of service

7. Thus for being classified as *Works Contract* the transaction under consideration would have to be a composite transaction involving both goods and services 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. If a transaction involved only service *i.e.*, work and labour, then the same could not be treated as Works Contract.

8. On a conjoint reading of the above definition and on examining the terms and conditions laid down in the Purchase Orders and Contract entered into between the assessee and M/s. Emami Agrotech Ltd., Kolkata, it was found that the said contract was a composite contract for “*SPX GS Processing Equipments for Margarine and Shortening*” and included supply of imported and indigenous equipments and also its installation and commissioning and training of technicians

2. *Supply and installation and commissioning of Emulsion mixing tank related to Margarine and Shortening” plant,*
3. *Supply and installation and commissioning of Scrap Tank (Rectangular) and other Accessories for scrap Tank related to Margarine and Shortening” plant,*
4. *Supply and installation and commissioning of additional feed Line and software Integration for Tank farm related to Margarine and Shortening plant*

4.2 The Purchase Order No. EAL/KP/PO/SPX/01/2015-16/RI dated 23.09.2015 and the Contract made on 16/11/2015 were split into 2 parts as under:-

- A) Scope of Supply (Imported) of “*SPX GS Processing Equipments for Margarine and Shortening*” amounting to EURO 965,000 and
- B) Scope of Supply (Indigenous) and complete Installation and commissioning of “*SPX GS Processing Equipments for Margarine and Shortening*” amounting to Rs. 36,500,000/-.

4.3 Further, it was mentioned at Para 5 of Purchase Order No. EAL/KP/PO/SPX/01/2015-16/RI dated 23.09.2015 and contract made on 16/11/2015 that “*price is inclusive of packing and forwarding, loading, freight, installation and commissioning of total system(including imported and indigenous equipment both), training of technicians during startup & commissioning, any spares or components (which might be required for satisfactory running of machine, but not mentioned in the offer or in order), mechanical, electrical diagrams*” It was also mentioned that all applicable taxes including service tax at the time of dispatch should be paid extra.

4.4 Likewise, it was also mentioned in Para no 4 of every Purchase Order that price was inclusive of packing and forwarding, loading, freight, installation and commissioning of total system, training of technicians during startup & commissioning, any spares or components (which might be required for satisfactory running of machine, but not mentioned in the offer or in order), mechanical, electrical diagrams. It was also mentioned that all applicable taxes including service tax at the time of dispatch should be paid extra.

4.5 The price of the entire supply of goods and installation and commissioning as per Invoices, as mentioned in the notice was as under:

	(in Rs.)
Imported (order dated 23/09/2015)	7,11,01,200
Indigenous (order dated 23/09/2015)	3,65,00,000
 Extra supplies and installation	
As per PO EAL/KP/PO/SPX/02/2015-16 dated 2.2.2016	20,00,000
As per PO EAL/KP/PO/SPX/04/2015-16	

BRIEF FACTS

M/S. SPX FLOW TECHNOLOGY (INDIA) PVT. LTD., Survey No. 275, Odhav Road, Odhav, Ahmedabad-382415 (hereinafter referred to as '*the assessee*' for the sake of brevity) is engaged in providing services of (1) Technical Inspection and Certification Agency service; (2) Maintenance or repair service; (3) Erection, Commissioning and Installation Service and (4) GTA. They also receive services of (1) GTA, (2) Legal consultancy service, (3) Security Service Agency and (4) Manpower Recruitment Service. They hold Service Tax Registration No AAACS7234BST001 and also avail the facility of cenvat credit under Cenvat Credit Rules, 2004. The assessee was earlier registered under the Jurisdiction of the Commissioner of Service Tax, Ahmedabad. Consequent to the issue of Notification No.12/2017-Central Excise (NT) to 14/2017-Central Excise (NT) all dated 09.06.2017, appointing the officers of various ranks as Central Excise officers & reallocating the jurisdiction of the Central Excise Officers and Trade Notice No. 001/2017 dated 16.06.2017 issued by the Chief Commissioner, Central Excise & Service Tax, Ahmedabad Zone, the assessee is now registered under the Jurisdiction of the Commissioner, Central Goods and Service Tax, Ahmedabad South.

2. Whereas, during the course of audit, conducted for the period from January 2015 to March 2017, one particular contract entered into by the assessee with M/s. Emami Agrotech Ltd., Kolkata, was examined in detail. Whereas on examination of the Contract dated 16/11/2015, it was found that the buyer, M/s./ Emami Agrotech Ltd had engaged the assessee, M/s. SPX Flow Technology India Limited, for purchase of certain equipment and support services associated with processing equipment for margarine and shortening, at the buyer's plant at Krishnapatnam. It was further mentioned in the Contract that the seller had the expertise with respect to designing, manufacturing, assembly, installation and operation of the industrial equipment and was engaged in the business of selling such equipment and support services.

3. On perusal of the Purchase Order No. EAL/KP/PO/SPX/01/2015-16/RI dated 23/09/2015 of M/s. Emami Agrotech Ltd; the contract made between the assessee and M/s. Emami Agrotech Ltd., Kolkata on 16/11/2015; Purchase Orders No. EAL/KP/PO/SPX/02/2015-16 dated 02/02/2016, EAL/KP/PO/SPX/03/2015-16 dated 02/02/2016 and EAL/KP/PO/SPX/04/2015-16 dated 02/02/2016 of M/s. Emami Agrotech Ltd, it was seen that the assessee had received an order for *supply, installation and commissioning of SPX GS Processing equipments for margarine & shortening* with all its accessories from M/s. Emami Agrotech Ltd.

4.1. Further, on detailed examination of the above Purchase Orders and the Contract entered into between the assessee and M/s. Emami Agrotech Ltd., Kolkata, it was found that the terms and conditions of the said Purchase Orders / Contract were as under:-

1. *Supply and installation and commissioning of SPX GS Processing Equipments for Margarine and Shortening,*



OFFICE OF THE PRINCIPAL COMMISSIONER OF C. G. S. T.,
AHMEDABAD SOUTH

प्रधान आयुक्त का कार्यालय, के. व. से. क., अहमदाबाद दक्षिण
G. S. T. BHAVAN, AMBAWADI, AHMEDABAD – 380 015

व. से. क. भवन, आम्बावाड़ी, अहमदाबाद - ३८० ०१५

फा.सं. F.No. STC/04-46/SPX/OA-I/2018-19

आदेश की तारीख: Date of Order : 23.10.2019

जारी करने की तारीख: Date of Issue : 25.10.2019

द्वारा पारित / Passed by: Shri Mohit Agrawal, ADDITIONAL COMMISSIONER

मूल आदेश सं./Order-In-Original No.09/Cx-I/Ahmd/ADC/MA/2019

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

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

Any person deeming himself aggrieved by this Order may appeal against this order in Form E.A.1 to Commissioner (Appeals), Central GST, Central GST Bhavan, Near Government Polytechnic, Ambawadi, Ahmedabad -15 within sixty days from date of its communication. The appeal should bear a court fee stamp of Rs.2.00/- only.

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

The Appeal should be filed in form No. E.A.-1 in duplicate. It should be filed by the appellants in accordance with provisions of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be accompanied with the following:

उक्त अपील की प्रति।

Copy of the aforesaid appeal.

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

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

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

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

संदर्भ/Reference : कारण बताओ सूचना फा.सं. F.No. F. No. VI/1(b)/CTA/Tech-18/SCN/SPX/2018-19 dated 16.10.2018 issued to M/S. SPX FLOW TECHNOLOGY (INDIA) PVT. LTD., SURVEY NO. 275, ODHAV ROAD, ODHAV, AHMEDABAD, GUJARAT-382415.