रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद– 380015.

क फाइल संख्या : File No : **V2(RIP)41/STC-III/2016/Appeal-I** 1229 to 1233

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-270-16-17**
दिनाँक Date **23.03.2017** जारी करने की तारीख Date of Issue 31/3/17

श्री उमाशंकर, आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Uma Shankar** Commissioner (Appeals-I) Central Excise Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं _____
_____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No **GNR-STX-DEM-DC-09/2016** dated **22.06.2016** Issued by: Deputy Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

ध अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The **Appellants**/Respondents

M/s. Creative Infocity Ltd.

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:–
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद–380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 & (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत निर्धारित रकम

(ii) सेनवैट जमा की ली गई गलत राशि

(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(4)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

M/s Creative Infocity Ltd., Gandhinagar (hereinafter referred to as "the appellant") has filed the instant appeal against Order-in-Original No.GNR-STX-DEM-DC-09/2016 dated 22.06.2016 (impugned order) passed by the Assistant Commissioner of Central Excise, Service Tax Division, Gandhinagar (the adjudicating authority).

2. Briefly stated, the appellant is engaged in providing various taxable services and availing benefit of Cenvat credit of service tax paid on the input service. During audit of the records, it was noticed that the appellant has shown an amount as **'revenue from real estate scheme'** in their Profit & Loss Account; that on detailed enquiry, it was observed that the appellant has entered into lease agreement with M/s Gujarat Informatics Ltd- for short "GIL"- (A Government of Gujarat Organization), under which GIL has given 150 acres land to the appellant for right to use on lease rent. The appellant further transferred the said land on sub-lease to their client on collecting lease premium. It was observed that as per definition of taxable service under sub clause (zzzz) of Section 65 (105) of the Finance Act, 1994 and definition of service "Renting of Immovable Property" under Clause (90a) of Section 65 of Finance Act, 1994, the lease premium received by the appellant from the sub-lessees. Accordingly, a show cause notice dated 08.05.2014 was issued to the appellant for the period from 2013-14 to 2014-15 which was adjudicated vide the impugned order. In the impugned order, a duty amounting to Rs.2,84,589/- with interest was confirmed and imposed penalty under Section 78, 77 (2) of the Finance Act, 1994..

3. Feeling aggrieved, the appellant has filed the present appeal, stating that:-

- Their transaction is related to the sale of immovable property only and by name it cannot be classifiable as a renting transaction; that the ownership has been passed to the purchaser and depreciation generally may be claimed by the owner of the asset.
- They are not providing any service of renting of immovable property but transferring the ownership right as per section 20(a) of conveyance of immovable property of transfer of properties Act; that applicability of service tax can be decided only when some service has been provided.
- Conveyance and Sale deed essentially have no difference as in both documents, the right, interest and title of the previous owner is transferred to the purchaser It does not make any difference while transferring his right in properties via conveyance deed or sale agreement; that it has been called as transaction for the transfer of property under the Transfer of Property Act, 1882.
- As the show cause notice for the period from 01.04.2013 to 31.03.2015 was issued on 18.04.2016 extended period of cannot be invoked since there was no

suppression, willful or misstatement on the part of the appellant; that demand confirmed and penalty imposed is not sustainable.

- The appellant relied upon various law citations in support of their argument.

4. A personal hearing in the matter was held on 17.02.2017. Shri Vipul Khandar, Chartered Accountant appeared before me and reiterated the submissions made in the appeal. He further submitted a additional submissions.

5. I have carefully gone through the facts of the case, submissions made by the appellant in the appeal and during the course of personal hearing. The core issue to be decided in the matter is whether the lease premium received by the appellant from the lessees with whom they have made lease agreement is taxable under the service of "Renting of Immovable Property". The period involved in the dispute is from 01.04.2013 to 31.03.2015

6. With effect from 01.07.2010, as per Section 65(90a) of the Finance Act, 1994, 'Renting of Immovable Property" includes *"renting, letting, leasing, licensing **or other similar arrangements** of immovable property for use in the course or furtherance of business or commerce but does not include -*

(i) renting of immovable property by a religious body or to a religious body; or
(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation-I to Section 65(90a) clarified that -- for the purpose of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple use buildings.

Explanation-II to this Section clarified that for the removal of doubts, it is hereby declared that for the purposes of this clause, renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property.

7. The definition of taxable service under Section 65(105)(zzzz) of the Finance Act, 1994 provides that services provided by way of *leasing, licensing **or through other similar arrangements** of immovable property,* to any person by any other person in relation to such renting in course of or for furtherance of business or commerce is taxable. Explanation 1 mentions as to which immovable properties are included in expression "immovable property" and which immovable properties are not included in this term. For the purpose the said sub-clause, "immovable property" includes-

(i) *buildings and part of a building and the land appurtenant there to;*
(ii) .....
(iii) .....
(iv) .....
(v) vacant land given on lease or licence for construction of building or temporary structure

at a later state to be used for furtherance of business or commerce but does not include;

(a) .....

(b) .....

© .....

8. In view of above definition, giving /providing of vacant land on licence, rent or lease for construction of structure at a later stage for furtherance of business or commerce is taxable under Clause (v) of Explanation 1 to Section 65(105)(zzzz) from 01.07.2010. In the instant case, the appellant has entered into lease agreement with M/s Gujarat Informatics Ltd (GIL) for a period of 32 years under which GIL has given land admeasuring 150 acres to the appellant for right to use the said land on lease rent; this acquired land from GIL has been transferred on sub-lease to ultimate clients (sub-lessee) under a agreement made between the appellant and sub-lessee. On going through agreements, it is observed that the appellant receives one time premium on land per sq ft and annual lease rent on the transferred land of sub-lease portion. According to the definition of "Renting of Immovable Property" referred above, the activity of giving/providing vacant land on rent or lease is taxable. In the instant case, I observe that the issue raised and decided was regarding non inclusion of one time lease premium received by the appellant from their sub-lessee in the taxable value.

9. The appellant had received an amount of Rs.23,02,500/- as a premium for transfer of right in the rented property during the period from 01.04.2013 to 31.03.2015. As per the conclusion of the adjudicating authority, the registration fee as stamp duty paid by the appellant while registering the sub-lease land cannot be considered as sale as they are lease holder and not free holder of the land; that since the activity of transferring the rights in property is also the activity of renting/leasing of immovable property service, the premium received is nothing but a part of the consideration received by the appellant for providing leasing/sub-leasing/renting of immovable property for furtherance of business or commerce and such activities are taxable in view of Section 65(105)(zzzz of the Finance Act, 1994. Accordingly, the duty demand was confirmed, considering the amount of premium being the part of taxable value under the service of "Renting of Immovable Property".

10. On other hand, the appellant has argued that the ownership of the land has been passed to the purchaser (sub-lessee) and the purchaser claims the benefit of depreciation & other benefit as an owner; that their transaction is related to the sale of immovable property only and it cannot be classified as a renting transaction; and that hence the transaction of conveyance of immovable property i.e. the one time premium amount received from their client is not taxable. They also relied on case law in the case of M/s Greater Noida Indus. Development Authority Vs Commercial of Central Excise, Noida, reported at 2014 (33) STR 464 (Tri. Del).

11. I observe that the issue pertains to the instant case for the period of October 2011 to March 2013 has decided by the appellate authority vide OIA No.AHM-EXCUS-003-APP-087-16-07 dated 22.08.2016. Para 11 to 16 of the said OIA reads as under:-

"11. The relevant portion of the judgment is reproduced below:

"10. Whether the Service Tax is chargeable only on the lease rent or also on one time premium amount charged in respect of long term leases?

10.1 A lease is a transaction, which has to be supported by consideration. The consideration may be either premium or rent or both. The consideration which is paid periodically is called rent. As regards premium, the Apex Court in the case of Commissioner of Income Tax, Assam and Manipur v. Panbari Tea Co. Ltd. reported in (1965) 3 SCR 811 has made a distinction between premium and rent observing that when the interest of the lessor is parted with for a price, the price paid is premium or salami, but the periodical payments for continuous enjoyment are in the nature of rent, ***the former is a Capital Income and the latter is the revenue receipt.*** *Thus, the premium is the price paid for obtaining the lease of an immovable property. While rent, on the other hand, is the payment made for use and occupation of the immovable property leased. Since taxing event under Section 65(105)(zzzz) read with Section 65(90a) is renting of immovable property, Service Tax would be leviable only on the element of rent i.e. the payments made for continuous enjoyment under lease which are in the nature of the rent irrespective of whether this rent is collected periodically or in advance in lump sum. Service Tax under Section 65(105)(zzzz) read with Section 65(90a) cannot be charged on the "premium" or 'salami' paid by the lessee to the lessor for transfer of interest in the property from the lessor to the lessee as this amount is not for continued enjoyment of the property leased. Since the levy of Service Tax is on renting of immovable property, not on transfer of interest in property from lessor to lessee, Service Tax would be chargeable only on the rent whether it is charged periodically or at a time in advance. In these appeals, in the show cause notice dated 19-3-2012 issued by the Addl. Director, DGCEI, New Delhi, Service Tax has been demanded only on the lease rent and not on the premium amount while in the subsequent show cause notice dated 17-10-2012 issued by the Commissioner of Central Excise and Service Tax, Noida, the amount of premium has also been included in the lease rent for the purpose of charging of Service Tax for which no valid reasons have been given. Therefore, the Order-in-Original dated 30-4-2013 confirming the Service Tax demand on the premium amount is not correct and to this extent, the Service Tax demand would not be sustainable."*

12. As per above judgment, service tax is not chargeable on one time premium paid by lessee to lessor for transfer of interest in property as this amount is not for continued enjoyment of leased property. I observe that the Hon'ble CESTAT has come to the said conclusion on the basis of decision of the Apex Court in the case of Commissioner of Income Tax, Assam and Manipur v. Panbari Tea Co. Ltd. reported in (1965) 3 SCR 811 which made a distinction between premium and rent observing that when the interest of the lessor is parted with for a price, the price paid is premium or salami, but the periodical payments for continuous enjoyment are in the nature of rent, the premium is a capital income and the rent is the revenue receipt. The Hon'ble CESTAT further held charging of service tax onthe premium amount as incorrect to the extent, no valid reason was given by the adjudicating authority regarding the premium amount, which was included in the lease rent.

13. In the instant case, the objection arose on verification of Profit & Loss Account of the appellant, which indicated amount of one-time premium received on account of giving/providing land on sub-lease. The appellant has shown it as "Revenue from Real Estate Schemes". In this case, the appellant has given the vacant land on a long term lease with an explicit understanding that the sub-lessee would use it for commercial purpose. They being lessee of GIL themselves in respect of the land under consideration, the appellant cannot transfer the ownership of the land, as per agreement. As per the

agreement between the appellant and sub-lessee, premium at the prescribed rate per sq.ft for proportionate undivided share of land towards sub-lease of the land and annual rent at the prescribed rate have been received by the appellant and such amount was shown by them in their Profit & Loss Account as a revenue from real estate and not as a capital income. Thus, the situation discussed in the Hon'ble CESTAT's decision referred above are differentthan the that in the present case. Looking into the circumstances of the case, the amount received as premium is nothing but a consideration received towards leasing the land to their sub-lessee and taxable within the purview of service tax leviable under the service category of "Renting of Immovable Property" as specified under Section 65 (105) (zzz) of the Finance Act, 1994.

14. I observe that the sub-lease charges are a mix of: (i) a fixed amount based upon the sub-leased area; and (ii) annual regular payment, based upon sub-leased area. Mathematically speaking, the fixed amount also could have been apportioned for each year of long-term sub-lease proportionately, and if that amount were added to the annual premium, the new annual premium would have covered the fixed portion, and it would have become a **normal lease rent case**. It is pertinent to mention that the definition of "renting of immovable property" service clearly mentions that service of renting/leasing of immovable property in any manner, by whatsoever arrangement, is taxable. Considering the fact that the appellant is NOT the owner of land, but a lessee, any arrangement made by him for allowing another person to use the leased property has to be necessarily in the nature of sub-lease. Thus, such a service is covered by the definition and accordingly taxable.

15. I observe that while deciding stay application in the case of CIDCO Ltd Vs Commissioner of Service Tax, Mumbai, reported at 2015 (37) STR 122 (Tri-Mumbai), the Hon'ble CESTAT, Mumbai has considered that the demand on lease amount collected by way or premium at the time of entering 'agreement to lease' is taxable within the purview of Section 65(90a) read with Section 65(105) (zzzz) of the Finance Act, 1944.

16. The Hon'ble CESTAT observed as under:

"The expressions other similar arrangements used in Section 65(90a) and any other service in relation to such renting used in Section 65 (105) (zzzz) are expressions of width and amplitude. It would include not only the actual leasing or renting but also any other activity in relation to such leasing/renting. Therefore, the agreement to lease which is entered into prior to the actual leasing and which is in relation to the lease undertaken subsequently subject to construction of building, etc. would also come within the purview of service tax levy with effect from 01/07/2010, if not before. Therefore, the distinction sought to be made by the appellant in respect of "agreement to lease" and the "lease agreement" would not matter and the levy would apply, in both the situations. [Apex court decision in Doypack Systems Ltd. Vs. UOI - *2002-TIOL-389-SC-MISC referred to]"*

12. The appellate authority, vide the said OIA has upheld the order of lower authority. In view of above discussion, by following the said decision, I hold that amount that the amount of premium received by the appellant during the period under dispute is a service under "Renting of Immovable Property" as specified under Section 65 (105) (zzz) read with Section 65(6) (a) of the Finance Act, 1994 and liable to service tax. As the appellant has not discharged the tax liability for the period in dispute, the adjudicating

authority has rightly confirmed demand with interest as delineated in the impugned show cause notice.

18. As regards imposition of penalties under Section 78, 77(2) of the Finance Act, 1994 the adjudicating authority has discussed the grounds in the order and thereafter imposed such penalties looking into the facts and circumstances of the case..

19. In this backdrop, I reject the appeal filed by the appellant.

उमा शंकर

(उमा शंकर)
आयुक्त (अपील्स - I)
Date: 23/03/2017

Attested

(Mohanan V.V)
Superintendent (Appeals-I)
Central Excise, Ahmedabad

R.P.A.D

To
M/s Creaative Infocity Ltd
Infor Tower-1
Nr.Indroda Circle
Airport Road, Gandhinagar
Gujarat

Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-III
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-III
4. The Dy. / Asstt. Commissioner, Central Excise, S.T Division, Gandhinagar, Ahmedabad-III
5. Guard file.
6. P.A.