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(CS)52/STC-III/2016/Appeal-I**

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-001-17-18**
दिनाँक Date **15.05.2017** जारी करने की तारीख Date of Issue

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 **AHM-STX-003-ADC-AJS-019-16-17** dated **19.09.2016** Issued by: Additional Commissioner, Central Excise, Din: Mehsana, A'bad-III.

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

M/s. Super Construction Co.

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, ब्यांज 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 चर्चित 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

This appeal has been filed by M/s Super Construction Co.2, Shree Ram Complex, Radhanpur Road, Mehsana (hereinafter referred to as "the appellant") against the Order-in-Original No.AHM-STX-003-ADC-AJS-019-16-17 dated 19.09.2016 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner of Central Excise, Ahmedabad-III (hereinafter referred to as "the adjudicating authority")

2. Briefly stated, during the course of inquiry against the appellant on the basis of information that they were not paying service tax on taxable service provided, it was noticed that the appellant has provided [i] various civil construction work mainly as a sub contractor to the main contractor and in addition to the same they had also provided civil construction work on their own; and [ii] they had received services of transport of goods service from various transporters and also paid freight for the same and in terms of Section 68(2) of the Finance Act, 19194 read with Rule 2(1)(d) of Service Tax Rules, 1994 read with notification No.30/2012-ST the liability to pay service tax on GTA service lies on the appellant being receiver of GTA service. During scrutiny of records it was appeared that out of total service tax liability of Rs.38,94,908/- on construction income received by the appellant, they had paid only Rs.8,30,029/- and against total service tax liability of Rs.2,74,828/- on GTA service they had paid Rs.31,599/- during January 2013 to March 2014. Therefore, a show cause notice dated 02.03.2015 was issued to them for recovery of short paid amount of Rs.30,64,879/- and Rs.2,43,229/- with interest and imposition of penalty under Section 78, 77(2), 76 of the Finance Act, 1994 and under Rule 7Cof Service Tax Rules, 1994. Vide the impugned order, the adjudicating authority by confirming the short paid amount of service tax with interest in respect of value of construction received and dropped demand in respect of liability on GTA service. He has also imposed penalty of Rs.15,32,440/- under Section 78 of the Act, Rs.10,000/- each under Section 77(1) and 77(2) of the Act and late fee prescribed under Rule 7 C of Service Tax Rules.

3. Being aggrieved, the appellant has filed the present appeal on the grounds that:-

- The appellant had undertaken civil construction work as a sub contractor of M/s Varun Construction Co. Mehsana and Vinod H Patel and the nature of works carried out by them was as a sub-contractor; that for the aforesaid said activities the main contractor has deposited the entire amount of service tax on the full construction value, hence the demand of tax would amount to double payment of tax on the same value.
- Notwithstanding anything above, if the appellant was liable for service tax, then also they were liable for service tax @50% as per RCM proviso as specified in notification No.30/2012 dated 20.6.202.
- Under RCM provision, service tax liability comes to Rs.14,37,193/- against which they had deposited Rs.8,30,029/- and principal has paid Rs.6,42,834/- and balance 50% service tax liability has deposited by the ONGC as a service recipient: that they had neither charged nor collected service tax from their customers as they were not aware about the tax liabilities being a sub-contractor.

- Extended period cannot be invoked and therefore penalties imposed are required to be set aside.
- The appellant has relied on various case laws in support of their argument.

4. A personal hearing in the matter was held on 20.03.2017. Ms Rachana M Khandhar, Chartered Accountant appeared for the same and reiterated the grounds of appeal and submitted further written submissions.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the appeal memorandum as well as during the course of personal hearing. The core issue to be decided in the instant case is as to whether the appellant, being a sub-contractor of civil works, is required to be discharged service tax liability when their main contractor has discharged the requisite service tax.

6. The adjudicating authority has held that the main contractor has discharged service tax on the consideration for the service rendered by him, while the appellant, being a sub-contractor is liable for payment of service tax in respect of the value of his output service, which is an input for the main contractor; that since the scheme of Cenvat credit is available, it is not correct to state that there would be a double taxation.

7. I observe that the liability to tax has to be decided with reference to the definition the concerned taxable service at the relevant period of time and the activities carried out and the contract governing such activity. In the instant case, the period involved is January 2013 to March 2014. In terms of Section 66 B of the Finance Act, 1994 (FA), there shall be a levy of service tax on the value of all services other than those specified in the negative list. In the instant case, undisputed facts revealed that the services rendered by the appellant as a sub-contractor is not specified under the negative list or the said service is not a exempted service from payment of service tax.

8. The appellant has contended that the entire amount of service tax on the full value of works contract service has been deposited by the main Contractor; therefore, the demand would amount to double payment. They also relied on case laws viz., [i] in case of DNS contractor decided by Hon'ble Tribunal reported at 2015 (37) STR 848-Tri Del: [ii] in case of CCE, Pune V/s Akruti Projects decided by Hon'ble Tribunal reported at 2015 (37) STR 348 which support their arguments. I also observe that some of the case laws discuss that there shall be no levy of service tax on sub-contractors, considering that the main contractor had paid tax for the full value and some case laws are distinguished and held that Sub-contractor providing taxable service are liable to pay Service Tax.

9. I observe that the policy that if the main contractor has paid service tax, the sub-contractor need not pay tax again on the same service, for periods prior to introduction of Cenvat Scheme is reasonable and acceptable based on the Board's earlier Circulars, for maintaining equality before law. I observe that the Board has issued Circular No.

96/7/2007-ST, dated 23-8-2007, after introduction of Cenvat Scheme. The relevant clarification reads as under:

A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

The above circular clearly clarifies that the sub-contractor who is also a service provider for completion of the work of main contractor is liable for service tax in respect of his service.

10. I observe that in case of M/s Hargovind Electric Decorators , the Principal Bench of Hon'ble Tribunal reported at 2016 (143) STR 619- (Tri Del) has held that no legal provisions to support claim that sub-contractor need not pay Service Tax even if they provide taxable service when value of such service included in output service of main contractor. The Hon'ble Tribunal held that:-

> *"4.Reliance is placed by the appellants on a Circular dated 7-10-1998 of C.B.E. & C. We find that the clarifications relied upon by the appellants were issued prior to the introduction of Cenvat Credit Rules. The appellants have contended that the main contractors have paid service tax on total gross value which included the sub-contractor portion of the service. Here, we find that the tax liability discharged by the main contractor is as per the applicable legal provisions and it cannot be said that the main contractor is acting as an agent to discharge the tax liability of sub-contractor. The tax liability of the appellants are to be decided as per the applicable provisions of law during the relevant time. The admitted position is that the appellants could not state any legal provisions to support the claim that they need not pay service tax even if they provide taxable service when the value of such service is included in the output service of the main contractor. Such proposition will go against from principle of Cenvat Credit Rules and make the credit flow as mandated by these Rules as redundant. After the introduction of Cenvat Credit Rules and various changes in the legal provisions, the C.B.E. & C. issued a master Circular on 23-8-2007. One of the points clarified therein is the service tax liability of sub-contractors if tax is paid by main contractor. We also take note that the question of double taxation will not apply to the present situation as the Cenvat Credit Rules provides for the situation where, subject to satisfaction of all the conditions, the tax paid on the input services are eligible as credit for the output service provider. As such, we find no merit in the appellant's claim in this regard."*

In another case- M/s Furnace Fabrica India Ltd reported at 2016 (43) STR 175 (Ker), the Hon'ble High Court of Kerala held that:-

"4. This Court is of the considered opinion that in view of the specific clarifications regarding 'input service' rendered by the sub-contractor, which is used by the main service provider for completion of the work, it cannot be held that the sub-contractor is not liable to pay service tax for the services provided by him. However, it is for the adjudicating authority to decide on verification of records regarding the discharge of liability of 'service tax' and to decide with respect to the credit relating to the 'input service'. The directions issued by the CESTAT in Ext.P4 judgment is also to the affect of issuing similar directions."

In case of M/s Max Logestic Ltd reported at 2017 (47) STR 041 (TRr Del), it has been held that

"Assessee rendering services like transport of containers, handling cargo and various other incidental activities and receiving consideration in terms of agreement - Assessee providing input services (BAS) enabling RSIC to provide overall services - In such arrangement tax paid by RSIC to be on total gross value - Assessee's service forms part of overall service rendered by RSIC to various ICD users and payment of Service Tax by RSIC by itself not to exclude assessee's tax liability - Tax liability confirmed only w.r.t. consideration received and not on gross value received by RSIC - Fact that taxable service intended for use as input service by another service provider not to alter taxability of service provided - Not a case of double taxation - Findings in impugned order regarding tax liability upheld - Sections 65 and 73 of Finance Act, 1994".

11. In view of above, by following Board's clarification and supporting decisions discussed above, I am of the considered view that the appellant is liable to pay service tax on the taxable service provided by them during the relevant period.

12. However, the appellant argued that in terms of notification No.30/2012-ST dated 20.06.2012, notifying RCM, they are liable to pay only 50% of the total amount of tax payable. The adjudicating authority has contended that the RCM notified in the said notification is applicable only where the service recipient is a body corporate as specified in paragraph 1(v) of the notification and it is not applicable to the instant case as the recipient M/s Varun Construction being a partnership firm. The said notification specifies service tax payable in respect of service provided or agreed to be provided in service portion in execution of work contract -50% by the service provider and 50% by the service recipient, subject to provisions of 1(v) of the notification which reads as under. The relevant provisions stipulated in 1(v) of the said notification is as under"

"(v) provided or agreed to be provided by way of renting of motor vehicle designed to carry passengers to any persons who is not in the similar line of business or supply of manpower for any purpose or service portion in execution of works contract by any individual, Hindu Undivided Family or partnership firm whether registered or not including association of person, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory."

I observe that the adjudicating authority has mis-interpreted the notification and denied the benefit by stating that the said notification is applicable only where the service recipient is a body corporate. As per the above stipulation, any person who provided or agreed to be provided in respect of service portion in execution of work contract by any individual, HUF or partnership firm or not including association of person, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory. In the instant case, the appellant is a partnership firm and therefore, they are

eligible for availing the benefit of the said notification by discharging 50% of taxable amount as a service provider.

13. As regards penalty imposed, I observed that it is a fact that prior to extension of Cenvat credit scheme to Service Tax, the Board on a number of occasions had clarified that if the main service provider is discharging Service Tax liability then the sub-contractors to the main service provider need not pay Service Tax on the same activity and the issue was under litigation and some of the case laws upheld that no tax liability on sub-contractor when the entire liability was discharged by the main contractor. Since the issue involved is under dispute and accordingly the appellant was not discharging Service Tax liability, I am of the considered view that this case is fit for invoking the powers under Section 80 of the FA and accordingly, I set aside the penalty imposed under various Sections of FA.

14. In view of above discussion, the appeal filed by the appellant is modified to the above extent as discussed in para 11 to 13 above. The appeal stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स - I)
Date: 15/05/2017

Attested

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

BY R.P.A.D.

To,
M/s Super Construction Co.
2, Shree Ram Complex,
Radhanpur Road, Mehsana

Copy to:

1. The Chief Commissioner of Central Excise Zone, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner, Central Excise, Ahmedabad-III.
4. The Additional Commissioner(Systems) Central Excise, Ahmedabad - III
5. The A.C. / D.C., Central Excise Division: Mehsana, Ahmedabad-III
6. Guard file
7. P. A.