



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

वस्तु एवं सेवा

कर भवन,

सातवीं मंजिल, पोलिटेक्निक के पास,

आम्बावाडी, अहमदाबाद-380015

GST Building, 7th Floor,,

Near Polytechnic,

Ambavadi, Ahmedabad-

380015



☎ : 079-26305065

टैलेफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(MRS)10/AHD-III/2017-18 & 4068 to 4074
V2(HCP)03/RA/GNR/2017-18

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-0131-132-17-18

दिनांक Date : 26.09.2017 जारी करने की तारीख Date of Issue: 6-11-17

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश :
AHM-STX-003-ADC-AJS-001-17-18 दिनांक : 25.04.2017 से सृजित

Arising out of Order-in-Original: AHM-STX-003-ADC-AJS-001-17-18, Date: 25.04.2017
Issued by: Additional Commissioner, Central Excise, Div:Gandhinagar,
Ahmedabad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Murlidhar Horticulture Pvt. Ltd.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
- (c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- ए0बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैनटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 5 लाख या उससे कम है वहाँ रुपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 5 लाख या 50 लाख तक हो तो रुपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 50 लाख या उससे ज्यादा है वहाँ रुपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 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 अर्जी एवं अपील को लागू नहीं होंगे।

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.

(6)(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।

(6)(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

S No	Appeal No	Name of appellant	Amount involved (Rs)	Period
1	10/STC-III/17-18	M/s Muralidhar Horticulture Pvt Ltd (<i>appellant-1</i>)	74,17,793/-	01.07.12 to 28.02.16
2	03/RA/GNR/17-18	Asstt.Commissioner, CGST Divn. Gandhinagar (<i>appellant-2</i>) Vs M/s Muralidhar Horticulture Pvt Ltd (<i>appellant-1</i>)	44,66,145/-	01.10.10 to 30.06.12

The appeal mentioned at Sr.No.1 above has been filed by M/s Muralidhar Horticulture Pvt Ltd, Plot No.1322, Sector 1/C, Gandhinagar [hereinafter referred to as "the appellant-1"] against Order-in-Original No.AHM-STX-003-ADC-AJS-001-17-18 dated 25.04.2017 [impugned order] passed by the Additional Commissioner of Central Excise, Ahmedabad-III [adjudicating authority].

2. The appeal mentioned at Sr.No.2 above has been filed by the Assistant Commissioner of CGST Division, Gandhinagar in view of Commissioner of CGST, Gandhinagar's review Order No.08/2017-18 dated 21.07.2012 against the impugned order passed by the adjudicating authority in case of appellant-1.

3. Briefly stated, the facts of the cases are that during scrutiny of records/documents of the appellant-1 pertaining to the relevant period mentioned above, it was observed by the departmental officer that they had provided various services viz. maintenance and developing of garden, trees, pots and cutting and sampling of plants to M/s Reliance Industries Ltd as per work order and received taxable value of Rs.10,22,86,351/-. As it appeared that up to the period 30.06.2012, the said activities falls under the service category of "Management, Maintenance or Repair Service" and from 01.07.2012, it is taxable under section 65 B (44) of the Finance Act, 1994, a show cause notice dated 13.04.2016 for recovery of service tax amounting to Rs.1,18,83,938/- with interest and imposition of penalty was issued to the appellant-1. The said show cause notice was decided by the adjudicating authority, wherein, he confirmed the demand of Rs.74,17,793/- for the period of 01.07.2012 to 28.02.2016 with interest and imposed penalty of Rs.74,17,793/- under Section 78, Rs.10,000 each under Section 77(1)(a) and 77(2) of the Finance Act, 1994. The adjudicating authority has dropped demand of Rs.44,66,145/- for the period of 01.10.2010 to 30.06.2012.

4. Being aggrieved with the confirmation of demand amounting to Rs.74,17,793 with interest and imposition of penalty thereof, the appellant-1 has filed the appeal mentioned at (1) above. The appellant-2 has filed the appeal mentioned at (2) above, being aggrieved with the amount of Rs.44,66,145/- dropped.

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5. The appellant-1 has filed the said appeal on the grounds that:

- The explanation rendered by CBEC in para 4.4.2 of Education Guide itself consider pisciculture, sericulture, floriculture and horticulture and forestry being the activities covered in the definition of the term "agriculture" and the adjudicating authority has erred in considering the said facts; that the activity carried out by them is horticulture activities including cleaning (leaves, twigs, plant clipping etc) weeding, pruning, hoeing or cultivation of land, application of fertilizer, pest control, water mowing etc which all amounts to upbringing, evolving and preservation of shrubs, grass and trees.
- Clause (3) of Section 65 B of FA defines the expression "Agriculture" to mean the cultivation of plants and rearing of all life-forms of animals, excepts the rearing of horses, for food, fibre, etc or other similar products; that it is clearly comes out from the contract which they have entered into with M/s Reliance Industries Ltd that they engaged primarily for undertaking horticulture activities;
- Penalty under fraud and suppression of facts cannot be invocable in the case as the service tax leviable in the instant case was a matter of interpretation.
- They relied on Hon'ble Supreme Court decision in the case of Smt Rekha Das reported in 2003 (2) ICC 233 wherein it has observed that Agriculture includes Horticulture.

The appellant-2 has filed in the appeal mentioned at Sr No.(2) above on the grounds that:

- With effect from 01.05.2006, the definition of Management, Maintenance or Repair brought maintenance or repair of properties or not within the scope of management, maintenance or repair service; that it quite clear that the intention of the legislature was to cover all properties excluding motor vehicle under the definition of said service; that the adjudicating authorities has inappropriately relied on the definition of immovable property whereas, the amendment has brought all types of properties within it ambit.
- The adjudicating authority has grossly erred in law and facts by relying on the decision of Hon'ble Tribunal in case of M/s ANS Construction-2010(17) STR 549; that the period involved in the said was up to 28.02.2006 whereas, in the case period covered is from October 2010 onwards; that though the case is identical, in the instant case the appellant-1 is liable for service tax in view of amended provisions of Section 65(64) of the FA w.e.f 01.05.2006.
- The appellant-2 has relied on various decisions of Tribunal in support of their arguments.

6. Personal hearing in the matter of appellant-1 was held on 07.09.2017 and Shri Gunjan Shah, Chartered Accountant appeared for the same. He reiterated the grounds of appeal. He explained departmental guide and submitted case law which are based on departmental guide. Personal hearing in respect of appellant-2 was held on 08.09.2017 and 11.09.2017. Shri Amitabh Teotia, Proprietor of M/s Muralidhar Horticulture Pvt Ltd appeared on 08.09.2017 and pointed out that the case of M/s Tarachand -2016 (42) STR 83 (Tri Del) is totally different than their case. In the said case, the work order includes so many works which is not horticulture and a composite contract. He showed their order to show that their works relates only to plants/horticulture. He further pointed out the definition of

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park and submitted that their work order not relates to park but industrial installations which is not a public/entertainment area, rather it is created to meet environmental requirements. The appellant-1 has submitted further written submission in support of their argument. On behalf of department, Smt. Mary George, Superintendent of CGST Division, Gandhinagar appeared on 11.09.2017 and reiterated the grounds of appeal and further pointed out citations in favour of department mentioned in the appeal.

7. I have carefully gone through the facts of the cases and submissions made by the appellant-1 and appellant-2 in the appeal memorandum as well as at the time of personal hearings. Since the issues involved in both the appeals are against same impugned order, I decide both the cases in a common order.

8. The issue to be decided in these two appeals are:

[i] appeal mentioned at S.No. (1) above is as to whether the activities viz. maintenance and developing of garden, trees, pots and cutting and sampling of plants to M/s Reliance Industries Ltd as per work order is taxable in terms of section 65 B (44) of the Finance Act, 1994 for the period from 01.07.2012 onwards; and

[ii] in respect of appeal mentioned at Sr. No (2) above is as to whether the said activities falls under the service category of "Management, Maintenance or Repair Service" prior to 01.07.2012.

9. In the instant case, I observe that a show cause notice was issued to the appellant -1 pertains to the period of 01.10.2010 to 28.02.2016 for recovery of service tax amounting to Rs. 1,18,83,938/- with interest and imposition of penalty thereof, relating to non-payment of service tax rendered by them to M/s Reliance Industries Ltd. I further observe that out of the said amount, the adjudicating authority has dropped an amount of Rs.44,66,145/- for the reason that upto the period 30.06.2012, the service provided by the appellant-1 is not classifiable under the service category of "Management, Maintenance or Repair Service". The appellant-2 has filed the appeal mentioned at Sr.No. (2) above. Therefore, I first take the issue involved in appeal filed by appellant-2 pertains to the period upto 30.06.2012 for decision.

10. I observe that the adjudicating authority in the impugned order contended that up to 30.06.2012, the service of Management, Maintenance or Repair of movable and immovable properties were taxable and as per Section 3 of Transfer of Property Act 1882, immovable property does not include standing timber, growing crops and grass; that the work undertaken by the appellant is maintenance of garden, lawn hedge, shrubs etc., maintaining by regular watering, weeding cutting, trimming etc. supply of sweet garden soil, supply of farm yard manure etc. The adjudicating authority upholds that the said activities do not fall within the ambit of



11. As per Section 65(64) of the Act, "Management, maintenance or repair" service means any service provided by (a) any person under a contract or an agreement; or (b) a manufacturer of any persons authorized by him, in relation to management of properties, whether immovable or not; maintenance or repair of properties, whether immovable or not; or (c) maintenance or repair including reconditioning or restoration or servicing of any goods, excluding a motor vehicle. I observe that there was no dispute that the activities carried out by the appellant is maintenance and developing **of garden, trees, pots and cutting and sampling of plants** etc to M/s Reliance Industries Ltd as per their work order. In the instant case, the appellant have entered into a contract work with M/s Reliance Industries Ltd primarily for undertaking horticulture activities. The details of work order showing description of Horticulture Development work furnished by the appellant is placed below:

NOTICE OF ORDER

V.O. Number: 76 / 31137020 Dtd: 11/11/2014

Page No: 1

(Horticulture Work at Ahmedabad Airport Domestic (OLD) & New & Old Domestic Terminal Bldgs. Outside & Inside, Aprons, Dividers/Jetty)

No.	Item Code	Description of Work	Quantity	UOM	Price Details	Unit Rate	Amount (INR)
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1		Horticulture Development Work		S/PU	Value of Work		INR/PU = 2,533,650.00
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The order covers the following work:-

10/3121111 TREE / SHRUBS PLANTATION WORKS

12

EA

each / PU 1

Unit Value of Item 211,155.00

2,533,650.00

To carry out the following work:-

1. To carry out the following work:-

1.1. To carry out the following work:-

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Further, I observe that the scope of work as per the said contract specified that:-

- (i) Horticulture cleaning daily of Garden and remove all leaves, and unwanted vegetation to be removed;
- (ii) Application of (FYM) Farm Yard Manure-when required-it should be powdered, cleaned and applied in appropriate quantity to the plants;
- (iii) Application of FYM/fertilizer when required;
- (iv) Edging of lawn, flower beds and weeding regularly;
- (v) Giving support to the plants
- (vi) Plants protection measures by using suitable insecticides and pesticides
- (vii) Pruning of trees when required.

12. I observe that the Review Authority has filed the instant appeal mainly on the basis of decision in case of [i] CCE Jaipur V/s Tarachand Chaudhury [2016 (42) STR 83 (Tr.Del)]; [ii] CCE Jaipur V/s Suresh Jaiswal [2016-42-STR-97]; and CCE Jaipur V/s Chotelal Virendra Kumar [2016 (41) STR 296 (Tri. Del)]. In all cases cited above, I observe that the facts of the case is that the assesseees were entered into contracts with Jaipur Development Authority (JDA) for management and maintenance of Parks and road side plantation and maintenance. The scope of work was mainly as under:

"Management, Maintenance and Repair service - Management and maintenance of parks and road side plantation and maintenance on behalf of Jaipur Development Authority/Jaipur Nagar Nigam - W.e.f. 1-5-2006 change in definition of "Management, maintenance or repair" brought "maintenance or repair of properties whether immovable or not" within scope of "Management, maintenance or repair service" - Roads, airports, railway, building, parks, electrical installation and the like are clearly immovable properties, therefore, management, maintenance or repair thereof clearly liable to Service Tax - Maintenance of trees, grass, etc., chargeable to Service Tax w.e.f. 1-5-2006 - Demand upheld - Section 73 of Finance Act, 1994.

Demand - Limitation - Extended period - Invocation of - Suppression of fact - Appellant not obtained Service Tax registration and did not file ST-3 return pertaining to service chargeable to tax - Appellant did not submit details in spite of being asked and did not even respond to summons - Appellant clearly guilty of suppression of facts - Demand upheld - However, matter remanded to recompute the demand and penalties after extending benefit of Notification No. 12/2003-S.T. - Section 11A of Central Excise Act, 1944 - Section 73 of Finance Act, 1994.

[Order per : R.K. Singh, Member (T)]. - Appeal has been filed against order-in-original No. 16/2012(ST)-COMM. dated 22-2-2012/23-2-2012 in terms of which service tax demand of Rs. 74,72,718/- was confirmed along with interest and penalties on the ground that the appellant provided management, maintenance or repair service but had not paid service tax.

2. The facts, briefly stated, are as under :

The appellant, a contractor, entered into contracts with Jaipur Development Authority (JDA) and Jaipur Nagar Nigam (JNN) for management and maintenance of parks and road side plantation and maintenance. The scope of work was mainly as under:

- (a) Supply and growing of plants;
- (b) Supply and providing fertilizers and pesticides to the plants at regular interval;
- (c) Watering of lawns, plants;
- (d) Lawn cutting and pruning and trimming of hedges;
- (e) De-weeding of lawns and flower beds;
- (f) Preparation of flower beds and planting of shrubs, etc.;
- (g) Removing of stone pieces from other than lawn area in a park;
- (h) Brooming the lawn and collecting the dirt at destined places;
- (i) Operating the water pump;
- (j) Putting on the lights and shutting them off;
- (k) Operating the fountains;
- (l) Providing round the clock security of the parks;
- (m) Colouring the pots; potting and re-potting;
- (n) Filling up new pots and planting plants therein;
- (o) Replacement of dead plants."

From the facts of the said cases referred above, it emerges that the **JDA** is providing **facilities to public** and for the said purpose they entered into contract

with the concerned assesseees for undertaking above activities. On perusal of the above referred activities, I observe that the assesseees had undertaken composite activities i.e first Horticulture and secondly works other than horticulture as mentioned at (g) and (i) to (o) above. However, so far as the activities undertaken by the appellant-1 in the impugned case is concerned, they entered into a contract with respect to work description as mentioned at para 11 above which exclusively pertain to "Horticulture" activities. Further, from the contract of work description and the invoice (reproduced at para 11 above) given to the appellant-1, it is pertinent to mention here that the activities undertaken by them is not in a public place as done by JDA referred to supra.

12.1. Since the contract works contract given to the appellant-1 is relating to 'Horticulture', it is required to describe the word '**Horticulture**'. I observe that the word '**Horticulture**' has been defined by Merriam Webster Dictionary as "the science and art of growing fruits, vegetables, flowers or ornamental plants. The Free Dictionary also defines it as "the science and art of cultivating fruits, vegetables, flowers or ornamental plants"; that horticulture is a term that evokes images of plants, gardening and people working in horticulture. Such activities are practiced from the individual level in a garden up to the activities of a multinational corporation. The service related to horticulture includes plant conservation, landscape restoration, landscape and garden design/construction /maintenance etc. A healing garden needs to provide a multi-sensory experience with colourful flowers, varying shades and textures of green, the sights and sounds of water, elements that attract birds and butterflies, fragrances, and ornamental grasses which move with the slightest breeze.

12.2. The word "Park" means, as per Cambridge Dictionary, a large area of land with grass and trees which is maintained for the pleasure of the public. Further, Various definition of "Park" as per Free Dictionary is a piece of land with few or no building within or adjoining a town, maintained for recreational and ornamental purpose; A landscaped city square; A large tract of rural land kept in its natural state and usually reserved for the enjoyment and recreation of visitors; Further, Park as per **Oxford dictionary** means [i] a large public green or area of land used for recreation; As per Webster Dictionary, "Park" defines as a piece of ground in or near a city or town kept for ornament and recreation; an area maintained in its natural state as a public property etc. The JDA had given the composite contract (which also included non-horticulture activities) for maintaining of Public Park. In these cases quoted by Revenue, there are two important aspects i.e [i] Composite Contract which included non-horticulture activities also; and [ii] Public Park. However, I find that the instant case is not related to Public Park and it is not meant for recreation. The horticulture activities related to non-public area and are industrial in nature.

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13. In the instant case, it is fact that the appellant-1 is engaged in the activities of developing of garden, trees, pots and cutting and sampling of plants etc and its maintenance as per contract order. As per description of work and scope of work mentioned in the work contract, the appellant-1 is engaged in the activities of growing grass, plants trees, regular mowing of lawns, pruning & trimming of shrubs, maintaining season flowers, maintaining by regular watering and cleaning garden etc. The definition of "Management, maintenance or repair" under Section *supra* means *any service provided by (a) any person under a contract or an agreement; or (b) a manufacturer of any persons authorized by him, in relation to management of properties, whether immovable or not; maintenance or repair of properties, whether immovable or not.* As per Section 3 of Transfer of Property Act, 1988, "**immovable property**" does not include standing timber, growing crops or grass. However, the term "immovable property" has not defined under the Finance Act. Looking into the interpretation clause under Transfer of Property Act and the description of work of the appellant-1, the activities undertaken by them definitely falls under the exclusion to the definition of Management, Maintenance or repair. In the circumstances, I am of the considered view that the adjudicating authority has correctly considered that such activities are not within the ambit of "Management, Maintenance or Repair service" and dropped the demand accordingly.

14. I further observe that while dropping the said demand, the adjudicating authority has relied on Commissioner (Appeal), Ahmedabad's OIA No.120/2013 (STC)/SKS/Commr (A)/Ahd dated 17.06.2013 in case of M/s Sanwaliya Seth Gardens Pvt Ltd (a group company of the appellant), wherein it has been held that such activities are out of ambit of 'Management, Maintenance" service. I observe that the said order of Commissioner (Appeals) has relied on Hon'ble Supreme Court's judgment in case of Smt.Kasturi Vs Gaon Sabha [Civil Appeal No.351 of 1974 decided on 27.07.1989]. In para 7 of the said judgment, the Hon'ble Court has stated that;

"The definition of land in the Act is wide and in paragraph 4(d) the admitted position is 'fuelwood' was being grown on the property. "Horticulture", "Garden" and "Groveland in the absence of statutory definition, would have the common parlance meaning. "Horticulture" means 'the cultivation of garden'. "Garden" means 'an area of land, usually planted with grass, trees, flower beds, etc an area of land used for the cultivation of ornamental plants, herbs, fruit, vegetables, trees, etc."

The Commissioner (Appeals), in the said OIA, further relied on the judgment of Hon'ble Tribunal, New Delhi, Principal Bench in the case of M/s ANS Construction Ltd [2010 (17) S.T.R. 549 (Tri. - Del.)] which states that

The respondents were engaged for activities of growing of grass, plants, trees or fruits, vegetable, regular mowing of lawns, pruning and trimming of shrubs and cleaning of garden, would not come within the ambit of "maintenance of immovable property". We have noted that respondent paid

tax on construction of walkways and other incidental work in the garden. Therefore, the Commissioner (Appeals) rightly held that no tax is liable on such activity during the relevant period.

15. The department contended in the review appeal that the above decision is not applicable to the instant case as the period involved in the Tribunal's decision was 16.06.2005 to 28.02.2006. The contention is not correct and not sustainable as the Hon'ble Tribunal has categorically discussed the amended provisions Section 65 (64) of Finance Act, 1994 in the said decision. In para 7 of the decision it has been contended that *"It is noticed that by amendment of Section 65(64) with effect from 1-5-2006, service tax is leviable on maintenance of all properties (whether immovable or not). The respondents were engaged for activities of growing of grass, plants, trees or fruits, vegetable, regular mowing of lawns, pruning and trimming of shrubs and cleaning of garden, would not come within the ambit of "maintenance of immovable property".* Further, I observe that the decisions relied on by the department is not squarely applicable to the case of appellant-1 as the activities carried out by the appellant-1 and discussed in the said decisions varies.

16. Further, I also observe that the decisions relied on by the Review Authority has in case of [i] CCE Jaipur V/s Suresh Jaiswal [2016-42-STR-97]; [ii] CCE Jaipur V/s Tarachand Chaudhury [2016 (42) STR 83 (Tr.Del)]; and CCE Jaipur V/s Chotelal Virendra Kumar [2016 (41) STR 296 (Tri. Del)] is also not relevant to the facts of the instant case, looking into the facts and nature of the works involved, as discussed in para 12 above. Further, the service tax on "Maintenance and Repair Service is leviable, according to the nature of work entered by a service provider. The Hon'ble Tribunal in the case of M/s ANS Construction Ltd *supra* has held that "services in relation to agriculture, horticulture, animal husbandry or diary were excluded from the definition of "cleaning activity" under Section 65(24b) of the Act. So, the horticulture activity is outside of "cleaning activity" a separate activity. As per Section 3 of Transfer of Property Act, 1982 "immovable property" does not include the standing timber, growing crops or grass. The activity of horticulture which deals with growing of grass, flowering and plant are not act of maintenance of immovable property." It appears that in case of decision cited by the Revenue *supra*, certain description of work carried out by the service provider is not in the nature of Horticulture functions; that it appears as a composite contract works. Whereas, the activities undertaken by the appellant-1, in view of definition of "Horticulture", "Park", clearly leads to that it is not within the ambit of "Management, Maintenance and Service".

17. In view of above, looking into the activities carried out by the appellant-1 which support by the decision of Principal Bench, Tribunal New Delhi *supra*, I do not find any merit in the appeal filed appellant-2; hence, I reject the departmental appeal by upholding the impugned order in the issue.

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18. Now I takes the appeal filed by the appellant-1 pertaining confirmation of demand of Rs. 74,17,793/- with interest and imposition of penalty thereof pertaining to the activities viz. maintenance and developing of garden, trees, pots and cutting and sampling of plants to M/s Reliance Industries Ltd as per work order which is said to be taxable in terms of section 65 B(44) of the Finance Act, 1994 for the period from 01.07.2012 onwards. The adjudicating authority in the impugned order contended that the services provided by the appellant-1 is not relating to agriculture or agricultural produce and hence not covered under the Negative list as per Section 66 d(d) of the Act. The appellant-1 argued that their activities ought to have considered as agriculture and such activities are excluded from the levy of service tax.

19. As per definition under Section 65B (3) of the Finance Act, "Agriculture" means **"the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products"**. Further, Negative List of service, as per Section 66 D (d) of the Act, services relating to agriculture or agricultural produce by way of "agriculture operations directly related to production of any agriculture produce including cultivation, harvesting, threshing plant protection or seed testing. In other words, under the negative list, the definition of agriculture includes cultivation of plants, and its protection.

20. It has been already discussed in above paras that the service related to "horticulture" includes plant conservation, landscape restoration, landscape and garden design/construction /maintenance etc. and definition of "Park"; that "Park" means *"a large area of land with grass and trees which is maintained for the pleasure of the public; a piece of land with few or no building within or adjoining a town, maintained for recreational and ornamental purpose; A landscaped city square; A large tract of rural land kept in its natural state and usually reserved for the enjoyment and recreation of visitors; and a large public green or area of land used for recreation; and a piece of ground in or near a city or town kept for ornament and recreation. Horticulture is generally classified as a subdivision of agriculture which deals with plant gardening.* It is easy to relate the two because some of the techniques employed are used interchangeably in both sciences, for instance in the cultivation of crops, plants etc which is an agricultural process, many horticulture methods are employed. Horticulture is a complete science of its own as well as a full industry. In other words, Horticulture is a branch of agriculture that concerns cultivation of crops, while agriculture broadly involves cultivation of both plants and animals. Both have the mutual aim of human consumption/sustaining life.

21. It is not disputed that the appellant-1 is engaged in the activities of growing grass, plants trees, regular mowing of lawns, pruning & trimming of shrubs, maintaining season flowers, maintaining by regular watering and cleaning garden

etc. The description of work and scope of work mentioned in the work contract clearly stipulates that the appellant-1 is undertaken such activities. Further, the definition under Section 65 B (3) of the Finance Act, "Agriculture" also stipulates that "the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products".

22. The adjudicating authority in the impugned order has stated that the contention of the appellant-1 that activities ought to have considered as agriculture and such activities are excluded from the levy of service tax is not tenable as the service provided by the appellant does not find a mention in the services relating to agriculture or agriculture produce in terms of Section 66 D (d) of the Act; that it is not directly relating to production of any agriculture produce, as there is no such agricultural production involved. I do not find any merit consideration in the contention of the adjudicating authority as the activities carried out by the appellant-1 clearly falls within the ambit of "agriculture" as defined under Section 65 B (3) of the Act and in view of Negative List of service relating to agriculture or agricultural produce, as per Section 66 D (d) of the Act. I observe that the adjudicating authority has not considered the definition under Section 65 B(3) and 66 D (d) as discussed in para 21 above.

23. Further, vide Educational Guide rendered by CBEC, pisciculture, sericulture, floriculture and **horticulture** and forestry being the activities covered in the definition of the term "**agriculture**". Further, I observe that the explanation rendered by CBEC in para 4.4.2 of **Education Guide** consider pisciculture, sericulture, floriculture and **horticulture** and forestry being the activities covered in the definition of the term "**agriculture**". I observe that the adjudicating authority has not considered the said CBEC guide as dependable as per excerpts of Education guide which is as under:

"It is clarified at the outset that this guide is merely an educational aid based on a broad understanding of a team of officers of the issues. It is neither a "departmental circular" nor a manual of instructions issued the Central Board of Excise and Customs. To that extent it does not command the required legal backing to be binding on either side in any manner. The guide is being released purely as a measure of facilitation so that all stakeholders obtain some preliminary understanding of the new issue for smooth transition to the new regime. "

However, the Educational Guide is dependable in view of following decisions. [i] The Hon'ble Tribunal decision in case of Advinus Therapeutics Ltd [2016-TIOL-3138-CESTAT-Mum] has been held that:

"16. Note intended to tax the activity of altering goods supplied by the recipient of service or for repairs on goods, rule 4(1) of Place of Provision of Service Rules, 2012 would appear, by elimination of possibilities, to relate to goods that require some activity to be performed without altering its form. The exemplification in the Education Guide referred supra is pellucid. Certification is an important facet of trade and such certification, if undertaken in India, will not be able to escape tax by reference to location of

the entity which entrusted the activity to the service provider of India. This is merely one situation but it should suffice for us to enunciate that rule 4(1) is intended to resorted when service are rendered on goods without altering its form that in which it was made available to the service provider. This is the harmonious construct that can be placed on the applicability of rule 4 in the context of tax on services and the general principle that taxes are not exported with service or goods."

[ii] While deciding stay application in case of B.M.Vijay Kumar [2013-TIOL-1355-CESTAT-MAD], it has been held by the Hon'ble CESTAT Chennai that:

"3. The learned counsel drew the attention of the Bench to the lease agreement which shows that the security deposit is refundable at the completion of the lease tenure without any interest. The original authority in the impugned order observed that this amount is an additional consideration. The learned AR submits that in terms of Section 67 of the Finance Act, 1994, this amount would be included in the gross amount charged for the taxable service. He submits that this amount was collected in relation to the renting of immovable property and therefore the amount is received towards taxable service. We find that the amount collected by the applicant on renting is a taxable service and they are paying tax. It is a security deposit which is returned after the completion of the tenure agreement. We also notice that the Board in the 'Service Tax Education Guidelines' clarified that refundable deposit is in the nature of security and hence do not represent the consideration of Service Tax. In view of that, we find the applicant has made out a *prima facie* case for waiver of pre-deposit of entire amount of dues. Accordingly, we grant waiver of pre-deposit of Service Tax and penalty along with interest and stay its recovery during the pendency of the appeal. Stay application is allowed."

24. In view of above citations, it is very clear that the "Education Guide" of CBEC 2012 is dependable because the Hon'ble Tribunal in many cases has depended on the clarifications contained in it. In the circumstances, the adjudicating authority's contention in this regard in para 24.4 of the impugned order is not correct and not acceptable and find that adjudicating authority's rejection of the CBEC ^{guide} has not reliable is not correct. The above guide is an official document which clarifies certain issues and throws intent behind. In view of above discussion, the activities of Horticulture undertaken by the appellant should be considered as "agriculture" activities as the activity involves maintenance and developing of garden, trees, pots and cutting and sampling of plants, trees, grass, water, fertilizers etc.

25. I further observe that the Hon'ble Tribunal, Bangalore while deciding a stay application in a similar issue in case of M/s Garden makers [2009 (15) S.T.R. 37 (Tri. - Bang.)] has held that the activity of gardening falls within ambit of Horticulture activities. The gist of decision is as under:

".....The appellant were providing the services related to beautification of spaces, landscaping, etc. The Revenue wants to bring the activity under the category of "Interior Decorator Service". The appellants took the stand that they were undertaking the work like planting of trees, garden plants, grassy lawn, etc. After due consideration, the Original authority had accepted the plea and dropped the show cause notice to bring the activity under "interior Decorators Services". The Commissioner has reviewed the Order-in-Original and held that the activity falls under "Interior Decorators Services" and confirmed the demand and also held that the larger period is invokable."

"2. We have heard both the sides in the matter. Prima facie, there is a merit in the appellant's submission that the activity of gardening under Horticulture activities, such as planting of trees, garden plants, grassy lawn etc. does not fall within the scope of "Interior Decorators"....."

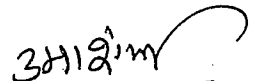
26. In view of above discussion, I am of the considered view that the service rendered by the appellant-1 is not liable for service tax as the activities carried out by them involves maintenance and developing of garden, trees, pots and cutting and sampling of plants, trees, grass, water, fertilizer and well within the definition of "agriculture" activities. Therefore, I set aside the demand of service tax with interest demanded in the impugned order.

27. As regards penalty, I observe that the adjudicating authority has imposed penalty of Rs. 74,17,793/- under Section 78, Rs.10,000 each under Section 77(1)(a) and 77(2) of the Finance Act, 1994. In view of above discussion, the appellant is not liable to pay service tax for the service rendered by them during disputed period and once it is found that they were not liable to pay service tax, no penalty can be imposed. I observe that the Hon'ble Court of Punjab & Haryana in case of Ajay Kumar Gupta Vs CESTAT [2015 (39) STR 736] has held that penalty was not liable to be imposed on account of the fact that the service which he was rendering was not taxable. The relevant portion of the decision is as under:

"11. Once the Service Tax was not leviable under Section 68 at that point of time and the liability was only to deposit the tax under Section 73A(2), which has been done on 15-11-2008, after delay, but due to the service being not taxable at the relevant time when the invoices were raised, we are of the opinion that the case would not fall under the provisions of Section 78 for invoking of the penalty, as has been held by the Tribunal. It was the categorical stand of the appellant before the First Appellate Authority that the Service Tax had been collected by mistake, on account of the new provision and the office of the appellant was not fully acquainted with the interpretation of the statute due to which the default had occurred and therefore, in view of the defence taken, the Tribunal was not justified, in the present facts and circumstances, to hold that there was a wilful suppression of facts, to bring it within the ambit of Section 78."

By following the above decision, I also set aside the penalty imposed under Section 78, 77 (1) (a) and 77(2) of the Act.


28. In view of above discussion, I allow the appeal filed by the appellant-1 and reject the appeal filed by the appellant-2. Both the appeals stand disposed of accordingly.


(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 26/09/2017

Attested


(Mohanan V.V)
Superintendent (Appeal-I)

BY R.P.A.D.

To,

1. M/s Muralidhar Horticulture Pvt Ltd,
Plot No.1322, Sector 1/C, Gandhinagar
2. The Assistant Commissioner
CGST Division, Gandhinagar.

Copy to:

1. The Chief Commissioner of Central Excise Zone, Ahmedabad.
2. The Commissioner of CGST, Gandhinagar.
3. The Additional Commissioner(Systems) CGST, Gandhinagar.
4. The Additional Commissioner, CGST, Gandhinagar
5. The AC/DC, CGST, Gandhinagar Division
6. Guard file
7. P. A