



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय कर भवन, 7th Floor, Central Excise Building,
सतर्वा मंजिल, पॉलिटेक्निक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-
380015



: 079-26305065



टेलीफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(CS) 1/STC-III /16-17/A-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-068-17-18 / 4809-12
दिनांक Date 27.07.2017 जारी करने की तारीख Date of Issue 11/08/17

श्री उमाशंकर, आयुक्त (अपील) केन्द्रीय कर, अहमदाबाद द्वारा पारित

Passed by Shri Uma Shankar Commissioner (Appeals) Central Tax, Ahmedabad

ग Deputy Commissioner, Service Tax Division, Gandhinagar द्वारा जारी मूल आदेश सं
163/Ref/ST/DC/2015-16 दिनांक : 29.12.2015 से सृजित

Arising out of Order-in-Original No 163/Ref/ST/DC/2015-16 दिनांक : 29.12.2015 Issued by:
Deputy Commissioner, Service Tax Division, Gandhinagar

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

M/s. Shreeji Corporation

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 विरुद्ध 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी
होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए
5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या
उससे ज्यादा है वहाँ 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 शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 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, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 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 हैं

- (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 होंगे।

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 order arises out of an appeal filed by the Asstt. Commissioner, Service Tax Division, Gandhinagar (in short 'appellant') in terms of Review Order No.86/2015-16 dated 21.03.2016 passed by the Commissioner, Central Excise, Ahmedabad-III(in short 'review authority') against Order-in-Original No.163/Ref/ST/DC/15-16 dated 29.12.2015(in short 'impugned order') passed by the Deputy Commissioner, Service Tax Division, Gandhinagar(in short 'adjudicating authority') in case of M/s.Shreeji Corporation, Shreeji Avenue, F.P.No.20, Opp. Shrinath Park Residency-1, Near IOC Petrol Pump, Adalaj, Gandhinagar (in short 'respondent').

2. Briefly stated that the adjudicating authority sanctioned refund of service tax of Rs.48,021/- vide impugned order on the ground that while paying service tax for the quarter ending March-2016, the respondent had paid excess service on the amount which they had received against outright sale of their shops which they had sold after getting BU permission from Gandhinagar Rural & Urban Development Authority (in short 'GRUDA') after completion of their whole scheme.

3. Aggrieved with the said impugned order, the review authority vide review order directed the adjudicating authority to file present appeal on following ground viz.

- (a) the total amount shown in ST-3 return for the quarter ending March-2013 is cum-duty price and therefore total amount received by the respondent is inclusive service tax.
- (b) since the amount received from the buyers of commercial units is inclusive of service tax, the respondent has not borne burden the service tax on their own but the same has been passed on to the customers of commercial units, doctrine of unjust enrichment is applicable in the present case. This aspect is not considered by the adjudicating authority in the impugned order.

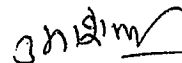
4. One set of appeal memorandum filed by the appellant was sent to the respondent on 04.05.2016 to file memorandum of cross objection, if any, against the said appeal with a request to remain present on hearing of appeal. Three opportunities were given to the respondent to remain present on personal hearing fixed on 17.05.2017, 20.06.2017 and 20.07.2017. None appeared for hearing on the given date nor any memorandum of cross objection is filed by the respondent till date. Hence, I proceed to decide the case on merits.

5. I have carefully gone through the appeal memorandum and documentary evidences available on records. I find that main issue to be decided is whether the impugned order passed by the adjudicating authority for sanction of refund of service tax of Rs.48,021/- is just, legal and proper or otherwise.

6. Prima facie, I find that the respondent is engaged in providing 'construction of commercial-cum-residential complex' service. As provided in Clause(b) of Section 66E of the Finance Act, 1994, no service tax is payable on sale of commercial unit after issuance of completion certificate(i.e. BU permission) by the competent authority (i.e. GRUDA). I find that the respondent has received BU permission from GRUDA on 01.12.2012. Accordingly, there is no liability of paying service tax on sale of commercial unit after 01.12.2012. The respondent filed ST-3 return for the quarter ending March-2013 showing receipt of Rs.29,32,550/-, paid service tax of Rs.98,347/-. It implies that they have considered said amount as cum-duty price in view of the fact that as per Para 23 of Sale Deed, the burden of service tax is borne by the respondent. I find that later on when they came to know that no service tax is payable on sale of commercial units after obtaining BU permission, they filed refund claim of Rs.48,021/- being excess service tax paid. This plea of the

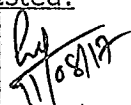
respondent is not tenable in view of the fact that the Para 23 of the Sale Deed clearly provides for bearing of burden of service tax by the respondent. It means that price is inclusive of service tax and is collected from the buyers and not borne by the respondent. When the refund is claimed, onus lies on the claimant that incidence of tax is not passed on to the buyers in terms of provisions contained in Section 11B of the Central Excise Act, 1944 as made applicable to the Finance Act, 1994. Thus, I find that the appellant has failed to consider this aspect and refund sanctioned by him vide impugned order is erroneous and requires to be recovered with interest as per law.

7. In view of the above discussion and findings, the appeal filed by the appellant succeeds and accordingly allowed in above terms.



(Uma Shanker)
Commissioner(Appeals)
Central Tax, Ahmedabad.
Dt.27.07.2017

Attested:


(B.A. Patel)
Supdt(Appeals).

BY SPEED POST TO:

- (1) The Asstt. Commr, Central Tax, Gandhinagar Division(Appellant)
- (2) M/s. M/s.Shreeji Corporation,Shreeji Avenue, F.P.No.20,
Opp. Shrinath Park Residency-1, Near IOC Petrol Pump,
Adalaj, Gandhinagar(Respondent)

Copy to:

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Commissioner, Central Tax, Gandhinagar(RRA Section).
- (3) The Asstt. Commissioner(System), Central Tax HQ, Ahmedabad.
(for uploading the OIA on website)
- (4) Guard file
- (5) P.A. file.

