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
सत्यमेव जयते
079-26305065
टेलेफैक्स: 079 - 26305136

क फाइल संख्या :File No : **V2/45/GNR/2018-19** / 10877 to 10882

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-0215-19-20**

दिनाँक Date :**18-04-2019** जारी करने की तारीख Date of Issue: 03/06/2019

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-ST-003-JC-AKS-020-17-18** दिनाँक : **15-02-2018** से सृजित

Arising out of Order-in-Original: **AHM-ST-003-JC-AKS-020-17-18,** Date: **15-02-2018** Issued by: Joint Commisisoner,CGST, Div:RRA, HQ, Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Diamond Infracon

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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 पूवोक्त 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 प्रकिया 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 मामलें 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 डयूटी केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

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 **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

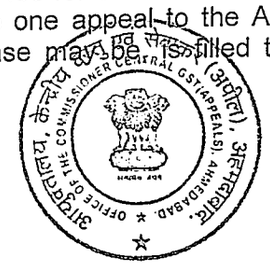
To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत 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. Registar 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 ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

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 not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.



(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 beer a court fee stamp of Rs.6.50 paisa 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 in 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, 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।

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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

ORDER IN APPEAL

M/s. Diamond Infracon, 14, Ambica Nagar Society, Nr. Bus Station, Kadi *(hereinafter referred to as 'the appellants')* have filed the present appeal against Order-in-Original No. AHM-ST-003-JC-AKS-020-17-18 dated 15.02.2018 *(hereinafter referred to as 'impugned order')* passed by the Joint Commissioner, C.G.S.T. & Central Excise, Gandhinagar.

2. The facts of the case, in brief, are that the appellants are engaged in the business of providing "Works Contract Service", for which they were holding erstwhile Service Tax Registration No. AAHFD8572BSD002. On the basis of detailed scrutiny of their ST-3 returns, it was noticed that the appellants had short paid/not paid Service Tax during the period 2011-12 and 2012-13. Accordingly, a show cause notice, dated 18.10.2016, was issued to the appellants which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority, vide the impugned order, confirmed the demand of Service Tax amounting to ₹99,37,994/- (₹97,53,034/- under Works Contract Service + ₹1,84,960/- under GTA Service) under Section 73(1) of the erstwhile Finance Act, 1944 and ordered to appropriate the amount of ₹1,77,201/- already paid by the appellants against the GTA Service. He also ordered to recover interest at appropriate rate under Section 75 of the erstwhile Finance Act, 1944 and also ordered to appropriate the amount of ₹ 1,07,629/- already paid by the appellants against their interest liability under the GTA Service. The adjudicating authority, further, imposed penalty under Sections 77(1)(e), 77(2) and 78 of the erstwhile Finance Act, 1944

3. Being aggrieved with the impugned order the appellants have preferred the present appeal before me. The appellants have submitted that the show cause notice is *non-est* as no show cause notice was issued before rejection of their VCES declaration. They further quoted that the entire activity carried out by them was exempted as the services were provided to GPCL for the development of potable water supply. They further pleaded that the rejection of their VCES declaration is bad in law as there is no justification to reject the VCES application merely because an inquiry was pending.

4. Personal hearing in the matter was granted and held on 26.11.2018 and 28.03.2019. Shri Jigar Shah and Shri Ambarish Pandey, Advocates, appeared before

me in both the dates and reiterated the contents of appeal memo and requested to set aside the impugned order. Shri Shah pleaded that their VCES application was rejected after 30 days of submission. He further stated that regarding the main issue, if the main contractor pays Service Tax, no tax can be demanded from the sub-contractors. Also, the project was pertaining to water conservation and non-commercial and hence, non-taxable.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. At the onset, I would like to proclaim, regarding the issue of VCES, that the appellants should have filed an appeal before me, at proper time, when their VCES declaration was rejected. However, instead of following a proper procedure, they have pleaded about the said rejection along with the present case. Thus, I conclude that the principle of limitation would be applicable to the case as the appellants should have filed the appeal of rejection of their VCES application within two months from the date of rejection. In the case of Badruka Exim Pvt. Ltd. vs. Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II, [2018 (10) G.S.T.L. 454 (Tri. Hyd.)], the Hon'ble CESTAT, Regional Bench, Hyderabad has proclaimed that appeal provision under Sections 85 and 86 of the Finance Act, 1994, would be applicable to proceedings arising out of VCES declaration. Thus, even if the law of limitation regarding VCES vaguely saves the appellants, general clause of limitation as mentioned as per rule, would be applicable. Further, I find that their VCES-1 declaration was already rejected by the Deputy Commissioner, Central Excise, Kadi Division stating that the appellants were not eligible for benefit under VCES, 2013 in view of the provisions of Rule 106(2)(a)(iii) of Chapter VI of the Finance Act, 2013 and clarification issued by the Board vide Circular number 169/4/2013-ST dated 13.05.2013. Thereafter, the jurisdictional Assistant Commissioner had referred the matter to the Assistant Commissioner (Preventive), Central Excise, Ahmedabad and thus, the inquiry was initiated against the appellants. Now, the main procedure to avail the VCES is that a declarant is required to pay not less than 50% of tax dues on or before 31.12.2013. However, looking to the present case, I find that the appellants had paid ₹ 1,77,201/- out of ₹ 1,84,960/- under the category of GTA service only (which has been rightly appropriated by the adjudicating authority). But the appellants did not pay anything under the category of works contract service (amounting to ₹ 97,53,034/- of Service Tax). Thus, on this very ground itself, the argument of the appellants does not

sustain. In view of the above, I do not consider the argument of the appellants to be valid and reject the same.

6. Now, I find that the appellants have provided certain services to the main contractors as well as to GPCL directly in relation to water supply projects and have received a particular amount in return of rendering the service. The work was basically pertaining to earthwork and lining work of desilting of existing tanks to and from storage reservoir for water supply scheme to Gujarat Solar Park Phase-I (service provided by the appellants as sub-contractor to Shri H. C. Prajapati and Shri J. N. Bhimani, both main contractors), development of potable water supply system from ground level reservoir-1 to investors on left side of diversion nalah at Gujarat Solar Park Phase-1 (service provided directly by the appellants as main contractor to GPCL), supplying and laying of pipelines, earthwork excavation and backfilling work, drain work, culvert work in drain (service provided by the appellants as sub-contractor to M/s. L & T ECC Division being the main contractor) and construction of transition wall for pipe culvert at the approach road of Phase-1 at Solar Park, Patan (service provided by the appellants as sub-contractor to M/s. Bhagirath Associates as main contractor). I find that the adjudicating authority has very clearly mentioned that the appellants have charged Service Tax from M/s. GPCL, M/s. L & T ECC Division and M/s. Bhagirath Associates. They have not charged Service Tax from Shri H. C. Prajapati and Shri J. N. Bhimani. Thus, the very first argument of the appellants that "Entire Activity Carried Out By The Appellants Is Exempted" gets negated. If the entire activity is exempted then why the appellants have charged Service Tax from M/s. GPCL, M/s. L & T ECC Division and M/s. Bhagirath Associates? Thus, I reject their argument pertaining to exempted activity.

7. Now, accepting the verdict of the adjudicating authority and considering the fact that the activity undertaken by the appellants was not exempted one, I would like to discuss the issue that when the two main contractors (Shri H. C. Prajapati and Shri J. N. Bhimani) have already paid Service Tax, is it necessary for the appellants, being sub-contractors, to pay Service Tax. In the C.B.E.C. Circular of F. No. B43/5/97-TRU dated 02.07.1997, in paragraph 3.4 it is clarified that *'the services should be rendered to a client directly, and not in the capacity of a sub-consultant/ associate consultant to another consulting engineer, who is the primary consultant. In case services are rendered to the prime consultant, the levy of the Service Tax does not fall on the sub-consultant but is on the prime or main consulting engineer who raises a bill on his client (which includes the charge for services rendered by the*

sub-consultant)'. On going through the said paragraph, I have come to the conclusion that if the sub-consultant provides service which is directly related to the work done by the main consultant to the client then the liability to pay Service Tax would come on the main consultant. Further, I find that there are two categories of sub-contractors for works contract services: (i) those to whom the support services are outsourced and (ii) those to whom part of the main work is outsourced. Work done by (ii) is treated as work of the same nature as the service of the main contractor and cannot be treated with a different approach. On the other hand, sub-contractors of category (i) provide services that are different in their nature, and these are treated differently. They are, at best, input services for the main works contract service. In the present case, the nature of work performed by the appellants falls under the category (i). Earlier the Board, in its Circular number 138/07/2011-ST, dated 06.05.2011 clarified that when a principal contractor while providing works contract services obtained the service of various other service providers, such as architect, consulting engineer etc. These are separately classifiable services. Therefore, while the principal contractor would not be liable to pay service tax on the construction of roads, dams, Govt. buildings etc. but the consulting engineer, architect, labour suppliers etc. who are providing services of design, drawing, engineering and other support services for such constructions would be liable to pay service tax as their services are separately classifiable and will not be covered under the works contract service. Further, the Master Circular number 96/7/2007-ST dated 23.08.2007 in Reference Code number 999.03/23.08.2007 also very well clarified the situation. The said clarification is submitted as below;

999.03 / 23.08.07	*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.

In view of the above Master Circular, I view that it is quite clearly clarified that the services provided by the sub-contractor are in the nature of input service and hence taxable. The Master Circular also has very evidently clarified that whether the services used as input services or otherwise by the main consultant, the sub-consultant has to bear the burden of Service Tax.

8. In view of above, I do not find any reason to interfere in the impugned order and reject the appeal filed by the appellants.

9. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeals filed by the appellant stand disposed off in above terms.

30.11.2018

(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED

30/11/18

(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS), AHMEDABAD.

To,
M/s. Diamond Infracon,
14, Ambica Nagar Society, Nr. Bus Station,
Kadi

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad.
2) The Commissioner, Central Tax, Gandhinagar.
3) The Joint Commissioner, Central Tax, Gandhinagar.
4) The Dy./Asst. Commissioner, Central Tax, Kadi Division, Gandhinagar.
5) The Asst. Commissioner (System), Central Tax, Hq., Gandhinagar.
6) Guard File.
7) P. A. File