



**आयुक्त(अपील) का कार्यालय,
Office of the Commissioner (Appeal),**



केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद 380015.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलिफैक्स 07926305136

DIN : 20220364SW000000A716

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1619 & 1622/2021 / 6637 - 41
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-110-111/2021-22**
दिनांक Date : **02-03-2022** जारी करने की तारीख Date of Issue 03.03.2022
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **PLN-AC-STX-11 & 12/2020-21** दिनांक: **09.03.2021** issued by Assistant Commissioner, CGST & Central Excise, Division Gandhinagar, Gandhinagar Commissionerate
- ध अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant / Respondent**
M/s Bahusmarna Construction Co.
Jani Nivas, At & Post Sankhari,
Taluka and District Patan-384277

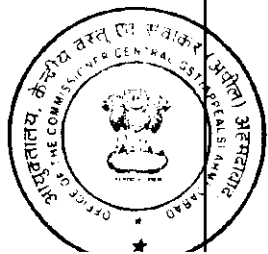
कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

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) केंद्रीय 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 अधीन 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 हानिकार खाने 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.



(क) 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।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

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।

(c) 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 ईए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इका मुख्य शीर्ष 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 होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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.

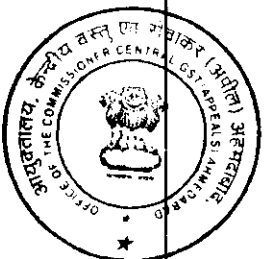
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) 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 2ndमाला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004; in case of appeals other than as mentioned in para-2(i) (a) above.



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 पट्टी 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 Appellate 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु.6.50 पैसे कान्यायालय 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 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.

- (19) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) के प्रतिअपीलो के मामले में कर्तव्यमांग(Demand) एवं दंड(Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है.

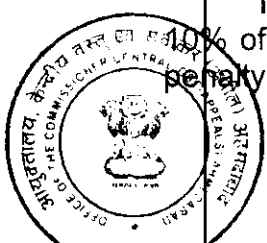
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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

- (xi) amount determined under Section 11 D;
- (xii) amount of erroneous Cenvat Credit taken;
- (xiii) amount payable under Rule 6 of the Cenvat Credit Rules.

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।

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

Two appeals have been filed by M/s. Bahusmarana Construction Co., Jani Nivas, At & Post : Sankhari, Taluka and District : Patan, Gujarat – 384 277 [hereinafter referred to as the appellant] against OIO No. PLN-AC-STX-11/2020-21 dated 09.03.2021 and OIO No. PLN-AC-STX-12/2020-21 dated 09.03.2021 [hereinafter referred to as the impugned orders] passed by Assistant Commissioner, Central GST, Division : Palanpur, Commissionerate : Gandhinagar [hereinafter referred to as the adjudicating authority]. Since the issue involved is the same in both the appeals viz. GAPPL/COM/STP/1619/2021 and GAPPL/COM/STP/1622/2021, they are being decided vide this OIA.

2. Briefly stated, the facts of the case is that the appellant are engaged in construction of Police Stations and Residential Quarters for M/s. Gujarat State Police Housing Corporation Ltd., Gandhinagar (hereinafter referred to as GSPHCL) and other government agencies. During the course of an enquiry against M/s. Devjeet Construction Co., Gandhinagar, details of various contracts awarded and payments thereof made by GSPHCL to various contractors were called for from GSPHCL. The details of contracts awarded to various contractors and payments made to them were submitted by GSPHCL. On scrutiny of the same, it was gathered that the appellant was providing services, to GSPHCL, falling under the category of "Works Contract Service" as defined under erstwhile Section 65 (105) (zzzza) of the Finance Act, 1994. It appeared that the appellant had provided the services of construction of Police Station, construction of office of SP and Residential Police quarters at various places to GSPHCL for which payments were received from GSPHCL. On going through the description of work allotted to the appellant, it appeared that the service provided by them to GSPHCL would be appropriately classifiable under 'Works Contract Service' and charged to service tax accordingly.



2.1 The appellant was issued periodical Show Cause Notice bearing No. V/ST/15-74/Dem/OA/2012 dated 22.10.2012 and V/ST/15-35/Dem/OA/2014 dated 28.04.2014 wherein it was proposed to :

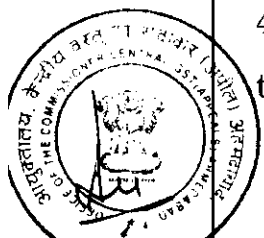
- A. to classify the service provided by them under Works Contract Service as defined under Section 65 (105) (zzzza) of the Finance Act, 1994;
- B. demand and recover Service Tax amounting to Rs.6,64,153/- and Rs.40,55,754/- respectively, under the proviso to Section 73 (1) of the Finance Act, 1994;
- C. Interest was also sought to be recovered under Section 75 of the Finance Act, 1994;
- D. Imposition of penalty was also proposed under Sections 76, 77(1)(a), 77(2) & 78 of the Finance Act, 1994.

In the SCN dated 28.04.2014 it was also proposed to recover Late Fees in terms of Rule 7 (c) of the Service Tax Rules, 1994.

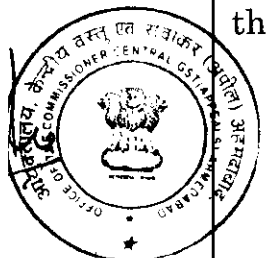
3. The said SCNs were adjudicated vide the impugned orders wherein :

- A. The services provided by the appellant were held to be classifiable under Works Contract Service as defined under Section 65 (105) (zzzza) of the Finance Act, 1994;
- B. Demands for Service Tax was confirmed under the proviso to Section 73 (1) of the Finance Act, 1994;
- C. Interest was ordered to be paid under Section 75 of the Finance Act, 1994; Penalty equal to the service tax confirmed was imposed under Section 78 of the Finance Act, 1994.
- D. Penalties under Section 77 of the Finance Act, 1994 were also imposed.
- E. The late fee of Rs.20,000/- was imposed Section 70 (1) of the Finance Act, 1994.

4. Being aggrieved with the impugned orders, the appellant has filed the instant appeals on the following grounds :



- i. The present SCNs are issued as part of protective demand for the subsequent period i.e. F.Y. 2011-12 and F.Y. 2012-13. The main issue dealt in both the SCNs are covered in earlier SCN issued for the F.Y. 2007-08 to F.Y. 2010-11. The SCNs are regarding exemption claimed for Work Contract Service as service provider as well as sub-contractor.
- ii. They mainly carry out construction of residential complexes for GSPHCL and construction of government offices like Police Station, Barracks etc.
- iii. The issue involved in the present appeals is already decided by the Commissioner (Appeals) vide OIA No. 3/2013(Ahd-III)/SKS/Commr.(A)/Ahd dated 08.01.2013 and the proceedings initiated through SCN were dropped. The present SCNs were transferred to the Call Book as the departmental appeal was pending in the Tribunal. The department has withdrawn its appeal from the Tribunal on monetary grounds. Therefore, the order of the Commissioner (Appeals) already decided in their favour prevails.
- iv. The adjudicating authority has not appreciated the facts and findings of the Commissioner(Appeals), though he was aware that the issue is similar to that in the earlier SCN which has been disposed off.
- v. The present notices are issued for work under government contracts for construction of residential complexes and government offices which are exempted from service tax.
- vi. They further submit that exemption is granted vide Notification No.25/2012-ST dated 20.06.2012. Thus, it can be concluded that the government never intended to tax such work and after negative list of services regime, such work is out of service tax purview.
- vii. The adjudicating authority has not considered the said notification and neither appreciated that the period of service is when such service was out of the purview of tax. The services are exempted as held by the Commissioner (Appeals) and the same is applicable for the period before and after 01.07.2012.

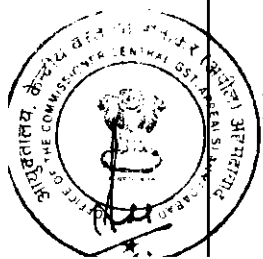


- viii. As there is no tax liabilities, no penalty is imposable. Penalty is imposable where there is intention to evade tax. There was no intention to evade tax, rather all tax has been deposited in government account. They rely upon the judgment of the Hon'ble Supreme Court in the case of Hindustan Steel Vs. State of Orissa – 1978 ELT (J159).
- ix. The present case is also a fit case to be covered under Section 80 of the Finance Act, 1994 which expressly provides that no penalty shall be imposed under Section 76 and 77 if the assessee has reasonable cause for default.
- x. Simultaneous penalty under Section 76 and 78 of the Finance Act, 1994 cannot be imposed.

5. Personal Hearing in the case was held on 09.02.2022 through virtual mode. Shri Arpan Yagnik, Chartered Accountant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, submissions made at the time of personal hearing and additional written submissions as well as material available on records. The issue before me for decision is whether the Construction of Residential Quarters and Police Stations for GSPHCL is classifiable as "Works Contract Service" and chargeable to service tax accordingly. The period involved in the present appeal is F.Y.2011-12 and F.Y.2012-13. Therefore, the provisions of the Finance Act, 1994, both pre and post 01.07.2012 are applicable.

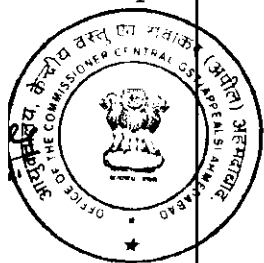
6.1 I find that previously the appellant was issued a SCN on the same issue covering the period from F.Y.2007-08 to F.Y. 2010-11 and the demand for service tax was confirmed vide OIO No. AHM-STX-003-ADC-024-12 dated 27.02.2012. The appellant filed an appeal before the Commissioner (Appeals), Ahmedabad, who vide OIA No. 3/2013)Ahd-III/SKS/Commr.(A)/Ahd dated 08.01.2013 allowed the appeal and set



aside the demand. The department filed an appeal against the OIA before the Hon'ble Tribunal, Ahmedabad. The present demands raised against the appellant vide the impugned SCNs were issued as protective demands in view of the departmental appeal pending before the Hon'ble Tribunal. The departmental appeal was subsequently withdrawn from the Hon'ble Tribunal on monetary grounds. Therefore, the impugned SCNs were retrieved from the Call Book and adjudicated by the impugned orders and the demands against the appellant were confirmed.

6.2 Without going in to the merits of the present appeals, it needs to be mentioned that the impugned orders passed by the adjudicating authority are in gross violation of the principles of judicial discipline. The adjudicating authority was very well aware that the issue, in this case involving the same appellant, has been decided in favour of the appellant by the Commissioner (Appeals), Ahmedabad vide OIA No. 3/2013)Ahd-III)/SKS/Commr.(A)/Ahd dated 08.01.2013. Therefore, following the principles of judicial discipline, the adjudicating authority was bound to follow the order of the higher appellate authority. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. This view has been consistently emphasized by the various judicial forums including the apex court in a catena of decisions. The CBEC has also issued an Instruction F.No.201/01/2014-CX.6 dated 26.06.2014 in this regard directing all adjudicating authorities to follow judicial discipline scrupulously. The impugned orders passed by the adjudicating authority by not following the principles of judicial principles are bad in law and is liable to set aside on this very ground.

6.3 Since the present appeals cover the period both pre and post 01.07.2012, it is relevant to refer to OIA No. 3/2013)Ahd-III)/SKS/Commr.(A)/Ahd dated 08.01.2013 passed by the Commissioner (Appeals), Ahmedabad in the case of the same appellant. The relevant portion of the said OIA is reproduced as under :



"6. I find that the adjudicating authority in the impugned order has classified the activities provided by the appellant to M/s Gujarat State Police Housing Corporation Ltd., Gandhinagar for construction of Police residential quarters, Police Stations, Barracks, office of S.P. etc, as taxable service under the category of "Works Contract Service" as per Section 65(105) (zzzza) of the Finance Act, 1994, though there were no transfer of the property involved. On going through the impugned notice and order, I find that the service tax has been demanded and confirmed without discussing the specific sub-clause (a) to (e) of explanation (ii) of Section 65(105) (zzzza) of Finance Act, 1994, under which the impugned activity of the appellant falls, as such, I find force in the contention put forth by the appellant. As per Section 65 (105) (zzzza) of the Finance Act, 1994 "Works Contract Service" has been defined as under:

"(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.—For the purposes of this sub-clause, "works contract" means a contract wherein,—

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects; "

In view of the above definition, the activities provided by the appellant in respect of construction of Police residential quarters appropriately cover under the sub-clause (c) to clause (ii) of explanation as clearly specified that "construction of a new residential complex", to ascertain taxability of such activities provided by the appellant, definition of "residential complex" required to be taken into consideration, which has been defined in section 65 (105) (91a) of Finance Act, 1994. The same is being reproduced as under:-

"Residential complex" means any complex comprising of—



(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

As per the above, it can be inferred that service tax is not leviable on the activities related to construction of a residential intended for Personal use, as the same falls under the excluded category for the purpose of service taxability. Further, the term "personal use" has been defined in explanation to definition, permits the complex for use as residence by another person on rent or without consideration. I find that in present case, the land was provided by the police department and then residential quarters have been constructed by the appellant. The said quarters are being used as residential accommodation by the staff of the police department; as such the said residential quarters constructed by the appellant for M/s GSPHCL are covered in the exclusion category of "residential complex".

7. As regard activities provided by the appellant related to construction of Police Stations, Barracks, office of Superintendent of Police, I find that said activities appropriately cover under the sub-clause (b) to clause (ii) of explanation to the definition under Section 65 (105) (zzzza) of the Finance Act, 1994 "Works Contract Service", as clearly specified that "construction of a new building or a civil structure or a part thereof, primarily for the purposes of commerce or industry". As per the wordings of the above definition, I find that service tax would be chargeable, if such constructed civil structure or building has been used for providing services primarily for commerce and industry purpose. In the instant case, I find that the said constructed buildings such as Police Stations, Barracks and Offices of SPs are not used for any commercial purposes, since the said buildings are being used for serving public as civic amenities. Therefore, activities related to above buildings do not attract Service Tax as per Section 65 (105) (zzzza) of the Finance Act, 1994. Therefore, I find that even otherwise, the services provided by the appellant to M/s GSPHCL, for construction of residential accommodations for Police staff, construction of building for Police Stations, Barracks and Offices of SPs, not covered under the category of taxable service as per Section 65 (105) (zzzza) of the Finance Act, 1994.

8. I find that the adjudicating authority has confirmed the demand of the service tax by applying the analogy of the case referred in Board's letter F.No.332/16/2010-TRU dated 24. 05.2010, wherein it has been mentioned that:-



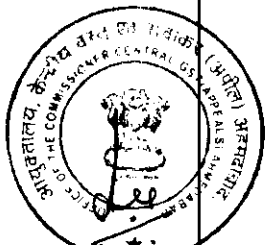
As per the information provided in your letter and during discussions, the Ministry of Urban Development (GOI) has directly engaged the NBCC for constructing residential complex for central government officers. Further, the residential complexes so built are intended for the personal use of the GOI which includes promoting the use of complex as residence by other persons (i.e., the Government officers or the Ministers). As such the GOI is the service receiver and NBCC is providing services directly to the GOI for its personal use. Therefore, as for the instant arrangement between Ministry of Urban Development and NBCC is concerned, the service is tax is not leviable. It may, however, be pointed out that if the NBCC, being a party to a direct contract with GOI, engages a sub-contractor would be liable to pay service tax as in that case, NBCC would be the service receiver and the construction would not be for their personal use."

The adjudicating authority on relying the above clarification, has held that "if M/s. GSPHCL (contractor) themselves undertake construction of residential quarters and office buildings and transfer the same to Police and Jail Department of Government of Gujarat, no service tax is required to be paid on such activity. However, if M/s GSPHCL engages a sub-contractor for getting the work done, then service tax is leviable on the value of contract as M/s GSPHCL is not the beneficiary department". I find that while deciding the matter the adjudicating authority has not considered the Circular No. 80/10/2004-S.T., dated 17-9-2004, wherein it has been clarified that the leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The relevant abstract of the said circular reproduced as below:-

"13 Construction services (Commercial and industrial buildings or civil structures):

13.1 Services provided by a commercial concern in relation to construction, repairs, alteration or restoration of such buildings, civil structures or parts thereof which are used, occupied or engaged for the purposes of commerce and industry are covered under this new levy. In this case the service is essentially provided to a person who gets such constructions etc. done, by a building or civil contractor. Estate builders who construct buildings/civil structures for themselves (for their own use, renting it out or for selling it subsequently) are not taxable service providers. However, if such real estate owners hire contractor/contractors, the payment made to such contractor would be subjected to service tax under this head. The tax is limited only in case the service is provided by a commercial concern. Thus service provided by a labourer engaged directly by the property owner or a contractor who does not have a business establishment would not be subject to service tax.

13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities.



Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.

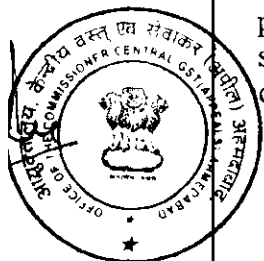
13.3 In case of multi-purpose buildings such as residential-cum-commercial construction, tax would be leviable in case such immovable property is treated as a commercial property under the local/municipal laws."

9. I find in the present matter, the use of the civil structure / Building is not disputed as the same are being used for non-commercial purpose, as such the service tax is not leviable in the present case. In above viewpoint I placed reliance on the decision of Hon'ble Tribunal in case of *Sima Engg. Constructions Vs. Commissioner of Central Excise, Trichy* reported at - 2011 (21) S.T.R. 179 (Tri. - Chennai), wherein the Hon'ble Tribunal while remanding the case held that "*Plea for exclusion from Service tax and explanation relating to personal use to be considered*". The abstract of the said decision is reproduced as below:-

"The appellants under contract from the Tamil Nadu Police Housing Corporation Ltd. (TNPCL), which is a Tamil Nadu Government undertaking have constructed quarters for the Tamil Nadu police officials. Shri V.S. Manoj, Ld. Adv., appearing for the appellants states that as per the definition of the expression "residential complex" under Section 65(91a) of the Finance Act, 1994, it does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person. He, also refers to the explanation below the said definition which states that "Personal use" includes permitting the complex for use as residence by another person on rent or without consideration. He argues that in view of the above definition and explanation, the quarters constructed by the appellants for the TNPCL for occupation by the police personnel does not attract service tax for construction of the residential complex.

2. Ld. Advocate states that this plea was taken by the appellants in a letter addressed to the Jr. Commissioner of Service Tax, a copy of which is at page 117 to page 124 of the appeal papers. However, we find that this letter does not bear a date nor is it signed. Further, we do not find that the adjudicating Commissioner has anywhere dealt with this plea, nor is it indicated in the impugned order that such a plea was taken. Nevertheless, considering the fact that the impugned quarters were constructed for the Tamil Nadu Police personnel under a contract from the TNPCL, the plea taken for exemption of such quarters from the purview of the service tax on the basis of the definition of "residential complex" and explanation relating to "personal use" deserves to be considered. Hence, after waiving the requirement of pre-deposit, we set aside the impugned orders and remand all the matters to the original authority for fresh decision. The appellants shall be given adequate opportunity of hearing before passing fresh orders."

The ratios of the above decision is squarely applicable with the facts of the present case and in the instant case the use of the building is not in dispute, as such the service tax is not leviable in the present case being residential complexes and civil structures are used by the Police staff for personal

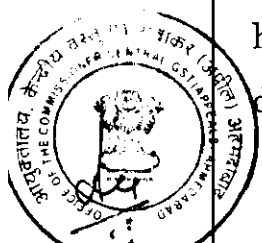


purpose. I find that the adjudicating authority has not considered or misinterpreted the provision mentioned in sub-clause (b) to explanation to Section 65(105) (zzzza) i.e. Work Contract Service. As per the said sub-clause, the service tax would be chargeable only if the building or civil structure is used for commerce or industry, whereas in the present case at hand, the said structures are undoubtedly used for the purpose of civil amenities only. As such, demand of service tax is not sustainable. In above view point I rely upon the decision of the Hon'ble Tribunal in case of Khurana Engineering Ltd., Versus Commissioner of C. EX., Ahmedabad reported at -2011 (21) S.T.R. 115 (Tri. - Ahmd.), while allowing the appeal with consequential relief, the Hon'ble Tribunal has held that *"service provided by the appellant is to be treated as service provided to Govt. of India directly and end use of the residential complex by Govt. of India is covered by the definition "Personal Use" in the explanation to definition of residential complex service, the other aspects need not be considered"*.

10. In view of the above discussion, I find that the adjudicating authority has not considered the definition as stipulated in Section 65(105) (zzzza) and 65(105) (91a) of Finance Act, 1994 while deciding the matter. The adjudicating authority has wrongly confirmed the demand of the service tax for the activities carried out by the appellant for construction of buildings and civil structures intended for personal use and which were not being used for the purpose of commerce and industry. It is well established law practice that if certain activity excluded in the definition of the taxable service i.e. Commercial and Industrial construction service, residential complex service, such activity can not be termed as taxable even if the conditions explained in the definition of Work Contract Service are fulfilled. In the present case, the activities carried out by the appellant to construct residential complex for Police staff and Police offices are falling under the purview of excluded category of the taxable service i.e. residential complex service and Commercial and Industrial construction service, respectively. Moreover, it is pertinent to note that the very same issue has already been decided vide Circular No. 80/10/2004-S.T., dated 17-9-2004 wherein it has held that *"Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable."*

As such, the impugned activities provided by the appellant can not be termed as taxable service under Work Contract Service. Therefore, the appellant were not liable to pay service tax on the activities carried out for construction of Police quarters and offices, therefore, the impugned order required to be set aside to that extent. "

6.4 I find that the above OIA, passed by the Commissioner (Appeals), Ahmedabad on the same issue involving the same appellant, has not been set aside by any higher appellate authority. Despite the appellant succeeding on the issue in respect of the demand for the earlier period, the adjudicating authority has not extended the benefit of the said OIA and, has, on the contrary confirmed the demands against the appellant. While deciding against the appellant, the adjudicating authority has not referred



or relied upon any judgment of any higher appellant authority. Therefore, if the appellant, after contesting and succeeding legally, is denied the benefit of their legal success in the other pending proceedings on the same issue, it would be a gross violation of the basic tenets of justice. Accordingly, for the period prior to 01.07.2012, which is covered by the OIA, supra, I am not going into the merits of the issue and hold that the appellant are not liable to pay service tax on the Construction of Residential Complex and Police Station for GSPHCL, as the issue is covered by the OIA supra.

6.5 The legal position has subsequently changed from 01.07.2012 and Works Contract Service was defined under Section 65B (54) of the Finance Act, 1994, which is reproduced as under :

“works contract” means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property”.

I find that the appellant have not disputed the issue of their activity being covered under Works Contract Service. They have, however, claimed that their services are exempted by virtue of Serial No. 12 of Notification No.25/2012-ST dated 20.06.2012, which is reproduced as under :

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of—

- (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;
- (b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);
- (c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;
- (d) canal, dam or other irrigation works;
- (e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or
- (f) a residential complex meant predominantly for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65B of the said Act;”



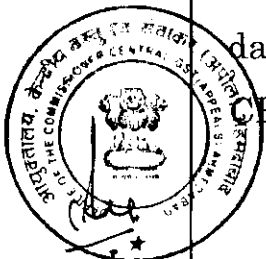
6.6 I find that impugned order pertaining to the SCN dated 28.04.2014 has been passed in light of the provisions of the erstwhile Section 65 (105) (zzzza) of the Finance Act, 1994 and the changed legal position with effect from 01.07.2012 has not been taken cognizance of by the adjudicating authority. I further find that the claim of the appellant for exemption under Serial No. 12 of Notification No. 25/2012-ST dated 20.06.2012 was also not made before the adjudicating authority. In view thereof, I am of the considered opinion that the issue is required to be remanded back to the adjudicating authority for deciding the case afresh considering the changed provisions of law after 01.07.2012 and also considering the claim of the appellant for exemption under the aforesaid Notification.

6.7 I find that SCN dated 28.04.2014 has demanded Service Tax from 21.06.2012 to 21.03.2013. As already held by me in the preceding Paragraphs, the appellant are not liable to pay service tax for the period prior to 01.07.2012 in view of OIA No. 3/2013)Ahd-III)/SKS/Commr.(A)/Ahd dated 08.01.2013 passed by the Commissioner (Appeals), Ahmedabad. Therefore, the demand for service tax needs to be re-quantified, by excluding the period prior to 01.07.2012.

7. It is observed that the impugned SCNs have been issued to the appellant under the proviso to Section 73 (1) of the Finance Act, 1944 by invoking the extended period of limitation. However, as the impugned SCNs are periodical notices issued as protective demand, it cannot be alleged that there was suppression on the part of the appellant as all the facts were within the knowledge of the department. I, therefore, hold that the extended period of limitation cannot be invoked against the appellant.

7.1 It is further observed from Para 22 of the impugned order that the appellant had filed their ST-3 returns for the period from April, 2012 to June, 2012 on 30.04.2013 for which late fee has been imposed on them which was also ordered to be recovered by the impugned order. The due date for filing of ST-3 returns for the said period was 26.11.2012 as per

CBIC Order No.3/2012 dated 15.10.2012. The notice for the period



F.Y.2012-13 was issued to the appellant on 28.04.2014. Therefore, applying the normal period of limitation of 18 months from the relevant date i.e. date on which the returns were to be filed, I find that the impugned SCN dated 28.04.2014 has been issued within the normal period of limitation.

9. In view of the facts discussed herein above, I set aside the impugned order No.PLN-AC-STX-11/2020-21 dated 09.03.2021 and allow the appeal No.GAPPL/COM/STP/1619/2021 filed by the appellant. As regards, impugned order No. PLN-AC-STX-12/2020-21 dated 09.03.2021, the impugned order is set aside and remanded back to the adjudicating authority to decide the matter afresh in light of the observations contained in Paragraphs 6.6, 6.7 and 7 above. Appeal No. GAPPL/COM/STP/1622/2021 is allowed by way of remand.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Bahusmarana Construction Co.,
Jani Nivas, At Post : Sankhari,
Taluka and District : Patan,
Gujarat – 384 277

The Assistant Commissioner,
CGST & Central Excise,
Division- Palanpur,

Appellant

Respondent

Akhilesh Kumar
..2nd March 2022..
(Akhilesh Kumar)
Commissioner (Appeals)
Date: .03.2022.



Commissionerate : Gandhinagar

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.
(for uploading the OIA)

- ✓ 4. Guard File.
5. P.A. File.

