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

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलेफैक्स07926305136

DIN : **20220364SW0000454178**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STD/143/2021 / 7191 - 95

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-118/2021-22**
दिनाँक Date : **29-03-2022** जारी करने की तारीख Date of Issue 31.03.2022

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **AHM-CEX-003-ADC-PMR-028/20-21** दिनाँक: **26.02.2021** issued by Additional Commissioner, CGST& Central Excise, HQ, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पताName & Address

1. **Appellant**
   The Assistant Commissioner, CGST Division Palanpur
   2nd Floor, Sardar Patel Vyapar Sankul, Malgodown Road,
   Mehsana- 384002

2. **Respondent**
   M/s G.P. Chaudhary, 93-94, Rajkamal Society, Banas Dairy Road,
   Near Arbuda Mandir, Palanpur,
   Banaskantha - 385001

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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त 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 मे 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.

(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 मामलें 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 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।

(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 इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का 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 रूपये या उससे कम होतो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,BahumaliBhawan,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. 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 फ़ीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होत`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 filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.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 in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(26) 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:

(lxi) amount determined under Section 11 D;
(lxii) amount of erroneous Cenvat Credit taken;
(lxiii) 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

The present appeal has been filed by the Assistant Commissioner, Central GST, Palanpur Division, Commissionerate- Gandhinagar (hereinafter referred to as the appellant), on the basis of Review Order No. 06/2021-22 dated 25.05.2021 passed by the Commissioner, Central GST & Central Excise, Gandhinagar Commissionerate in terms of Section 84 of the Finance Act, 1994 against Order in Original No. AHM-CEX-003-ADC-PMR-028-20-21 dated 26.02.2021 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, CGST & Central Excise, Commissionerate- Gandhinagar [hereinafter referred to as "*adjudicating authority*"] in the case of M/s. G.P.Chaudhary, 93-94, Rajkamal Society, Banas Dairy Road, Near Arbuda Mandir, Palanpur [hereinafter referred to as the respondent].

2. Briefly stated, the facts of the case is that an inquiry was initiated against the respondent and documents were called for detailed scrutiny. On scrutiny of the documents, it was observed that the respondent had provided construction service to Gujarat State Police Housing Corporation Ltd. (hereinafter referred to as GSPHCL), Banas Dairy, Palanpur and Sardar Krushinagar Dantiwada Agricultural University (hereinafter referred to as SDAU). However, the respondent had not paid service tax amounting to Rs.1,34,40,228/- under the category of Works Contract Service during the period from F.Y. 2008-09 to F.Y. 2011-12. It was further observed that the respondent had not paid their service tax liability amounting to Rs.2,58,078/- under the category of GTA service during the period from F.Y. 2008-09 to F.Y. 2011-12.

2.2 The respondent was issued Show Cause Notice bearing No. IV/16-50/PI/2011-12 dated 23.04.2014 wherein it was proposed to recover the service tax totally amounting to Rs. 1,36,98,306/- (Rs.1,34,40,228/- under Works Contract Service + Rs.2,58,078/- under GTA service) under Section 73 (1) of the Finance Act, 1994 along with interest under

Section 75 of the Finance Act, 1994. Imposition of penalty under Section 77 (1) (a), 77 (1) (e), 77 (2) and Section 78 of the Finance Act, 1994 was also proposed. The said SCN was adjudicated vide the impugned order wherein the proceedings initiated against the respondent were vacated.

3. Being aggrieved with the impugned order the appellant department has filed the instant appeal on the following grounds:

i) The demand has been dropped without considering the fact that GSPHCL was awarded the original contract related to construction of residential and non-residential buildings to various departments of the Government of Gujarat. GSPHCL sublet some quantum of work to the respondent. The respondent also provided construction services to Banas Dairy related to civil structural and internal electrification work for construction of training centre. The respondent also provided construction services to SDAU, related to construction of civil structure for educational institution, which is a Government institution.

ii) It is not disputed that the respondent had provided works contract service to various Government Departments/Organizations which was not for the purposes of commerce or industry. However, the adjudicating authority ought to have appreciated the fact that the service had been provided by the respondent as a sub-contractor for the period prior to 01.07.2012.

iii) The CBIC vide Letter F.No.332/16/2010-TRU dated 24.05.2010 had clarified that if the contractor themselves undertake construction of residential quarters and office buildings and transfer the same to the Government, no service tax is required to be paid. However, if the contractor engages a sub-contractor for getting the work done, then service tax is leviable as the contractor is not the beneficiary department. The above

position was reiterated by the CBIC vide Letter F.No. 137/88/2012-ST dated 18.12.2012.

iv) In short, the contractor engaged in constructing residential complex for GSPHCL is required to pay service tax on such construction activity. A number of contractors are contesting the levy and the issue is sub-judice.

v) The findings of the adjudicating authority appears to be based on presumption and without any basis as no oral/documentary evidence have been brought on record to pin point that the structure erected by the respondent was solely for non-commercial purposes.

vi) The adjudicating authority has committed gross error in considering that as the constructions are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for purposes of profit are not taxable, being non-commercial in nature. CBIC Circular No.80/10/04-ST dated 17.09.2004 clarifies the scope of applicability of service tax with regard to service.

vii) Government buildings which are used for commercial purposes like local government bodies getting shops constructed for letting out, such activity would be commercial and would be subject to service tax.

viii) In view of the above, the construction service provided to SDAU and Banas Dairy was nothing but a service for furtherance of business and industry and to earn profit.

ix) The Hon'ble Apex Court in the case of Tata Engineering & Locomotive Co. Ltd. Vs. Collector of Central Excise, Pune – 2006 (203) ELT 360 (SC), set aside the order of the Tribunal as the findings recorded by the Tribunal were cryptic and non speaking and remitted the matter back to the Tribunal for taking a fresh decision by a speaking order in accordance with law.

x) Reliance is also placed upon the decision in the case of Gadkari Rangayatan Vs. Commissioner of Service Tax, Mumbai-II – 2014 (36) STR 155 (Tri.-Mumbai).

xi) The respondent was therefore, liable to service tax under the category of Works Contract Service and the demand is sustainable.

xii) The adjudicating authority has committed gross error in accepting the contention of the respondent that they had availed the service of local transporters i.e. the owners of the vehicle themselves drive the vehicle, for transportation of sand, stone bricks etc. to the construction site and shown the same under the head 'carting' without verifying the invoices substantiating voucher entries and concluded that service tax is not chargeable on GTA service.

xiii) The adjudicating authority has simply gone by the contention of the respondent without making any verification that they had availed the service of local transporters. There is no mention that the respondent had submitted documentary evidences and the same were verified in the course of adjudication.

xiv) Reliance is placed upon the decision in the case of Asstt. Commr. , Commercial Tax Department Vs. Shukla & Brothers – 2011 (22) STR 105 (SC).

xv) As the respondent had suppressed the facts, the consequences shall automatically follow. Reliance is placed upon the judgment in the case of UOI Vs. Dharmendra Textile Processors – 2008 (231) ELT 3 (SC) ; UOI Vs. RSWM – 2009 (238) ELT 3 (SC); Commissioner of Central Excise, Chandigarh Vs. Pepsi Foods Ltd.- 2010 (260) ELT 481 (SC); Shiv Network Vs. CCE, Daman – 2009 (14) STR 680 (Tri.Ahmd); CCE, Vapi Vs. Ajay Sales Agencies – 2009 (13) STR 40 (Tri.-Ahmd) and Bajrang Security Services Vs. CST, Ahmedabad – 2010 (019) STR 0577 (Tri.-Ahmd).

4. Personal Hearing in the case was held on 09.03.2022 through virtual mode. Shri M.H.Raval, Consultant, appeared on behalf of the respondent for the hearing. He stated that he would submit written submission as cross-objection to the departmental appeal.

5. The respondent filed their written submission on 09.03.2022, wherein it was inter alia, submitted that :

- The service provided by them to GSPHCL are mainly for police and jail department of Government of Gujarat. GSPHCL had vide their letter dated 26.11.2010 clarified that they work purely in the capacity of a contractor and execute various works through open tender procedure. The works are undertaken on the basis of requisition by the concerned government departments and funds are also provided by the government through budgetary allocations. The land is also provided by the concerned department. GSPHCL, for the limited period of execution of work, takes possession and ultimately on completion of the work the possession is handed over to the government department. The ownership and title always remained with the concerned government department.
- In terms of the definition of Works Contract Service as per Section 65 (105) of the Finance Act, 1994, the construction of a new building or a civil structure are taxable only if it is primarily for the purpose of commerce of industry. In the present case the construction was for government of Gujarat and hence it is not for commercial or industrial purpose. Therefore, the service provided in construction of non-commercial buildings is not taxable.
- The rely upon the clarification issued by CBIC vide Circular No. 80/10/2004-ST dated 17.9.2004.
- Residential complex as defined under Section 65 (91a) of the Finance Act, 1994 does not include a complex which is constructed

by a person directly engaging any other person and the construction is intended for personal use as residence by such person. In the present case, the residential complex are constructed for the employees of the police/jail department. Since the quarters are used for personal use of its employees, the same are not falling under the definition of residential quarters.

- Even if it is argued that they are not directly engaged by the government of Gujarat, they being the sub-contractor are eligible for exemption as GSPHCL is eligible for exemption. They rely upon CBIC Circular No. 147/16/2011-ST dated 21.10.2011.
- The adjudicating authority has issued a well reasoned order after considering the factual position and by following the judicial principles set by various decisions of the Hon'ble Tribunal and higher appellate authorities. The adjudicating authority has given a clear finding about the use of the complex and he concluded that it was for personal use for residence by government staff and hence not taxable.
- The department has in their appeal not given a single reason or produced any tangible evidence to prove that the findings of the adjudicating authority are wrong i.e. the complex was used for commercial purpose as to as to attract tax. In the absence of any such evidence, the appeal filed by the department is devoid of any merit and has been filed on frivolous grounds.
- While the department is heavily relying upon CBIC Letter F.No. 332/16/2020-TRU dated 24.05.2010, the adjudicating authority has relied upon number of decisions of various judicial forums. It is settled law that the quasi judicial officer has to come to an independent finding on its own after considering the evidences placed before him. They rely upon the decision in the case of Madras Steel Re-Rollers Association – 2012 (28) STR 193 (SC).
- The adjudicating authority has also considered the judgment of the Hon'ble Bombay High Court in the case of BJ Shirke Construction Technology Pvt. Ltd.- 2019-TIOL-645-HC-MUM-ST

and Circular No. 80/10/2004-ST dated 17.09.2004 before concluding that construction of government building for residential purposes or buildings for non commercial use do not attract service tax.

- The applicability of the case laws mentioned in the impugned order are not challenged in the appeal. It is settled law that decisions of the higher appellate forums are binding on the lower authorities. The case laws relied upon by the department in the appeal are not relevant to the issue and hence not applicable in the facts and circumstances of the case.
- Regarding the Works Contract Service provided to SDAU, the department has in their appeal failed to contradict the findings of the adjudicating authority and neither have they challenged the applicability of Circular No. 80/10/2004-ST dated 17.09.2004. Therefore, the appeal is without merit.
- Regarding the service provided to Banas Dairy, the adjudicating authority has correctly observed that the activity carried out at the training centre is for the welfare of milk farmers and not for any commercial purpose and hence, not taxable. The department has in their appeal not given a single reason as to why the findings of the adjudicating authority are wrong. They have failed to prove with evidence that the activity of Banas Dairy is commercial so as to attract service tax.
- Regarding the issue of service tax demanded under GTA service on the carting expenses, it is submitted that the department has not alleged that they had availed the service of any goods transport agency. Without bringing on record about availing of service of a goods transport agency, the department cannot demand service tax from them as recipient of service. It has been held in the case of Lakshminarayana Mining Co. – 209 (16) STR 691 (Tri.Bang.) that thte services of transport provided by truck owners or truck operators are not covered as per legislative intention.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. The issues involved in the present appeal is :

i) whether the Works Contract Service provided by the respondent to GSPHCL, Banas Dairy and SDAU is chargeable to service tax?

ii) whether the respondent are liable to pay service tax under GTA in respect of the Carting Expenses?

The period for which the service tax has been demanded under Works Contract Service and GTA service is summarized as below ;

Financial Year	Name of Service Recipient	Amount of Service Tax demanded (Rs.)
2008-09	GSPHCL	3,19,003
2008-09 to 2010-11	Banas Dairy	56,02,734
2008-09 to 2011-12	SDAU	75,18,490
2008-09 to 2012-13	GTA Service	2,58,078

7.1 In respect of the demand for service tax on the works contract service, I find that the period involved is prior to 01.07.2012, i.e., prior to the introduction of the Negative List of Services regime. Therefore, the provisions of Finance Act, 1994, as it stood prior to its amendment w.e.f 01.07.2012 are applicable. In respect of the service provided to GSPHCL, I find that the same issue was decided earlier by the Commissioner (Appeals), Ahmedabad in the case of Bahusmarana Construction Co vide OIA No. 3/2013)Ahd-III)/SKS/Commr.(A)/Ahd dated 08.01.2013. 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. (TNPHCL), 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 TNPHCL 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 TNPHCL, 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 mis-interpreted 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. "

7.2 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. I further find that subsequent to the passing of the OIA, supra, the Hon 'ble Tribunal in the case of Sima Engineering Constructions & Others – 2018-TIOL-3479-CESTAT-MAD held that :

"7. Undisputedly, the appellants have entered into an agreement with TNPHCL for providing services in relation to construction of residential complex. However, these are meant for use of police personnel. The said issue was considered by the Tribunal in the case of Nithesh Estates (supra), wherein the Tribunal has observed as under:-

"7.1 In this case there is no dispute and it clearly emerges that the residential complex was built for M/s. ITC Ltd. And appellant was the main contractor. Appellant had appointed sub-contractors all of whom have paid the tax as required under the law. The question that arises is whether the appellant is liable to pay service tax in respect of the complex built for ITC. From the definition it is quite clear that if the complex is constructed by a person directly engaging any other person for design or planning or layout and such complex is intended for personal use as per the definition, service tax is not attracted. Personal use has been defined as permitting the complex for use as residence by another person on rent or without consideration. In this case what emerges is that ITC intended to provide the accommodation built to their own employees. Therefore it is covered by the definition of 'personal use' in the explanation. The next question that arises is whether it gets excluded under the circumstances. The circular issued by C.B.E.&C. on 24-5- 2010 relied upon by the learned counsel is relavant. Para 3 of this circular which is relevant is reproduced below :

"3. 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 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 for carrying out the whole or part of the construction, then the 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." It can be seen that if the land owner enters into a contract with a promoter/builder/developer who himself provided service of design, planning and construction and if the property is used for personal use then such activity would not be subject to service tax. It is quite clear that C.B.E.&C. also has clarified that in cases like this, service tax need not be paid by the builder/developer who has constructed the complex. If the builder/developer constructs the complex himself, there would be no liability of service tax at all. Further in this case it was different totally, the appellant, has engaged sub-contractors and therefore rightly all the sub-contractors have paid the service tax. In such a situation in our opinion, there is no liability on the appellant to pay the service tax."

8. The said decision was followed by the Tribunal in the case of Lanco Tanjore Power Co. Ltd. (supra) wherein the Tribunal discussed as under:-

"7. Construction of residential complex activity was carried out by the assessee for M/s. Lanco. It is submitted that such residential units were constructed for use as quarters of the employees of M/s. Lanco. It is evident from the facts of the case that M/s.Lanco has engaged the assessee with the specific purpose of construction of such residential units which are

meant for personal use of the employees of M/s. Lanco. We extract below the statutory definition of section 65(91a) of the Finance Act, 1994:-

"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;"
The above definition specifically excludes construction undertaken for personal use and such personal use includes permitting the complex for use as residence by another person. We find that the above exclusion clause covers the construction activity undertaken by the assessee.

8. We have gone through the case law relied upon by the respondents where a similar case has been dealt with by the Tribunal. Following the decision of the Tribunal in Nithesh Estates Ltd. (supra), we find no reason to interfere with the impugned orders which are sustained and the appeals filed by Revenue are rejected."

9. Following the said decisions, the facts being identical, we hold that the levy of service tax cannot sustain. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any.

7.3 The above judgment of the Hon'ble Tribunal was followed in the case of Shri S Kadrivel Vs. Commissioner of CST, Trichy – 2018-TIOL-2332-CESTAT-MAD. In view of OIA, supra, passed by the Commissioner (Appeals), Ahmedabad as well as the judgments of the Hon'ble Tribunal, supra, and following the principles of judicial discipline, I hold that the adjudicating authority has rightly held that the respondent are not liable to pay service tax on the Works Contract Services provided by them to GSPHCL.

7.4 Regarding the issue of Works Contract Service provided by the respondent to Banas Dairy and SDAU, I find that the appellant

department has contended that the service provided to them was nothing but a service for furtherance of business and industry and to earn profit. However, I find that contention is not supported by any evidence put forth either in the SCN issued to the respondent or in the grounds of appeal. The SCN has proposed to treat SDAU as commercial solely on the grounds that they collect fees from the students for providing education. I do not find any merit in this contention of the appellant department. Merely because fees is collected from the students does not make SDAU a commercial organization or its activity a commercial activity for the purpose of profit. The adjudicating authority has in Para 34 of the impugned order recorded that SDAU is a government university set up under the Gujarat Agricultural University Act, 2004. This fact is not disputed by the appellant department. In view of this fact, I am of the view that SDAU cannot be equated with the commercial coaching and training institutes and the service provided by the respondent to SDAU cannot be charged to service tax. Therefore, I do not find any infirmity in the impugned order in holding that the service provided to SDAU is out of the purview of Works Contract Service.

7.5 In respect of the service provided to Banas Dairy, though it is accepted in the SCN that Banaskantha District Cooperative Milk Producers Union Limited is cooperative organization established under the Gujarat Co-operative Societies Act, 1961, it is alleged that Banas Dairy is a commercial organization. There is no evidence presented in the SCN to substantiate the allegation that the Training Centre constructed by the respondent is for commercial purposes. As against this, the adjudicating authority has at Para 35 of the impugned order recorded that "*The work carried out by the service provider is construction of Training Centre. The training center is a part of providing technical inputs to farmer households by the Cooperative Milk Societies. Thus, I am of the considered view that the activity carried out at the training centre is for the welfare of the milk farmers*

and not for any commercial purpose". The appellant department, in the grounds of appeal, has not controverted the findings of the adjudicating authority and neither has any evidence been brought out to support the claim that the Training Centre constructed by the respondent for Banas Dairy is for the purpose of Commerce and Industry. In the absence of any such evidence, I do not find any reason to interfere with the findings of the adjudicating authority, recorded in the impugned order, that the demand for service tax on construction of training centre for Banas Dairy is not sustainable.

8. As regards the demand for service tax on GTA service, I find that the allegation against the respondent made in the SCN is on the grounds that "*in the absence of any evidence indicating that carting expenditure shown in the balance sheet is in relation to the purpose stated by the service provider, it appears that the said expenses are transport expenses incurred for receipt of goods and material by the service provider."* This is a very fallacious ground for demanding service tax under the category of GTA service. The appellant department has in the grounds of appeal contended that the adjudicating authority has not verified the invoices substantiating the voucher entries, which too is baseless. When it is the contention of the respondent that the transport service was provided by the owners of the vehicles who are not goods transport companies, it is farfetched to expect that invoices would have been issued by these vehicle owners. Therefore, I do not find any merit in the appeal filed by the department in this regard.

9. I find that the demand for service tax has been raised against the respondent on the basis of an inquiry carried out by the appellant department. However, no evidence has apparently been unearthed in the course of the inquiry by the appellant department as seen from the SCN issued to the respondent. As it is the appellant department which seeks to charge and recover service tax from the respondent, the onus of proving that the respondent was liable to pay service tax was on the

appellant department and the same cannot be shifted and laid upon the respondent, particularly when the demand was raised not as a part of assessment of the returns, but on the basis of an inquiry against the respondent. Therefore, I do not find any infirmity in the findings of the adjudicating authority.

10. In view of the above, I am of the considered view that there is no merit in the appeal filed by the department. Accordingly, I uphold the impugned order and reject the appeal filed by the appellant department.

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

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

29th March, 2022

(**Akhilesh Kumar**)
Commissioner (Appeals)

Attested:

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

Date: .03.2022.

BY RPAD / SPEED POST

To

The Assistant Commissioner,
CGST & Central Excise,
Division- Palanpur ,
Commissionerate : Gandhinagar

Appellant

M/s. G.P.Chaudhary,
93-94, Rajkamal Society,
Banas Dairy Road,
Near Arbuda Mandir,
Palanpur

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.