



सत्यमेव जयते

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 : 20220864SW000092449C

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/05/2022 /2940 - 2944
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-40/2022-23**
दिनांक Date : **11-08-2022** जारी करने की तारीख Date of Issue 16.08.2022
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of OIO No. **44/D/GNR/KP/2020-21** दिनांक: **15.03.2021** passed by Assistant Commissioner, CGST & Central Excise, Division Gandhinagar, Gandhinagar Commissionerate
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Madhuram Greens**
Survey No. 10, Kha Road Extension,
Sargasan, Gandhinagar, Gujarat - 382006

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 :

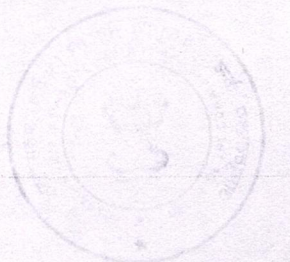
Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में 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 इए-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 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 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 पढी 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.

- (61) 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.

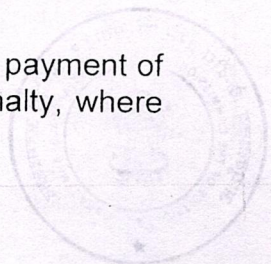
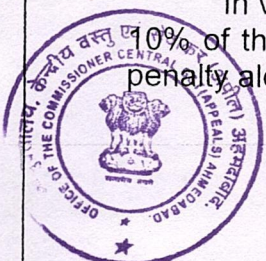
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (clxvi) amount determined under Section 11 D;
- (clxvii) amount of erroneous Cenvat Credit taken;
- (clxviii) 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 M/s. Madhuras Greens, Survey No. 10, Kha Road Extension, Sargasan Sector-6, Gandhinagar- 382 006 (hereinafter referred to as the appellant) against Order in Original No. 44/D/GNR/KP/2020-21 dated 15.03.2021 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner, CGST, Division : Gandhinagar, Commissionerate : Gandhinagar [hereinafter referred to as "adjudicating authority"].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. AARFM9639GSD001 and were engaged in providing Construction of Residential Complex service. Analysis of the Sales/Gross Receipts from Services (value from ITR), Total amount Paid/Credited under Sections 194C, 194I, 194J and Gross Value of Services provided was under taken by the Central Board of Direct Taxes (CBDT) for the F.Y. 2014-15 and details of the same were shared with CBIC. On perusal of the said analysis, it was noticed that the appellant had shown less amount of the Gross Value of Services provided in their ST-3 returns. It, therefore, appeared that the appellant had in their ST-3 returns mis-declared/suppressed the Gross Value of Services provided during F.Y. 2014-15, and, consequently, had short paid service tax. As per the details shared by the CBDT, the Sales/Gross Receipts from Services was Rs.71,96,710/-. The appellant was called upon to submit copies of Balance Sheet, Income Tax Returns, Form 26AS, Service Tax Ledger and ST-3 returns for F.Y. 2014-15. However, the appellant did not respond to the letters and emails.

3. Subsequently, the appellant was issued a SCN vide F.No. IV/16-09/TPI/PI/Batch 3B/Gr.III dated 25.06.2020 wherein it was proposed to :

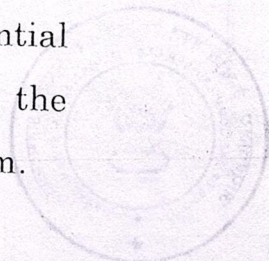
- Demand and recover service tax amounting to Rs.8,89,513/- under the proviso to Section 73 (1) of the Finance Act, 1994;
- Demand and recover Interest under Section 75 of the Finance Act, 1994;
- Impose penalty under Section 77 and 78 of the Finance Act, 1994;



4. The said SCN was adjudicated vide the impugned order wherein the demand for Rs. 8,89,513/- was dropped. However, as the scrutiny of the documents submitted by the appellant indicated that they had shown Rent Income amounting to Rs.21,22,517/- and Rs.20,85,848/- during F.Y. 2014-15 and F.Y. 2015-16 respectively, the service tax amounting to Rs. 2,62,343/- and Rs.3,12,877/-, respectively, applicable thereon was ordered to be recovered under the proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75. Penalty of Rs.5,75,220/- was imposed under Section 78 of the Finance Act, 1994.

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

- i) The adjudicating authority has passed an order on an issue which was not present in the SCN issued. As such, the act is bad in law. They rely upon the judgment of the Income Tax Appellant Tribunal in the case of Vesuvius India Limited Vs. CIT (Kolkata-IV) in I.T.A No. 663/Kol./2010.
- ii) The SCN issued is time barred. The Apex Court has in the case of Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay – 1995 (75) ELT 721 (SC) held that the burden is on the revenue to prove that the elements required to uphold validity of extended period and that detailed verification must be made prior to issuing SCN and complete details provided to the person in the SCN.
- iii) The guidelines laid down by the Apex Court as well as the guidelines contained in Master Circular dated 10.03.2017 issued by the CBIC have been ignored.
- iv) While the SCN states that letters/emails were sent to them seeking documents and that they had not responded to the same, the details of such letters sent to them nor the dates have not been shared.
- v) Section 66D (m) of the Finance Act, 1994 provides that when a residential building is let out as such and is used for residence, service tax will not be charged. They had let out only residential property to be used as residence by the lessee. Therefore, the adjudicating authority had wrongly denied the exemption to them.



- vi) The adjudicating authority has concluded that they being a real estate owner, provided services by leasing out residential property with a commercial intent. The term 'Commercial Intent' has not been defined in the Finance Act and no pre-condition has been stipulated to avail exemption provided in the Negative List of Services that exemption would be available only if the specified services are not provided with a commercial intent. In the absence of any such condition, the adjudicating authority should not deny exemption based on a made up condition.
- vii) The basic intention behind renting out property is to earn money. By the logic of the adjudicating authority, if earning money is commercial intent, all renting of property will be classified as taxable services and the exemption would be invalid.

6. Personal Hearing in the case was held on 02.08.2022 through virtual mode. Shri Geet Mecwan, Chartered Accountant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

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 dispute involved in the present appeal relates to the confirmation of demand for service tax on the Rent Income received by the appellant. The demand pertains to the period F.Y.2014-15 to F.Y. 2015-16.

8. The appellant have contested the confirmation of demand on merits as well as on the ground that the impugned order has travelled beyond the SCN as the issues on which demand was confirmed against them was not raised in the SCN issued to them. I find that the SCN issued to the appellant proposed to demand and recover service tax amounting to Rs.8,89,513/- on the taxable value amounting to Rs.71,96,710/-. The appellant had in their submissions before the adjudicating authority explained that this amount pertained to sale of immovable property after receipt of Building Use (BU) permission and, hence, was not chargeable to service tax. The adjudicating authority



accepted the contention of the appellant, and, had dropped the demand for service tax raised in the SCN.

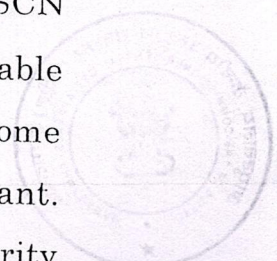
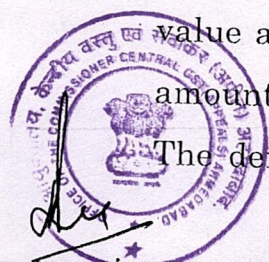
8.1 I find that it has been recorded at Para 25 and 27 of the impugned order that scrutiny of the documents submitted by the appellant indicated that they had received Rent Income of Rs.21,22,517/- during F.Y. 2014-15 and Rs.20,85,848/- during F.Y.2015-16. The adjudicating authority has, at Para 29 of the impugned order, included the issue of determining whether the Rent Income received by the appellant was liable to service tax. After giving his findings, the adjudicating authority has proceeded to order recovery of service tax totally amounting to Rs.5,75,220/- in respect of the Rent Income received by the appellant during F.Y.2014-15 and F.Y. 2015-16.

8.2 I find that the service tax in respect of the Rent Income has been ordered to be recovered under the proviso to Section 73 (1) of the Finance Act, 1994, which is reproduced below :

“Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :”.

8.3 From a plain reading of the provisions of Section 73 (1) of the Finance Act, 1994, it is evident that a person charged with short levy or short payment of service tax has to be served a show cause notice. Therefore, for confirmation of service tax demand, there has to be a SCN demanding the service tax. In the instant case, I find that no SCN has been issued demanding service tax in respect of the Rent Income received by the appellant.

8.4 Hence, I find merit in the contention of the appellant that the adjudicating authority has travelled beyond the SCN in confirming demand for service tax on the Rent Income received by them. I find that the SCN issued to the appellant only proposed recovery of service tax on the taxable value amounting to Rs.71,96,710/-, which does not include the Rent Income amounting to Rs.21,22,517/- and Rs.20,85,848/- received by the appellant. The demand raised in the SCN was dropped by the adjudicating authority



vide the impugned order and there is no appeal by the department challenging the dropping of the demand for service tax. Further, the demand confirmed by the adjudicating authority vide the impugned order was not raised in the SCN issued to the appellant. Therefore, by raising a fresh demand in respect of the Rent Income in the course of adjudication and confirming the same, without issuance of SCN, the adjudicating authority has clearly travelled beyond the scope of the SCN issued to the appellant.

8.5 I find it relevant to refer to the judgment of the Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. Gas Authority of India Ltd. – 2008 (232) ELT 7 (SC), the relevant part of the said judgment is reproduced below :

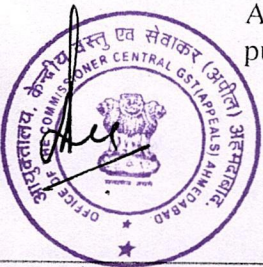
“7. As repeatedly held by this Court, show cause notice is the foundation of the Demand under Central Excise Act and if the show cause notice in the present case itself proceeds on the basis that the product in question is a by-product and not a final product, then, in that event, we need not answer the larger question of law framed hereinabove. On this short point, we are in agreement with the view expressed by the Tribunal that nowhere in the show cause notice it has been alleged by the Department that Lean Gas is a final product. Ultimately, an assessee is required to reply to the show cause notice and if the allegation proceeds on the basis that Lean Gas is a by-product, then there is no question of the assessee disputing that statement made in the show cause notice.”

8.6 A similar view as taken by the Hon'ble High Court of Madras in the case of R.Ramdas Vs. Joint Commissioner of Central Excise, Puducherry – 2021 (44) GSTL 258 (Mad.). The relevant parts of the said judgment are reproduced below :

“7. It is a settled proposition of law that a show cause notice, is the foundation on which the demand is passed and therefore, it should not only be specific and must give full details regarding the proposal to demand, but the demand itself must be in conformity with the proposals made in the show cause notice and should not traverse beyond such proposals.

11. The very purpose of the show cause notice issued is to enable the recipient to raise objections, if any, to the proposals made and the concerned Authority are required to address such objections raised. This is the basis of the fundamental Principles of Natural Justice. In cases where the consequential demand traverses beyond the scope of the show cause notice, it would be deemed that no show cause notice has been given, for that particular demand for which a proposal has not been made.

12. Thus, as rightly pointed out by the Learned Counsel for the petitioner, the impugned adjudication order cannot be sustained, since it traverses beyond the scope of the show cause notice and is also vague and without any details. Accordingly, such an adjudication order without a proposal and made in pursuant of a vague show cause notice cannot be sustained.”



8.7 Further, in the case of Reliance Ports and Terminals Ltd. Vs. Commissioner – 2016 (334) ELT 630 (Guj.), the Hon'ble High Court of Gujarat had held that at Para 9 of the judgment that :

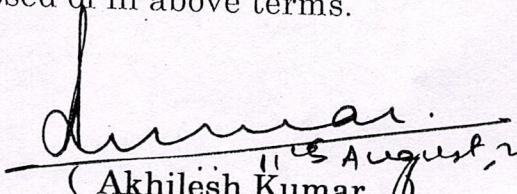
“Under the circumstances, in the light of the settled legal position as emerging from the above referred decisions of the Supreme Court, that the show cause notice is the foundation of the demand under the Central Excise Act and that the order-in-original and the subsequent orders passed by the appellate authorities under the statute would be confined to the show cause notice, the question of examining the validity of the impugned order on grounds which were not subject matter of the show cause notice would not arise.”

8.8. In view the above judicial pronouncements, I find that it is settled position of law that a SCN is the foundation of demand. In the instant case, I find that no SCN has been issued to the appellant demanding service tax on the Rent Income received by them. Therefore, confirmation of demand of service tax without issue of SCN is bad in law and, is accordingly, not legally sustainable.

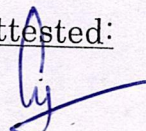
9. In view of the above facts, I am of the considered view that the impugned order confirming demand for service tax, in respect of the Rent Income received by the appellant, without issuance of SCN is required to be set aside. Accordingly, the impugned order is set aside and the appeal filed by the appellant is allowed.

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

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


(Akhilesh Kumar)
Commissioner (Appeals)

Attested:


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

Date: .08.2022.



BY RPAD / SPEED POST

To

M/s. Madhuran Greens,
Survey No. 10,

Appellant

Kha Road Extension,
Sargasan Sector-6,
Gandhinagar- 382 006

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

Respondent

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.

