केंद्रीय कर आयुक्त (अपील)
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
सत्यमेव जयते केंद्रीय कर शुल्कभवन, 7th Floor, Central Excise Building,
सातवीं मंजिल,पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015
079-26305065 टेलेफैक्स: 079 - 26305136

क फाइल संख्या : File No : **V2(ST)266/A-II/2016-17** 1904 to 1908

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-002-APP-352-17-18**

दिनाँक Date : **28/02/2018** जारी करने की तारीख Date of Issue 23/03/18

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **SD-02/REF-238/VIP/2016-17** Dated **27.12.2016** Issued by **Assistant Commr STC,** Service Tax, Div-II, Ahmedabad

ध अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

M/s. G M Chauhan
Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:–
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद–380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar,Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of

O.C

crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त,, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ **(OIA)**(उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा **अधीक्षक** केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करनें के निदेश देते हुए आदेश **(OIO)**,की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)**(OIA)**(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax **(OIO)** to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. **सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो**

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है –

(i) धारा 11 डी के अंतर्गत निर्धारित रकम

(ii) सेनवैट जमा की ली गई गलत राशि

(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇨ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

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

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇨ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) **इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।**

4(1) 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

Mr. G.M. Chauhan [*hereinafter referred to as the 'appellant'*], having the address at 39, B Safal Vivaan, Phase-I, Near Gota Cross Road, Behind Manan Auto Link, Off SG Highway, Ahmedabad-382481, had filed a refund claim amounting to Rs.3,02,136/-, along with interest, for the service tax borne by him on purchasing a flat at the above-mentioned address. The Assistant Commissioner, Service Tax, Division-II, Ahmedabad (hereinafter referred to as 'adjudicating authority') found the appellant's claim ineligible and baseless and rejected the same vide Order-in-Original No. SD-02/REF-238/VIP/2016-17 dt.27.12.2016 (hereinafter referred to as 'the impugned order'). Being aggrieved by the impugned order, the appellant has filed this appeal against the same, before me.

2. The facts of the case, in brief, are that the appellant had purchased a residential unit Duplex No. 39, B Safal Vivaan, Phase-I, Near Gota Cross Road, Behind Manan Auto Link, Off SG Highway, Ahmedabad, in the capacity of a buyer from M/s. Safal Construction Pvt. Ltd. (herein after referred as 'the builder'). The builder having Service tax Registration No. AACCS7461CST001, had charged and recovered Service tax amounting to Rs. 3,02,136/-, for the said residential unit from the appellant. As the appellant had borne the service tax, therefore relying on the Delhi High Court ruling in the case of Suresh Kumar Bansal & Anuj Goyal and others v/s Union of India [2016(6)TMI 192 (Delhi)] (herein after referred as 'the Suresh Kumar Bansal case'), the appellant had filed the refund claim for the Service tax amount of Rs. 3,02,136/-.

3. In the instant case, the refund claim was filed on the basis of Delhi High Court verdict in the case of Suresh Kumar Bansal wherein the Hon'ble High Court held that no service tax could be charged on Construction contracts involving Sale of land (immovable property) and services i.e. Composite contracts, as there is no machinery provided under the Finance Act, 1994, or the Valuation Rules for ascertaining the service element specifically in such contracts. The Hon'ble High Court held that no Service tax could be charged in respect to the contracts entered in to with the builders or developers for the purchase of apartments/flats. The appellant's claim pertains to the post-negative list period as the appellant had entered in to an agreement with the Service Provider on 09th December, 2014. According to Section 65(105)(zzzh) of the Finance Act, 1994 –

"Taxable service is defined as any services provided to any person by any other person in relation to construction of complex."

The Finance Act, 2010, inserted the following explanation to Section 65(105)(zzzh) of the Finance Act, 1994 :

> *"Explanation: For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer."*

By Service Tax (Removal of Difficulty) Order, 2010 [notified by MF (DR) Order No.1/2010, dt. 22.06.2010, w.e.f. 1.07.2010, the expression 'authority competent' includes, besides any Government authority :

> *"(i) architect, registered with the Council of Architecture constituted under the Architects Act, 1972; or*
>
> *(ii) chartered engineer with the Institution of Engineers (India); or*
>
> *(iii) licensed surveyor of the respective local body of the city or town or village or development of planning authority;*
>
> *who is authorised under any law for the time being in forces, to issue a completion certificate in respect of residential or commercial or industrial complex, as a precondition for it occupation."*

As per this explanation, unless a builder does not receive any sum of money from or on behalf of his prospective buyer before grant of completion certificate by the competent authority, the builder is supposed to have rendered service to the prospective buyer. If the builder has collected some amount towards the cost of construction of the flat in a complex, then the builder is required to pay service tax as he is supposed to have rendered the service to the prospective buyer. The appellant in this case has filed his claim on the basis of the Hon'ble High Court ruling in the case of Suresh Kumar Bansal & Anuj Goyal & Ors v/s. Union of India in which the Hon'ble Court held that no Service tax could be charged in respect to the contracts entered in to with the builders or developers for the purchase of apartments/flats. The Hon'ble High Court at Para 24,26 and 27 stated that –

> ***"24.*** *Insofar as the impugned explanation is concerned, it is apparent that the same expands the scope of the taxable service as envisaged in sub-clause (zzzh) of the Act. By a legal fiction, construction of a complex which is intended for sale by a builder or any person authorised by him before, during or after construction is deemed to be a service provided by the builder to the buyer. The only exception*

contemplated is where no sum is received from the prospective buyer prior to grant of the completion certificate. The grant of completion certificate implies that the project is complete and at that stage all services and goods used for construction are subsumed in the immovable property; thus at that stage sale of a complex or a part thereof to a buyer constitutes an outright sale of immovable property, which admittedly is not chargeable to service tax."

"26. *Service tax is essentially a tax on the value created by services as distinct from a tax on the value added by manufacturing goods. Construction of a complex essentially has three broad components, namely, (i) land on which the complex is constructed; (ii) goods which are used in construction; and (iii) various activities which are undertaken by the builder directly or through other contractors. The object of taxing services in relation to construction of complex is essentially to tax the various activities that are involved in the construction of a complex and the resultant value created by such activities.*

27. *It is a usual practice for builders/developers to sell their project at its launch. Builders accept bookings from prospective buyers and in many cases provide multiple options for making payment for the purchase of the constructed unit. In some cases, prospective buyers make the payment upfront while in other cases, the buyers may opt for construction linked payment plans, where the agreed consideration is paid in instalments linked to the builder achieving certain specified milestones. Whilst it may be correct to state that the title to the unit (the immovable property) does not pass to the prospective buyer at the stage of booking, it can hardly be disputed that the buyer acquires an economic stake in the project and in one sense, the services subsumed in construction - services in relation to a construction the complex - are rendered for the benefit of the buyer. However, but for the legal fiction introduced by the impugned explanation, such value addition would be outside the scope of services because sensu stricto no services, as commonly understood, are rendered in a contract to sell immovable property."*

Thus, the service tax levy on the construction of a complex for the service portion in the flat/apartment sold to a customer, was introduced through the above-mentioned explanation by the amendment made vide Finance Act, 2010. The Hon'ble High Court however clarified the composite nature of contract involved at Para 37 of the Order :

"37. *Undisputedly, the contract between a buyer and a builder/promoter/developer in development and sale of a complex is a composite one. The arrangement between the buyer and the developer is not for procurement of services simplicitor. As noticed hereinbefore, an agreement between a flat buyer and a builder/developer of a complex - who is developing the complex for sale is, essentially, one of purchase and sale of developed property. But, by a legislative fiction, such agreements, which have been entered into prior to completion of the project and/or construction of a unit, are imputed with a character of a service contract; the works involved in construction of a complex are treated as being carried by the builder on behalf of the buyer. However, indisputably the arrangement between the buyer and the builder is a composite one which involves not only the element of services but also goods and immovable property. Thus, while the legislative competence of the Parliament to tax the element of service involved cannot be disputed but the levy itself would fail, if it does not provide for a mechanism to ascertain the value of the services component which is the subject of the levy. Clearly service tax cannot be levied on the value of undivided share of land acquired by a buyer of a dwelling unit or on the value of goods which are incorporated in*

the project by a developer. Levying a tax on the constituent goods or the land would clearly intrude into the legislative field reserved for the States under List-II of the Seventh Schedule to the Constitution of India."

The Hon'ble High Court concluded on the issue vide Para 55 that :

*"**55.** In view of the above, we negate the challenge to insertion of sub-clause (zzzzu) in Clause (105) of Section 65 of the Act. However, we accept the petitioners contention that no service tax under Section 66 of the Act read with Section 65(105)(zzzh) of the Act could be charged in respect of composite contracts such as the ones entered into by the petitioners with the builder. The impugned explanation to the extent that it seeks to include composite contracts for purchase of units in a complex within the scope of taxable service is set aside."*

4. In the appellant's present case, the Adjudicating Authority does confirm that the Hon'ble High Court had held that no service tax could be charged on construction contracts involving Sale of land and Services i.e. Composite contracts, as there is no machinery provided under the Act or in the Valuation Rules for ascertaining the service element specifically in such contracts. However, the Adjudicating Authority observed that the High Court while passing the judgement had not expressed its opinion on the Amendment of Finance Act, 2012, wherein provision [Section 65(105) defining all the services under the Act was deleted and all services [as defined under Section 65B (44) of Finance Act, 2012] were made chargeable to Service Tax except the negative list meaning thereby that the said judgment is applicable to the agreements entered prior to the year 2012. As the appellant had entered in to an agreement with his contractor (service provider) on 28th September, 2015 i.e. in the post negative list era, the Adjudicating Authority found the appellant's claim ineligible and the said ruling of the Hon'ble High Court not applicable in the appellant's case. Therefore, the Adjudicating Authority rejected the appellant's claim of Rs.3,02,136/-, vide the impugned order.

5. Being aggrieved by the impugned order, the appellant has filed this appeal before me on the grounds that (i) the Adjudicating Authority has erred in rejecting the claim even after agreeing to the main contention of the Hon'ble Delhi High Court; (ii) the allegation of the adjudicating authority that the appellant has failed to produce any documentary evidence is baseless and false; and (iii) the appellant being a Service Receiver cannot be held responsible for non-reversal of Cenvat credit by the service provider.

6. The appellant was called for a personal hearing on 4.10.2017, 20.12.2017 and 10.01.2018, but the appellant vide his letter dt. 3.10.2017, had informed that no useful purpose will be served by his appearance other than wastage of my time. As the appellant has been given three opportunities to personally hear him and he has not availed it, I now proceed to decide the case based on the facts of the case on record, grounds of appeal in the Appeal Memorandum and additional submissions made by the appellant.

7. I find that the appellant has entered in to an agreement with his Service provider in September, 2015 i.e. post negative list period. I don't find any distinction in the treatment of levy of Service tax on Composite Construction Contracts in the pre-negative list period and post-negative list period. The decision of the Hon'ble Delhi High Court in the case of Suresh Kumar Bansal relied on by the appellant will prevail till any decision is passed by the Hon'ble Supreme Court on the appeal filed by the Department. The Adjudicating Authority's conclusion that the Hon'ble High Court's ruling is not applicable to the appellant's refund claim, does not appear to be based on facts of the case. Hence, the appellant's case also being a Composite Construction Contract, the decision of the Hon'ble High Court has to be applied in this matter. The impugned order also discusses Preferential Location Charges and its applicability, but no such facts have been brought up against the said claim of the appellant and the Adjudicating Authority has also not touched that aspect while rejecting the claim. However, in Para 13 of the impugned order, the Adjudicating Authority did bring to the fore the fact that as the services provided by the Service Provider became exempted in the light of the Hon'ble High Court's order, and the Service Provider has taken credit of input services used in such exempted services as well as taxable services, therefore under Rule 6(3) of the Cenvat Credit Rules, 2004, the Service Provider is required to reverse the amount of Cenvat credit of inputs services as provided therein. The appellant has contended in his appeal that being a Service Receiver, he cannot be held responsible for non-reversal of Cenvat credit by the service provider. Moreover, in Para 14 of the impugned order, it is mentioned that the proof of payment etc. are required to be furnished. I find that these requirements as mentioned in Para 13 & 14 of the impugned order has not been fulfilled and in absence of these, no refund claim can be processed. The appellant has also not submitted any such documents before me nor he has availed the opportunity of Personal hearing. In the absence of any

documentary proof as discussed above, I have no option but to reject the claim and uphold the impugned order.

8. I, therefore, uphold the impugned order dt.27.12.2016.

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

9. The appeal filed by the appellant, stands disposed off on above terms.

(उमा शंकर)
आयुक्त (अपील्स)

ATTESTED

(R.R. NATHAN)
SUPERINTENDENT,
CENTRAL TAX APPEALS, AHMEDABAD.

To,

Shri G.M. Chauhan,
39-B, Safal Vivaan, Phase-I,
Near Gota Cross Road,
Behind Manan Auto Link, Off S.G. Highway,
Ahmedabad-382481.

Copy to:

1) The Chief Commissioner, Central Tax, GST, Ahmedabad Zone.
2) The Commissioner, CGST, Ahmedabad (North).
3) The Dy./Asst. Commissioner, Division-VI, CGST, Commissionerate-Ahmedabad(North).
4) The Asst. Commissioner(System), CGST, Hqrs., Ahmedabad(North).
5) Guard File.
6) P.A. File.