



| | | |
|---|---|--|
|  | केंद्रीय कर आयुक्त (अपील) |  |
| सत्यमेव जयते | O/O THE COMMISSIONER (APPEALS), CENTRAL TAX केंद्रीय कर शुल्क भवन सातवीं मजिल, पॉलिटेक्निक के पास आम्बावाडी, अहमदाबाद-380015 | 7 th Floor, Central Excise Building Near Polytechnic Ambavadi, Ahmedabad-380015 |
| ☎ 079-26305065 | | ☎ 079-26305136 |

क फाइल संख्या : File No : V2(STC)113/North/Appeals/ 17-18 329770

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-EXCUS-002-APP- 01 -18-19 3301

दिनांक Date : 26/04/2018 जारी करने की तारीख Date of Issue 29/5/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-02/SCN-75/udhayVJ/2016-17 Dated 17-Jan-18 Issued by Assistant Commissioner, Central GST , Div-VI , Ahmedabad North.

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

M/s Udhay-VJ Realty Pvt.Ltd

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 मैनटल हास्पिटल कम्पाउण्ड, मेघाणी 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 विरुद्ध 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 वहाँ 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 वहाँ 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



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 फॉर्म 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 करने 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 शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 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, 1988 की धारा 39 के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 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 रुपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल हैं -

- (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 होगा।

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,

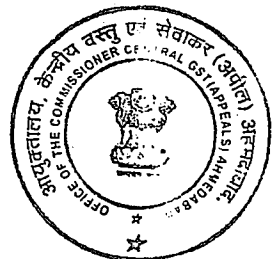
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

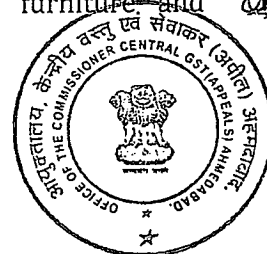
M/s. Udhay VJ Realty Pvt Ltd, Viral House, Near B-Safal House, B/h- Armeida, Sindhu Bhavan Road, Bodakdev, Ahmedabad 380054 (henceforth, "appellant") has filed the present appeal against the Order-in-original No. GST/D-VI/O&A/11/Udhay VJ/AC/KM/17-18 dated 17.01.2018 (henceforth, "impugned order") issued by the Assistant Commissioner, CGST Division-VI, Ahmedabad - North (henceforth, "adjudicating authority").

2. To state briefly, the facts of the case are that the appellant, a service tax registrant for providing renting of immovable property service, entered into lease agreements with M/s. ANZ Operations and Technologies Pvt Ltd renting out three floors of a commercial complex in Bangalore. The premises were rented out alongwith furniture, fixtures and office equipment and the appellant paid VAT on the amount pertaining to such furniture, fixtures and equipments. The department held a view that effective control and possession of the furniture, fixtures and equipments remained with the appellant and therefore, the transaction in respect of furniture, fixtures and equipments attracted levy of service tax under the category 'supply of tangible goods for use' service. A show cause notice dated 23.03.2017 was, therefore, issued for recovery of service tax **Rs.2,22,298/-** not paid for the year **2014-15**. The adjudicating authority confirmed the service tax demand of **Rs.2,22,298/-**, along-with interest, and imposed penalties under section 76 and 77 of the Finance Act, 1994.

3. Feeling aggrieved with the impugned order, appellant has preferred this appeal on following main grounds of appeal-

3.1 Appellant states that the transaction carried out under the agreement with the lessee is classifiable as sales under the provisions of State VAT/ CST laws; that the transaction is purely for the transfer of right to use the goods where possession and control of the goods is transferred for the exclusive use of the hirers; that they have been discharging VAT/ CST on the entire lease rent turnover and VAT assessments have been accepted by the VAT authorities.

3.1.1 Appellant states that 'transfer of right to use goods' has not been defined in any Act, however, this term has been interpreted in various judgments by various courts including Supreme Court. Appellant quotes and explains the followings case laws- Rashtriya Ispat Nigam Ltd v. Commercial Tax Officer [1990 (70) STC (182)]; G S Lamba & Sons, Secunderabad & Ors v. State of Andhra Pradesh [2011(52) APST 191]; BSNL Ltd v. UOI [2006(145) STC 91(SC)]; HLS Asia Ltd v. State of Assam & Ors [2003(132) STC 217 (Gauhati)]. As per appellant, once the furniture and



equipments are transferred to the customers for their use, the rights as existing with the appellant terminate and vest with the customers; that effective control of the goods therefore vests with the customers and not with the appellant; that as per clause 16.1 of the Lease Agreement, the customers will also repair and replace any damage in connection with the furniture and office equipment; that furniture and other office equipment becomes the property of the customers during the period of lease.

3.1.2 Appellant, relying on Tribunal's decision in the case of GIMMCO Ltd v. S.T., Nagpur [2017(48) STR 476(Trib.-Mumbai)], states that merely because restrictions were placed on lessee in the Agreement, absence of right to use by lessee cannot be presumed.

3.1.3 Appellant also refers to provisions of service tax as applicable w.e.f. 01.07.2012 to state that service tax is not applicable to transactions involving transfer of right to use the goods.

3.2 Appellant submits that service tax cannot be imposed on transactions which are leviable to VAT as the power to tax transfer of right to use goods is within the legislative competence of the State Legislature.

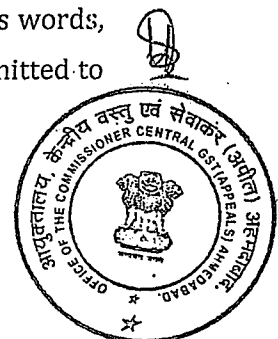
3.3 According to appellant, initiation of proceedings when it is a settled law that transfer of right to use goods attracts VAT and not service tax is like ignoring a binding precedent.

3.4 Appellant also argues that service tax and VAT are mutually exclusive in the present case and demanding service tax on the turnover on which VAT is paid will amount to double taxation.

3.5 Appellant has also contested the imposition of penalties.

4. In the personal hearing held on 25.04.2018, Ms Priyanka Kalwani, Advocate reiterated the grounds of appeal and pointed out the Order-in-Appeal passed in the case of *Ingersoll Rand (India) Ltd* in the similar facts.

5. I have carefully gone through the appeal. Renting income pertaining to furniture, fixtures and office equipments is at the core of dispute. The adjudicating authority has held that the transaction in dispute is essentially covered under 'supply of tangible goods for use service' in terms of section 65(105)(zzzj) of the Finance Act, 1994 as there is no transfer of right to use the goods. In others words, adjudicating authority held a view that the customer (lessee) was only permitted to



use the goods but right to use the goods was retained by the appellant and hence, the transaction was not of deemed sale but that of service. According to adjudicating authority, mere payment of VAT by the appellant on his own volition does not make the transaction a transaction of deemed sale.

5.1 The supply of tangible goods for use, without transfer of right to use, was brought under the tax net with effect from 16.5.2008 under section 65(105)(zzzzj) of the Finance Act, 1994. In the negative list regime effective from 1.7.2012, *transfer of goods by way of firing, leasing, licensing or in any such manner without transfer of right to use such goods* is a 'declared service' under section 66E(f) of the Finance Act, 1994. Thus, essentially, the supply of tangible goods for use **without transferring the right to use** the goods is a service transaction. Further, transfer of right to use involves transfer of both possession and control of the goods to the user of the goods, as clarified in Board's Instruction Letter No.334/1/2008-TRU dated 29.2.2008. It was further explained in this letter that whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts; that this could be ascertainable from the fact whether or not VAT is payable or paid; that supply of tangible goods for use and leviable to VAT/ sales tax as deemed sale of goods is not covered under the scope of supply of tangible goods for use service.

5.2 The relevant facts of the case are that the appellant rented out certain premises of a commercial complex, alongwith furniture, fixtures and office equipments, by entering into a Lease Agreement with the customer namely M/s. ANZ Operations and Technologies Pvt Ltd. Thus, customer got legal right to use the goods in terms of Lease Agreement. Also, considering that operation and maintenance of the furniture, fixtures and equipment being the customer's responsibility in terms of clause (16) of the Agreement, effective control of the goods also stood transferred to the customer. Thus, it appears that both possession and effective control of the goods stood transferred to the customer. If this is the case, then there is no ground to state that right to use the goods was retained by the appellant. The restrictions placed on the customer with regard to making any alterations, additions in the premises cannot be interpreted to mean that the appellant retained the right to use. Since appellant is still legal owner of the premises and of furniture, fixtures and equipments in the premises, it is perfectly right for him to place such restrictions, however, as held by Hon'ble Mumbai Tribunal in the case of **GIMMCO Ltd v. S.T., Nagpur** [2017(48) STR 476 (Trib.-Mumbai)], the restrictions in the Agreement cannot be read as absence of right to use by the lessee. The payment of VAT on the transaction and acceptance of the VAT assessments by the state VAT authorities is also an undeniable fact here and that is



one of the aspects that has to be considered to ascertain the nature of transaction in clarified in the Board's Instruction Letter No.334/1/2008-TRU dated 29.2.2008.

5.3 The appellant has argued that the facts of this case are similar to the matter decided in the case of Ingersoll Rand (India) Ltd – OIA No.AHM-EXCUS-002-APP-124-17-18 dated 27.10.2017. In the case of Ingersoll Rand (India) Ltd, I had found that transaction of renting of air compressors by Ingersoll Rand (India) Ltd was not a service transaction but a deemed sale transaction and hence not leviable to service tax. The case of Ingersoll Rand (India) Ltd also involved the interpretation of facts relating to transfer of right to use the goods in a situation where appellant had paid VAT considering the transactions as deemed sale. I find that instant case very similar to that of Ingersoll Rand (India) Ltd and therefore, I find it appropriate to remand the present matter back to the adjudicating authority to ascertain the facts correctly and decide the issue afresh in light of OIA passed in the case of Ingersoll Rand (India) Ltd.

6 Accordingly, the impugned order is set aside and appeal is allowed by way of remand.

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

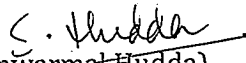
The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested


(Sanwamal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
M/s. Udhay VJ Realty Pvt Ltd,
Viral House, Near B-Safal House,
B/h- Armeida, Sindhu Bhavan Road,
Bodakdev, Ahmedabad 380054

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, CGST Ahmedabad North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt. Commissioner, CGST Division-VI, Ahmedabad North.
5. Guard File.
6. P.A.

