



आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,



केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎: 079-26305065 टेलीफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(ST)107 /North/Appeals/2018-19 9708/09712
ख अपील आदेश संख्या : Order-In-Appeal No..AHM-EXCUS-002-APP-199-18-19
दिनांक Date : 28/02/2019 जारी करने की तारीख Date of Issue 25/3/2019

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-OriginalNoMP/02/DEM/AC/2018/KDB Dated 07/05/2018
Issued by **Deputy Commissioner** , Central GST , Div-II , Ahmedabad North.

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

M/s Bhakti Infrastructure 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 :-

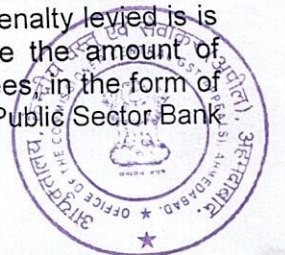
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और 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 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 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 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, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 43 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 अर्जी एवं अपील को लागू नहीं होंगे।

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.

रजिस्टर्ड डाक ए.डी. द्वारा



दूरभाष : 26305065

ORDER-IN-APPEAL

This appeal has been filed by M/s Bhakti Infrastructure Pvt Ltd, 28, Vijayant Park Society, Hirawadi Road, Saijpur Bogha, Ahmedabad [hereinafter referred to as "the appellant"] against Order-in-Original No.MP/02/Dem/AC/2018/4DB dated 27.04.2018 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner of CGST, Division-II, Ahmedabad North Commissionerate [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the fact of the case is that during the course of audit of the records of the appellant, it was observed that the appellant had provided Construction of Residential Complex service during April 2011 to June 2012 and wrongly classified the said service under Work Contract Service and thereby availed Cenvat credit on the service tax paid on input service; that as per notification No.01/2006 -ST dated 01.03.2006 as amended, if an assess pays the service tax under simplified scheme i.e after availing of abatement of taxable value while providing Construction of Residential Complex service, Cenvat credit on inputs, capital goods and input service is not available. Since the appellant has wrongly classified the said service under Work Contract instead of Construction of Residential Complex and availed the benefit of Cenvat credit for service tax paid input service, a show cause notice dated 22.09.2016 was issued to the appellant for [i] classifying the service under Residential Complex service instead of Work contract service; [ii] recovery of Cenvat credit amounting to Rs.26,11,067/- wrongly taken and utilized with interest; and [iii] imposition of penalty under Section 78 and 77(2) of Finance Act, 1994 (FA). The adjudicating authority, vide the impugned order, has classified the said service under 'Construction service of Residential Complex service under Section 65(105(zzzh) of FA and confirmed the recovery of Cenvat credit wrongly taken and utilized with interest and also imposed penalty of Rs.10,000/- under section 77(2) of FA and Rs.26,11,067/- under Section 78 of FA.

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

- They do not provide mere service of construction but supply of goods is also involved in the execution of the construction service. They were also liable to pay sale tax on transfer of property in goods involved in the execution of such contract. Therefore, their service is specifically covered under Work Contract service as provided under Section 65(105(zzzza) of FA.
- Construction of Residential complex is specifically included in the definition of work as provided in entry © to Clause (ii) to explanation to Section ibid.
- As per Board's circular No.128/10/2010-ST dated 24.08.2010, classification of construction works service will undergo change if they are in the nature of work contract.



- Section 129 of FA has made retrospective amended w.e.f 01.07.2010 in the valuation and made work contract and Construction of Residential Complex service at par; it prove beyond doubt that there were doubts in classification between Work Contract and CRC services and in case of such retrospective amendment, charges of suppression is not required.
- They relied on decision of L&T Ltd of Hon'ble Supreme Court [2015 (39) STR 913 -SC] in their favour.

4. Personal hearing in the matter was held on 13.02.2019. Shri Punit Prajapati, Chartered Accountant appeared for the same and reiterated the grounds of appeal. He further pointed out that prior to negative list, the service provided by the appellant is falling under Work Contract Service.

5. I have carefully gone through the fact of the case and submissions made by the appellant in the appeal memorandum and at the time of personal hearing. The mute issue to be decided in the instant case is whether [i] the service provided by the appellant in dispute for the period of April 2011 to June 2012 falls under "Work Contract Service" or "Construction of Residential Complex Service" and eligibility of Cenvat Credit on inputs services thereby.

6. The adjudicating authority has contended that the service provided by the appellant falls under the category of 'Construction of Residential Complex Service' and not under 'Work Contract Service'; that as per notification No.01/2006 dated 01.03.2006, as amended, if an assessee pays the service tax under simplified scheme i.e after availing of abetment of taxable value while providing Construction of Resident Complex service, Cenvat Credit of inputs, capital goods and input services is not available to them. Therefore, the appellant has wrongly classified the said service under 'Work Contract service' and availed Cenvat Credit on input service amounting to Rs,26,11,017/- during April 2011 to June 2012. On other hand, the appellant has submitted that their service is specifically covered under Work Contract service as provided under Section 65(105)(zzzza) of FA as they do not provide mere service of construction but supply of goods is also involved in the execution of the construction service and they were also liable to pay sale tax on transfer of property in goods involved in the execution of such contract.

7. Service tax payable under 'Work Contract Service' as provided under Section 65(105)(zzzzh) of FA is 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)

...



- (b) ..
 (c) **construction of a new residential complex or a part thereof; or**
 (d)
 (e)

The residential complex is defined in Section 65(91a) of the FA as follows:-

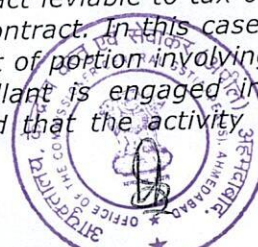
"(91a) **"residential complex"** means any complex comprising of -

- (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."

8. The definition of 'Work Contract service' involves [i] transfer of property in goods involved in the execution of any contract which leviable to tax as sale of goods and [ii] construction of a new residential complex or a part thereof. Every service of work contract generally has a contract of work to be carried out with certain condition. In the instant case, the appellant have an agreement for construction of Residential buildings and sale with certain conditions. This fact was not disputed. As per contention of the adjudicating authority, vide para 16.4 of the impugned order, the appellant had entered into development agreement with land owner to develop properties as constructed Residential Buildings and sale the same on his own and other conditions mentioned in agreement. For construction of a new residential complex, if the contract involved transfer of property in the execution of such contract leviable to tax on sale of goods, besides the construction itself, such a contract can be classified as 'works contract'. These facts has been uphold by the Hon'ble Tribunal in the case of M/s Mantri Developers Pvt Ltd [2014 (36) S.T.R. 944 (Tri. - Bang] by following Hon'ble Supreme Court's decision in the case of Larsen & Toubro Ltd. In the instant case, the undisputed fact revealed that the appellant had registered for payment of tax in respect of portion involving transfer of property under the AP VAT Act, 2005 and it was engaged in the construction of residential complex. By following the ratio of the decision of M/s Mantri Developers supra, such activity covers by 'works contract'. The fact that appellant entered into individual contracts in two stages with buyers of flats, first for undivided share of land and second for construction of the flat, was immaterial. For sake of clarity, the relevant para of the said decision of Hon'ble Tribunal is as under:

6. The definition of works contract in Section 65(105)(zzzza) clearly covers construction of new residential complex or a part thereof. Therefore in the case of construction of a new residential complex, if the contract involves transfer of property in the execution of such contract leviable to tax on sale of goods, such a contract can be classified as works contract. In this case, the appellants have registered for payment of tax in respect of portion involving transfer of property under the AP VAT Act and the appellant is engaged in the construction of residential complex. Therefore, we find that the activity is clearly covered by



works contract service. Further, we also find that the Hon'ble Supreme Court in the case of *Larsen and Toubro Ltd. and Another v. State of Karnataka and Another* - (2013) 65 VST 1 (SC) = 2014 (34) S.T.R. 481 (S.C.) = 2014 (303) E.L.T. 3 (S.C.) also took the view that activities of construction of residential complex and transfer of individual flats after construction has to be treated as works contract for the purpose of levy of VAT. Para 93 and Para 100 of the Hon'ble Supreme Court decision are applicable and are reproduced below :-

93. The question is : Whether taxing sale of goods in an agreement for sale of flat which is to be constructed by the developer/promoter is permissible under the Constitution? When the agreement between the promoter/developer and the flat purchaser is to construct a flat and eventually sell the flat with the fraction of land, it is obvious that such transaction involves the activity of construction inasmuch as it is only when the flat is constructed then it can be conveyed. We, therefore, think that there is no reason why such activity of construction is not covered by the term "works contract". After all, the term "works contract" is nothing but a contract in which one of the parties is obliged to undertake or to execute works. Such activity of construction has all the characteristics or elements of works contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. When the transaction involves the activity of construction, the factors such as, the flat purchaser has no control over the type and standard of the material to be used in the construction of building or he does not get any right to monitor or supervise the construction activity or he has no say in the designing or lay-out of the building, in our view, are not of much significance and in any case these factors do not detract the contract being works contract insofar as construction part is concerned.

100. We have no doubt that the State legislatures lack legislative power to levy tax on the transfer of immovable property under Entry 54 of List II of the Seventh Schedule. However, the States do have competence to levy sales tax on the sale of goods in an agreement of sale of flat which also has a component of a deemed sale of goods. Aspects theory though does not allow the State legislature to entrench upon the Union List and tax services by including the cost of such service in the value of goods but that does not detract the State to tax the sale of goods element involved in the execution of works contract in a composite contract like contract for construction of building and sale of a flat therein. In Para 88 of *Bharat Sanchar*, the Court stated : "the aspects theory does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax". Having said that, the Court also stated that the States were not competent to include the cost of service in the value of the goods sold (i.e. the SIM card) nor the Parliament could include the value of the SIM card in the cost of services. But the statement in Para 92(C) of the Report is clear that it is up to the States to tax the sale of goods element in a composite contract of sale and service. *Bharat Sanchar* [(2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.)] thus supports the view that taxation of different aspects of the same transaction as separate taxable events is permissible.

9. The adjudicating authority has made the above cited decision inapplicable to the instant case by stating that the Hon'ble Court has specifically noted that Construction of Residential Complex service, Commercial Construction service are applicable only for the taxation of pure service contract. This is not a correct interpretation. The Hon'ble Court has clarified that "for construction of a new residential complex, if the contract involved transfer of property in the execution of such contract leviable to tax on sale of goods, besides the construction itself, such a contract can be classified as 'works contract'. Further, in the instant case, as stated above there is an agreement between the appellant and land owner to develop properties as constructed Residential Buildings and sale the same on his own and



other conditions mentioned in agreement. Therefore, I find that the appellant has correctly classified the service under "Work Contract Service". In the circumstances, denial of Cenvt credit as per condition of Notification No.1/2006 dated 01.03.2006 is not correct and tenable.

10. Further more, I find that the CBEC vide circular No.128/10/2010-ST dated 24.08.2010, while answering a question "*While prior to the said date services like Construction; Erection, commissioning or installation; Repair services were classifiable under respective taxable services even if they were in the nature of works contract, whether the classification of these activities would undergo a change?*" has clarified that "*As regards the classification, with effect from 1-6-2007 when the new service 'Works Contract service' was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 1-6-2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of Section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date.*" In this circumstance, I do not find any merit in the contention of the adjudicating authority that the appellant has specifically classified their service under 'Work Contract service' wrongly instead of 'Construction Residential complex service' so as to avail the availed Cenvat credit.


11. In the instant case, the appellant has further contended that demand under longer period cannot be invoked. I find merit consideration in the said argument. I find that the appellant has filed ST-3 return for the relevant period in respect of service viz 'Construction of Residential Complex' and r 'Work Contract Service' and shown paying tax as availing Cenvat credit under the service category of 'Work Contract Service'. It is an admitted fact that the department has not objected at any point of time that the classification of service adopted by the appellant is wrong till at the time of Audit. Therefore, the department's contention in the show cause notice that at no point of time the appellant disclosed this material fact in any manner is factually not correct. The adjudicating authority has also not put forth any contention against the argument of the appellant. Further, as stated above, the CBEC has clarified that as per the provisions of Section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after 01.06.2007. In the circumstances, apart from the merit of the case discussed in favour of the appellant, I find that the entire demand involved in the instant case is not covered within the limitation period of one year as stipulated under the Act.

12. In view of above discussion and by following the decision supra, I allow the appeal filed by the appellant and set aside the impugned order.



11. The appeal stands disposed of accordingly.

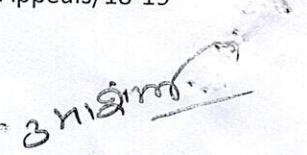
Attested


(Mohanan V. V. V.)
Superintendent (Appeal),
Central Tax, Ahmedabad.

By RPAD.

To,
M/s Bhakti Infrastructure Pvt Ltd,
28, Vijayant Park Society, Hirawadi Road,
Saijpur Bogha, Ahmedabad
Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad-Noroth.
3. The Assistant Commissioner, System, Central Tax, Ahmedabad North.
4. The Assistant Commissioner, CGST, Div-II, Ahmedabad North
5. Guard File.
6. P.A.


(उमा शंकर)

प्रधान आयुक्त (अपील्स)

Date : .2 .2019

