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 **टेलेफैक्स** : 079 - 26305136

क फाइल संख्या : File No : **V2(ST)187 /North/Appeals/2018-19** 9925 to 9929

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-002-APP-203-18-19** 28.03.2019

दिनाँक Date : **20/03/2019** जारी करने की तारीख Date of Issue _____

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-OriginalNo**Div- VII/North/113/Refund/Housing/18-19** Dated **23/10/2018** Issued by **Assistant Commissioner ,** Central GST , Div-VII , Ahmedabad North.

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

M/s Housing & Urban Development Corporation 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 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 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 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

M/s. Housing & Urban Development Corporation Ltd., 4th Floor, Gruh Nirman, Ashram Road, Ahmedabad *(hereinafter referred to as 'the appellants')* have filed an appeal against the Order-in-Original number Div-VII/North/113/Refund/Housing/18-19 dated 23.10.2018 *(hereinafter referred to as 'impugned order')* passed by the Assistant Commissioner, Central Tax, Division-VII, Ahmedabad-North *(hereinafter referred to as 'adjudicating authority')*;

2. The facts of the case, in brief, are that the appellants had filed a refund claim amounting to ₹39,97,732/- for the period 2012-13 to 2017-18 before the adjudicating authority. Later on the appellants amended their refund claim to ₹ 29,74,276/-. During the course of scrutiny, the adjudicating authority found that the claim of refund was beyond one year and accordingly, disposed off the refund claim application of the appellants, vide the impugned order, on the ground of time bar under the provisions of Section 11B of the erstwhile Central Excise Act, 1944 made applicable to the Service Tax vide Section 83 of the erstwhile Finance Act, 1994.

3. Being aggrieved with the said verdict, the appellants preferred an appeal before me. The appellants argued that they had paid full Service Tax against 50% tax liability as per Notification number 30/2012-ST dated 20.06.2012. They further clarified that the excess payment was made by them due to their mistake of interpretation of law and therefore, the amount which was in excess of the duty liability, should be treated as deposit with the government and not as a tax and therefore, the issue should be out of the purview of Section 11B of the erstwhile Central Excise Act.

4. Personal hearing in the matter was granted and held on 18.01.2019 wherein Shri Pravin Dhandharia, Chartered Accountant, appeared before me and reiterated the contents of appeal memo. He submitted that 150% duty has been paid and that is undisputed, hence, 50% excess amount is not duty but deposit and therefore, limitation under Section 11B is not applicable. He further tabled before me the judgment of Hon'ble High Court in the case of Joshi Technologies International vs. Union of India.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. I find that the adjudicating authority has rejected the refund claim on the ground of limitation without going to the merit of the case.

6. At the onset, I find that the appellants were supposed to execute their tax liability as per the Notification number 30/2012-ST dated 20.06.2012.

However, instead of 50% Service Tax (under Reverse Charge Mechanism), they paid 100% tax and when they came to know about their mistake, they applied for refund of the excess amount of Service Tax. I also find from the impugned order that the appellants have regularly paid 100% Service Tax from 2012-13 to 2017-18 showing that they were sincere about the payment of tax. Moreover, I find that the appellants have submitted photocopies of several affidavits where the sub-contractors have committed to pay their part of Service Tax. The appellants have also submitted before me, copies of Chartered Accountants certificates confirming that Service Tax had been paid by the sub-contractors. The adjudicating authority, in the impugned order, did not counter the above facts. In fact in the Discussion and Finding part of the impugned order, the adjudicating authority has quoted a clarification from the Service Tax department mentioning that sub-contractors are liable to pay 50% of Service Tax and if the appellants had paid in excess, they could claim the refund. I reproduce the said quote below, verbatim;

"The main concern is, when full service tax is already paid by HUDCO, the reimbursement to CPWD for further reimbursing to Sub-Contractors, would tantamount to double taxation. Also HUDCO has been provided one clarification received by CPWD from Service Tax Department (ref: F.No.STC/4-1/Tech/Misc/15-16/143, dt. 18.05.2015) clearly mentioning that Sub-Contractors are liable to pay 50% of the tax dues and if HUDCO has paid in excess then 50% of the tax due, refund can be claimed."

I further reproduce below, verbatim, the next paragraph where the adjudicating authority wonders as to why the appellants continued to pay 100% Service Tax even after clarification dated 18.05.2015;

"From the ground of refund submitted by the claimant, it is observe that 50% of Service Tax paid by the sub-contractor are yet to be reimbursed to the CPWD. The Joint Commissioner, Service Tax Ahmedabad has already clarified vide letter F.No. F.No.STC/4-1/Tech/Misc/15-16/143, dt. 18.05.2015 that Dub-Contractors are liable to pay 50% of the tax dues, I do not understand as to why HUDCO continued to pay 100% Service Tax even after the clarification dated 18.05.2015."

Thus, it is quite clear from the above that the adjudicating authority did not negate the fact that the appellants had paid Service Tax more than they were required to pay. However, it seems that the adjudicating authority did not personally verify the fact that sub-contractors have paid 50% of the Service Tax. The adjudicating authority is also directed to verify and confirm that the appellants have paid duty as claimed by them and the same is not adjusted in the liability of the subsequent period. He is also directed to look into the applicability of unjust enrichment. He only relied upon the facts

mentioned in the **grounds of refund** submitted by the appellants. He should have investigated the fact independently and mentioned the same in the impugned order. In view of the above only, the case is needed to be remanded back to the adjudicating authority for proper verification and a fresh order.

7. Thus, looking to the intention of the appellants and the prevailing situation, if the adjudicating authority finds that the appellants had actually paid excess amount of Service Tax that they were not liable to pay, their payment of duty may be treated as a procedural lapse on their part or payment due to mistake of law and there would be no reason to deny them the refund of excess amount paid. The law should be always applied to help the trade and not to punish them on flimsy procedural grounds. I have seen many instances where tax has been paid on goods or on services which are not at all leviable to tax. Often the tax payers pay such amounts due to insufficient knowledge on their part or on the part of Revenue who coax them to pay to be on the safe side. Later, when it is realized that the tax is not payable, refund claims are made which are rejected by Revenue on the ground of time bar. The statutory time bar given in the Service Tax, Excise and Customs Acts is invoked on the basis of judicial pronouncement. I am of the belief that the normal statutory time limit does not apply if the goods or services are not taxable. The court of law has always treated this subject with a very rational approach to ensure that the genuine tax payers are not penalized on limitation issues. There are plentiful of case laws to quote where the higher courts have negated the stringent approach of the department where the refund of unauthorized tax has been rejected with flimsy grounds.

In Salonah Tea Company [1988(33) ELT 249(SC)], the Hon'ble Supreme Court had held that as taxes should be paid by the citizen as soon as they are due in accordance with law, equally, taxes collected without authority of law, from a citizen, should be immediately refunded.

In Cawasi & Co. case [1978 E L T (J 154)], the Hon'ble Supreme Court observed that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known, be it 100 years after the date of payment. This judgment has been quoted and depended upon by the following judgment of the Hon'ble Andhra Pradesh High Court.

In the case of U Foam Pvt. Ltd. vs the Collector of Central Excise -1988 (36) E L T 551(A P), the issue was that Revenue rejected the refund quoting the time limit under Rule 11 of the Central Excise Rules, 1944, and Section 11B of the Central Excises and Salt Act, 1944. The high court held that *"the period of limitation to be applied is three years from the date when the assessee discovered the mistake in the payment of duty, or from the date*

when it came to the knowledge of the assessee that it is entitled to the refund".

In the case of Hexacom (I) Ltd. vs CCE, Jaipur - 2003 (156) E L T 357 (Tri - Del), the tribunal held that if any amounts are collected erroneously as representing Service Tax, which is not in force, there is no bar to the return of such amounts. The time limit under Section 11B of Central Excise Act, 1944 does not apply. The tribunal observed the following;

> *"We have perused the records and heard both sides. It is not in dispute that no service tax was leviable during the period in question. Therefore, whatever payment was made did not relate to Service Tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of Service Tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to service tax. Therefore, if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct".*

In the case of CCE, Raipur vs. Indian Ispat Works Ltd -2006 (3) S T R 161 (Tri -Del), the Tribunal held that, *"The department has allowed the claim of the respondents for the period 16-11-97 to 1-6-98, but rejected the refund claim for the previous period and subsequent period as time barred. The rejection of the claim of refund is wrong as it can be seen from the records, that the amount paid by the respondents is not a tax, but an amount collected by the department without any authority of law".* In the case of CCE, Bangalore vs Motorola India – 2006 (206) E L T 90 (Kar), the high court has held that in the case of claim of refund, limitation under Section 11B of Excise Act is not applicable since the amount paid by mistake in excess of duty and such amount cannot be termed as duty. Therefore, the conclusion is clear that if a tax has been collected which is not leviable at all, the time limit given in the tax laws does not apply. The general time limit under the Limitation Act 1963, applies under which the limit is three years from the time of coming to know of it. As, legally, there was only 50% tax liability on their part, the excess amount of Service Tax already paid by them has to be treated as deposit and not tax. When the amount paid by the appellants is to be treated as deposit, the principle of limitation and all other restricting criterion would not be applicable to the case.

8. Therefore, in view of the discussion held above, I remand back the case to the adjudicating authority with direction to examine independently.

whether 150% of Service Tax has been actually paid and whether all the sub-contractors have paid 50% of Service Tax as per the guidelines of Reverse Charge Mechanism or otherwise. If the above information comes to be authentic, then the adjudicating authority should allow the refund with consequential benefits as there would be no reason to reject the excess amount, on the ground of limitation under Section 11B, as discussed in paragraph 7 above.

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

9. The appeal filed by the appellants stands disposed off in above terms.

3/12/19

(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED

27/03/19

(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS), AHMEDABAD.

To,

Housing & Urban Development Corporation Ltd.,

4th Floor, Gruh Nirman, Ashram Road,

Ahmedabad

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad.
2) The Commissioner, Central Tax, Gandhinagar.
3) The Dy./Asst. Commissioner, Central Tax, Mehsana Division.
4) The Asst. Commissioner (System), Central Tax, Hq., Gandhinagar.
5) Guard File.
6) P. A. File.