



सत्यमेव जयते

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

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क फाइल संख्या : File No : **V2(ST)23 /North/Appeals/2018-19** / 6225 to 6229

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-002-APP-56-18-19**

दिनांक Date : **23-Aug-18** 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-Original No **STC/75/JC/2009** Dated **29-Jan-10** Issued by **Joint Commissioner** , Service Tax , Div-III , Ahmedabad .

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

M/s Dharnidhar Developers

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 :-

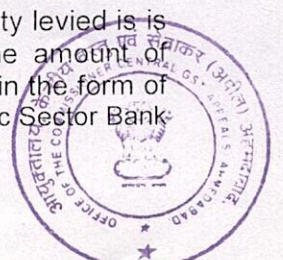
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

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.

D.A



(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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) 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 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.

रजिस्टर्ड डाक ए.डी. द्वारा

दूरभाष : 26305065



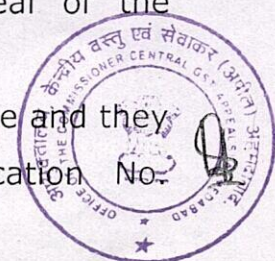
ORDER IN APPEAL

This is an appeal filed by M/s Dharnidhar Developers, 62, Surjen Complex, B/H SRP Quarters, New Naroda, Saijpur bogha, Ahmedabad-382345 (herein after referred to as the appellants) against the OIO No. STC/75/JC/2009 dtd. 29.01.2010 (herein after referred to as the impugned order) passed by the Joint Commissioner, Service Tax, Ahmedabad (herein after referred to as the adjudicating authority).

2. The brief facts of the case are that the appellants were engaged in providing their services of construction of residential complex as defined under Section 65(30a) of the Finance Act, 1994 (herein after referred to as the Act). They had filed ST-3 returns for the period April-2007 to September-2007 and it was noticed that they had paid service tax @ 2% instead of 12%. It was also noticed that they were not registered for the Works contract Service (WCS) w.e.f. 01.06.2007 and they had paid their service tax as per Works Contract Service. They had not discharged service tax amounting to Rs. 8,57,915/-. Accordingly, a show cause notice dtd. 03.12.2008 under Section 73 (1) of the Act was issued to the appellants. The adjudicating authority, after having considered their defence arguments and case records, held that the appellants were not entitled to payment of service tax under WCS as they had not followed prescribed procedure by not opting for the scheme of payment of service tax under WCS and had not reclassified their services from services of construction of residential complex as defined under Section 65(30a) of the Act to WCS. He, vide the impugned order, confirmed the demand of differential service tax of Rs. 8,57,915/- along with interest and also imposed penalties under various Sections of the Finance Act, 1994.

3. Being aggrieved by the impugned order, the appellants have filed this appeal on the following grounds:

- a) That the adjudicating authority has not considered the circular that no service tax was payable;
- b) That they had assigned the said mater to a professional and the professional did not inform the appellants about the proceedings or outcome of the proceedings of the subject show cause notice;
- c) That in an identical issue of the appellant group company i.e. M/s Dwarkesh Corporation, Ahmedabad, the Hon'ble Appellate Commissioner, vide Order-in-Appeal No. 324/210(STC)/MM/Commr.(A)/Ahd dtd. 23.09.2010 has allowed the appeal of the appellants;
- d) That the revision of classification was only a procedural issue and they were eligible for the exemption provided vide Notification No.



18/2005-ST dated 07.06.2005 and Notification No. 01/2006-ST dtd. 01.03.2008 under the category of construction of residential complex service. The said notification provides for charging of service tax on a value which is 33% of the gross amount charged;

- e) That when the matter was causing confusion and the deptt. had to issue a Circular No. 98/1/2008-ST dtd. 04.01.2008, penalty should not have been imposed;
- f) That the issue in the present appeal stands clarified vide the Board's Circular No. 108/02/2009-ST dtd. 29.01.2009 in which it has been clarified that such activity of residential complex would not be subjected to service tax;

4. The personal hearing in the case was held on 23.07.2018 in which Shri J. N. Bhagat, Advocate appeared on behalf of the appellants. He reiterated the grounds of appeal and pointed out para 5 (2) of Hon'ble Gujarat High Court for limitation and pointed out that Board's Circular dtd. 29.01.2009 and OIA No. 324/2010 of Commissioner (Appeal), Ahmedabad. He also made additional submission and reiterated the contentions of grounds of appeal.

5. I have carefully perused the documents pertaining to the case and submitted by the appellants along with the appeal. I have considered the arguments made by the appellants in their appeal memorandum as well as oral submissions during personal hearing. I find that the oral order dtd. 19.04.2018 in the Special Civil Application No. 1914 of 2018 filed by the appellants given by the Hon'ble Gujarat High Court has given orders that the appellants be allowed to file appeal before the undersigned and be heard on merits ignoring the question of limitation. I accordingly proceed to decide the issue without considering the issue of limitation in filing the present appeal.

6. I find that the issue to be decided in the instant case is whether the service tax has been rightly demanded on the services provided by the appellants.

7. I find that the appellants were engaged in providing their services of construction of residential complex as defined under Section 65(30a) of the Act. They had filed ST-3 returns for the period April-2007 to September-2007 and it was noticed that they had paid service tax @ 2% instead of 12%. It was also noticed that they were not registered for the Works contract Service (WCS) w.e.f. 01.06.2007 and they had paid their service tax as per Works Contract Service. They had not discharged service tax amounting to Rs. 8,57,915/-. It was held in the impugned order that the appellants were not entitled to payment of service tax under WCS as they had not followed prescribed procedure by not opting for the scheme of payment of service tax



under WCS and had not reclassified their services from services of construction of residential complex as defined under Section 65(30a) of the Act to WCS.

8. I find that there are two aspects of the issue. The first point is that they were engaged in providing their services of construction of residential complex as defined under Section 65(30a) of the Act. Works Contract Service was introduced w.e.f. 01.06.2007 and since a new service classification was introduced which provided more specific classification, the services of construction of residential complex would fall under works contract service w.e.f. 01.06.2007. The second issue was of rate of service tax on the ongoing contracts which had started before 01.06.2007 and continued thereafter i.e. whether the rate of service tax would be as per the rate applicable on the services of construction of residential complex or as per the rate applicable to works contract service.

9. First of all, I take up the first aspect of the issue. Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 provided option to pay service tax @ 2% of the gross amount charged for the works contract. However, the service provider opting for composition scheme for payment of service tax should exercise the option prior to payment of service tax. To clarify the issue, the Board issued a Circular No. 98/1/2008-S.T., dated 4-1-2008 in which it was made clear that vivisecting a single composite service and classifying the same under two different taxable services depending upon the time of receipt of the consideration is not legally sustainable. Accordingly it gave an impression that it was not permissible to the assessees to change the classification of ongoing projects. Since confusions/disputes prevailed with respect to long term works contracts which were entered into prior to 1-6-2007 (when the taxable service, namely, Works contract came into effect) and were continued beyond that date, the Board further issued a Circular No. 128/10/2010-S.T., dated 24-8-2010 in which the confusions and doubts were addressed and were clarified. It was 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. In view of this clarification, I find that there was automatic re-classification of the service provided by the appellants before 01.06.2007 to "works contract" service.

10. Now coming to the second aspect of the issue of whether the appellants were eligible to pay service tax as per Works Contract Service on the ongoing contracts, I find that the Circular No. 128/10/2010-S.T., dated 24-8-2010 has made it absolutely clear which I quote as under:



"As regards applicability of composition scheme, the material fact would be whether such a contract satisfies rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract. Once such an option is made, it is applicable for the entire contract and cannot be altered. Therefore, in case a contract where the provision of service commenced prior to 1-6-2007 and any payment of service tax was made under the respective taxable service before 1-6-2007, the said condition under rule 3(3) was not satisfied and thus no portion of that contract would be eligible for composition scheme. On the other hand, even if the provision of service commenced before 1-6-2007 but no payment of service tax was made till the taxpayer opted for the composition scheme after its coming into effect from 1-6-2007, such contracts would be eligible for opting of the composition scheme." (emphasis supplied)

In view of the above, it is clear that a service provider **who paid service tax prior to 01.06.2007** for the taxable service, namely, erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, as the case may be, is not entitled to change the classification of the single composite service for the purpose of payment of service tax on or after 01.06.2007 and hence, is not entitled to avail the Composition Scheme. I would like to refer to ascertain the fact of payment from the show cause notice. In 2nd para of impugned show cause notice, it is mentioned that ST-3 return for the period April-2007 to September-2007 was filed on 18.12.2007. Further para 3 of the show cause notice shows that the said service provider has paid service tax @ 2% instead of 12%. This clearly establishes that the appellants paid ST @ 2% only which was introduced on 01.06.2007 and therefore not hit adversely by the Circular dated 24.08.2010. Moreover on page 3 of the impugned show cause notice, penultimate para, the main allegation is that since the appellants have not yet taken registration under works contract service and no option for it has been received by the department, the appellants are not eligible for composition scheme. I find that not opting for "Works Contract Service" is only procedural requirement in view of circular dated 24.08.2010 quoted supra. Since the impugned show cause notice was issued in 2008, the authority was not having the benefit of the Circular dated 24.08.2010 which clarified the whole issue.



12. In view of the above findings, the impugned order is set aside and the appeal is allowed.
13. The appeal is disposed off accordingly with consequent relief.

अपीलकर्ता द्वारा दर्ज की गयी अपील का निपटारा उपरोक्त तरीके से किया जाता है !

उमा शंकर

(उमा शंकर)

केंद्रीय कर आयुक्त (अपील्स)

अहमदाबाद

दिनांक:

सत्यापित

धर्मद्र उपाध्याय

(धर्मद्र उपाध्याय)

अधीक्षक (अपील्स),

केंद्रीय कर, अहमदाबाद

By R.P.A.D.

To:

M/s Dharnidhar Developers,
62, Surjen Complex,
B/H SRP Quarters,
New Naroda, Saijpur bogha,
Ahmedabad-382345

Copy to:-

- (1) The Chief Commissioner, CGST, Ahmedabad Zone,
- (2) The Commissioner, CGST, Ahmedabad (North),
- (3) The Dy./Asth. Commissioner, CGST, Div.-III, Ahmedabad (North),
- (4) The Dy./Asth. Commissioner(Systems),CGST, Ahmedabad (North),
- (5) Guard File,
- (6) P.A.File.



