



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

☎ : 079-26305065

टेलीफैक्स : 079 - 26305136



क फाइल संख्या : File No : V2(ST)108/North/Appeals/2018-19

6666 + 06670

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-002-APP-58-18-19

दिनांक Date : 31-Aug-18 जारी करने की तारीख

Date of Issue

5/10/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No Div-VII/North/104/Refund/Geetaben/17-18
Dated 10-Jul-18 Issued by Deputy Commissioner , Central GST , Div-VII ,
Ahmedabad North.

घ अपीलकर्ता का नाम एवं पता

Name & Address of The Appellants

M/s Geeta ben Jigneshkumar Patel

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 :-

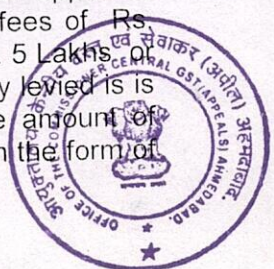
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 is 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, 1988 की धारा 39फ 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 रूपए 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 Geetaben Jigneshkumar Patel, 5-Shudarshan Sociery, Part-2, Naranpura, Ahmedabad (henceforth, "appellant") has filed the present appeal against the Order-in-Original No.Div-VII/North/104/Refund/Geetaben/17-18 dated 10.07.2018 (henceforth, "impugned order") passed by the Deputy Commissioner, Central Tax, Division-VII, Ahmedabad-North (henceforth, "adjudicating authority") rejecting a refund claim of Rs.8,77,686/-.

2. The facts of the case in brief are that appellant booked a bungalow in a scheme 'Venetian Villa' at Shilaj, Ahmedabad developed by M/s. Axis Infrastructure which was later on cancelled. The appellant claimed refund of Rs.8,77,686/- on 23.06.2017 on the ground that before completion of the services i.e. construction of the bungalow, the agreement was cancelled, advance paid was also received back but amount of service tax paid at the time of booking was not refunded to her by the developer. The developer has not refunded service tax portion to the appellant stating that they have already deposited the same to the Government. Therefore, as a bearer of the burden of tax, the appellant has preferred refund. Said refund claim was rejected by the adjudicating authority on 06.10.2017 on the ground that Section 12 E of the Central Excise Act under which the claim was filled was not relevant and other irregularities in respect of cancellation of agreement, service tax payment particulars, returns etc. were found. It was also held that entire amount with service tax has been received by the appellant from the developer and there appeared no scope for refund. Appeal against said order dated 06.10.2017 was decided by me and the case was remanded back to the adjudicating authority under order dated 23.02.2018 with a direction to decide it merit. After verification of ledger, copy of agreement etc. the adjudicating authority found that entire amount of Rs.2,45,00,000/- which includes service tax has been refunded to the appellant by the developer and therefore refund claim was again rejected under impugned order. It was also hold that though the agreement was cancelled, services were provided to the appellant. Refund sought from the department is not sustainable.



3. This appeal has been preferred against the impugned order contesting inter alia that while booking the bungalow the consideration including service tax was paid to the developer. However before the completion of service the contract was forfeited but the developer has paid refund of said advance amount without service tax portion; that since the service has not been completed, the service tax paid requires to be refunded by the developer along with amount taken as advance; that since the developer i.e. service provider has not refunded service tax portion stating that the same has been deposited with the Government by them, the appellant as a bearer of burden of duty under section 12(e) of the Central Excise Act has applied for refund with the department.

4. In the personal hearing held on 28.08.2018, Shri Vipul Khandhar Chartered Accountant reiterated the grounds of appeal, provided copy of certificate dated 29.06.2018 of Deepak Jayantilal Shah & Co., stating that it was not considered even in remand decision by adjudicating authority.

5. I have carefully gone through the appeal. The ground advanced by the appellant is that in the event of cancellation of an agreement wherein bungalow was booked in a project, no service has been received and hence service tax suffered needs to be refunded to her. The adjudicating authority after necessary verification of records has again arrived at the conclusion that entire amount of consideration received has been refunded to the appellant.

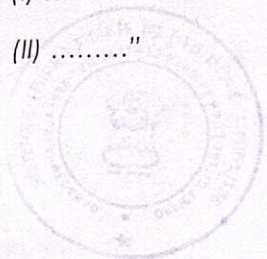
6. I find that under the negative-list regime of Service Tax, with effect from 01.07.2012, certain activities have been made chargeable to Service Tax, as 'declared services' by virtue of Section 66E of the Finance Act, 1994. One of such declared services is Construction Services and the relevant text of the statute reads as under:

"Section 66E: The following shall constitute declared services, namely:—

- a) -----
 b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.
Explanation.—For the purposes of this clause,—

(I)

(II)"



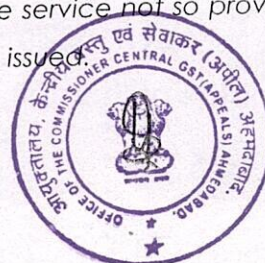
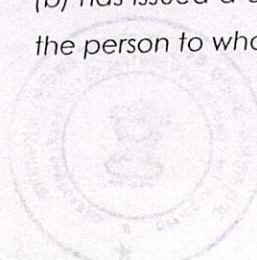
Above provisions makes it clear that, the activity of construction attracts service tax, if a part or whole of the consideration towards such construction is received prior to Completion Certificate/ Building Use permission. The activity of construction, in which the entire consideration is received after Building Use Permission, is a sale of immovable property and has been kept out of the scope of 'declared services'. In the case on hand the service provider, a developer of the scheme has collected tax in respect of a unit which was booked before the issue of Building Use (BU) permissions and has accordingly discharged his service tax liability. Prior to completion of the project, services viz. landscaping, works contractor (for construction), electrical fittings, architect, furniture for doors/windows, tiles fitting, coloring, etc. are utilized by the developer/builders. All such activities which takes place before issuances of completion certificate by the competent authority are continuous services in nature. Client when books unit in an ongoing project, said services automatically happens to be provided to the members. Therefore, during the period unit remain booked for the appellant, the construction of the scheme were under progress and flow of services existed. The plea of the appellant that no service has been provided has thus no leg to stand. Further, this is also not a case wherein evidence to the effect that the unit in question was booked after issuance of completion certificate and service tax was not applicable at all, are placed.

7. Further, rule 6(3) of Service Tax Rules provides provisions for taking credit of the service tax if paid in excess. The same being relevant are reproduced below;

*(3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, [or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a **contract**], the assessee may take the credit of such excess service tax paid by him, if the assessee.-*

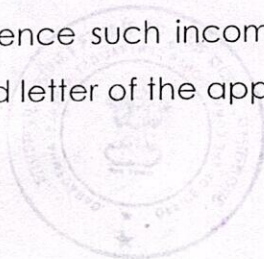
(a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or]

(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.



I find that the service provider i.e. the developer would have exercised his right of taking credit of tax paid if paid in excess in the instant case and necessary entry to this effect might have been made at column D4 of ST- 3 returns. The appellant has not put forth any evidence based on which it can be concluded that no such adjustment by way of credit has been made by the service provider. Refund of service tax if granted may result in loss of revenue in such a case.

8. To support their claim the appellant has provided certificate dated 26.06.2018 of CA firm wherein it is certified that service tax Rs.8,77,687/- has been recovered from the appellant and paid by the service provider. Service provider needs to discharge his service tax liabilities on total advances received from various members during the month/quarter and membe-wise service tax challans are not required. Therefore, in order to verify the tax payment in respect of a particular member, reconciliation of entire amount of advance and payment of service tax needs to be done. The certificate does not indicates such data. The certificate is also silent on the issue of which record of the service provider were verified, whether adjustment under rule 6(3) of Service Tax Rules were made or not ? The certificate also highlights the date of payment of service tax by the developer in January to March 2015 and collection of service tax in July 2017. Said fact indicates that unit remain booked for more than two and half years and therefore, it cannot be construed that no services were provided during such long period. Another facts reveals from the certificate is that letter dated 20.03.2017 of the appellant addressed to M/s. Axis Infrastructure states that advance Rs.1,73,45,000/-, Rs.2,00,000/-, Rs.61,25,000, & Rs. 2,45,000/- were paid on 14.10.2014, 29.12.2014, 20.03.2015 & 08.05.2015 respectively whereas the certificate shows that service tax thereof has been paid by M/s. Axis Infrastructure in January to March 2015. Said data reveals delayed payment of service tax by the service provider firm. If the tax was paid late as apparent from above, has interest been paid? No such proof has been submitted by either appellant or CA certificate. It also shows that CA has not examined the appropriate records or he is hiding the fact. If the tax payment has been delayed as apparent from above, was interest paid? If this fact was not disclosed to the department, this misstatement needs to be examined and appropriate legal action should be taken before granting refund. Such facts having impact on the tax needs to be considered before refund of tax and hence such incomplete and faulty certificate cannot be relied upon. Said letter of the appellant and certificate are placed below for



ease of reference:

FROM:-

GEETABEN JIGNESHBHAI PATEL
5, SUDARSHAN SOCIETY PART - II,
NAGANIPURA
AHMEDABAD - 380 013
GUJARAT

DATE: 20/03/2017

TO,

AXIS INFRASTRUCTURE
"VENETIAN VILLAS"
OPP. ANAND NIKETAN SCHOOL,
THALTEJ-SHILAJ ROAD,
AHMEDABAD

DEAR SIR,

Please note that I have paid the following amount as an advance to book Bunglow No. :- 13. Details are as under :-

Date	Amount
14/10/2014	1,73,45,000/-
29/12/2014	2,00,000/-
20/03/2015	61,25,000/-
08/05/2015	2,45,000/-
TOTAL(RS)	2,39,15,000/-

Due to unavoidable circumstances I want to discontinue the deal and request you to kindly refund the amount as earliest as possible.

I would appreciate your quick action.

Thanking You,

Yours Faithfully,

Geeta J. Patel
(GEETA JIGNESH PATEL)

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DEEPAK JAYANTILAL SHAH & CO.
Chartered Accountants

Deepak J. Shah
B. Com., F.C.A.
Chartered Accountant

T-12/A, Vikram Chamber, Ashram Road, Ahmedabad - 380 009.
Phone : 079-2754 6279 Mobile : 98240 26289 Email : djshah14364@gmail.com

CERTIFICATE

We have verified the records of M/s. Axis Infrastructure, Opp. Anand Niketan School, Nr. Shilaj-S.P. Ring Road, Ahmedabad - 380059 having Service Tax No.AASFA2924MSD001 and certify that the said firm has paid Service Tax in respect of Sale of Bunglow to Mrs. Geetaben Jigneshbhai Patel as per the details given in Annexure - A and has also recovered the said amount of Service Tax from the said party, details as per Annexure - B attached herewith.

Place: Ahmedabad
Date: 29-06-2018



For, Deepak Jayantilal Shah & Co.
Chartered Accountants

Deepak J. Shah

(Deepak J Shah)
Proprietor
Mem No.: 14364
FRN: 113625w



Deepak Jayantilal Shah & Co.
Chartered Accountants

CONTINUATION SHEET.

ANNEXURE - A

Details of Service Tax Paid by the Firm

<u>Sr. No.</u>	<u>Name</u>	<u>Amt of Service Tax Incl. Cess</u>	<u>Date of Payment</u>	<u>Challan No.</u>
1	Geetaben Jigneshbhai Patel	Rs. 6,43,153/-	06-01-2015	22096
2	Geetaben Jigneshbhai Patel	Rs. 7,416/-	06-01-2015	22096
3	Geetaben Jigneshbhai Patel	Rs. 2,27,115/-	31-03-2015	29618
Total		Rs. 8,77,684/-		

ANNEXURE - B

Details of Service Tax Recovered by the Firm

<u>Sr. No.</u>	<u>Name</u>	<u>Date of Payment</u>	<u>Chq. No. & Dt. Of Credit in Bank A/c</u>	<u>Amt Rs.</u>
1	Geetaben Jigneshbhai Patel	19-07-2017	123381, AXIS Bank Ltd. RTGS No. UTIB0000001 UTIBR52017071900352591	Rs. 8,77,684/-



For, M/s. Deepak Jayantilal Shah & Co.

Deepak J. Shah
Proprietor

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9. Further, above letter dated 20.03.2017 of the appellant addressed to M/s. Axis Infrastructure mentions details of total payment of Rs.2,39,15,000/-. However, under the Grounds of Appeal, said amount is shown Rs.2,45,00,000/-. Thus, actual value of consideration itself is not clear in the data provided by the appellant, therefore, all other findings relating to ST refund, as claimed becomes doubtful and concocted. In view of this, it is not understood, how CA has given the certificate? The CA certificate should have also examined the fact whether any adjustment by way of taking credit of the tax involved has been made by the service provider under the provisions of rule 6(3) of Service Tax Rules and

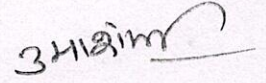


necessary details has been shown in ST-3 returns as discussed in para 7 supra. In absence of the same, CA certificate is incomplete. I find a lot of lacuna in the CA certificate, which makes it unreliable and unacceptable.

10. Above aspects are required in addition to the primary checks that amount paid as service tax has not been received back. Since entire amount paid as advance including service tax has been received back by the appellant, I do not interfere with the order of lower authority. The appeal is accordingly rejected.

11. 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.

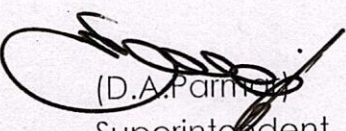


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:

Attested


(D.A. Parmar)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
Geetaben Jigneshkumar Patel,
B. No. 5-Sudarshan Society,
Part 1-2, Naranpura, Ahmedabad 380 013

Copy to:

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



