



आयुक्त का कार्यालय, (अपीलस)

Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

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क फाइल संख्या : File No : V2(ST)242 /North/Appeals/2018-19 / 11320 to 11324

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-002-APP-71-19-20

दिनांक Date : 24/06/2019 जारी करने की तारीख Date of Issue 03/07/2019

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No. CGST/A'bad-North/Div-VII/S.TAX-AC-07-18-19 Dated 30/01/2019 Issued by Assistant Commissioner , Central GST , Div-VII , Ahmedabad North.

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

M/s Omkar Corporation

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 :-

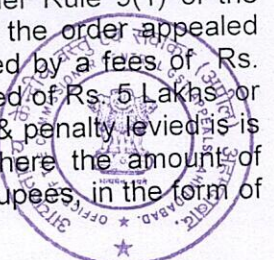
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ 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 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 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

M/s. Omkar Corporation, Ghatlodia, Ahmedabad (henceforth, "appellants") filed the present appeal against the Order-in-Original No. CGST/A'bad-North/Div-VII/S.Tax-AC-07-18-19 30.01.2019(henceforth, "impugned order") passed by the Assistant Commissioner, Central Tax, GST Division-VII, Ahmedabad-North (henceforth, "adjudicating authority").

2. Brief facts of the case are that demand notice dated 04.09.2018 issued to the appellant for short payment of service tax in respect of the period from April 2015 to March 2016 under the category of 'Construction of Residential Complex Service, Construction of other than Residential Complex including commercial/ Industrial building Service' was decided under impugned order confirming service tax along with interest and penalty.

3. Being aggrieved with the impugned order, the appellant preferred this appeal contesting *inter alia*, that allegation regarding non-declaration of actual value of service provided is baseless for which explanation/documents were already provided by the appellant; that Gross Revenue from operation as per audited finance report, considered by the department is the value of 'Sales Journal Entry' recognized on the basis of the accounting policy is not the income ledger for the purpose of service tax; that "Members Contribution " ledger showing the amount received was attached; that in respect of rent income on flats they stated that-It is very usual to believe that the residential flat given on rent were for the purpose of residential purpose only. Mere fact that the property was rented to company cannot be said that the property is not used for the residential purpose. Etc

4. In the personal hearing held on 21.05.2019, Shri Kalpesh Patel, CA reiterated the grounds of appeal.

5. I have carefully gone through the appeal memorandum, written submissions filed by the appellant and the submission made during personal hearing. The issues requiring determination in the case are whether the appellant has not included taxable value in ST-3 returns filed by them and thereby not paid service tax on amount received as advance from members and another issue whether income received by the appellant from renting of flats chargeable to service tax.



6. With reference to first issue, I find that the appellant has argued that Gross Revenue from operations as per audited finance report considered by the department is the value of 'Sales Journal Entry' recognized on the basis of the accounting policy and is not the income ledger for the purpose of service tax. They further stated that "Members Contribution" ledger showing the amount received was attached on which appropriate service tax was paid by them. It therefore, needs to be ascertained from the records i.e. 'Revenue from Operations' and 'Members Contribution' ledgers, Bank Statements etc. whether there is any amount **received as advance** for booking of unit and has not been included in the taxable value shown by the appellant under ST-3 returns and if any such amount is found, service tax needs to be paid on such quantum. Simply, for the reason that income is shown under the head 'Revenue from Operations', no tax liability can be tightened on the assessee unless it qualifies as advance against booking of unit developed/constructed by them. So far as impugned order holds entire revenue mentioned under the head 'Revenue from Operations' as taxable under the category 'Construction of Residential Complex Service, it certainly needs to be ascertain whether it forms part of amount **received as advance** for booking of units or not. I observe that this fact has not been verified by the lower authority as contended by the appellant. The issue can therefore, be justified by remitting the matter back for verification in this regard.

7. Another issue pertains to income received by the appellant from renting of flats whether chargeable to service tax or not. In this regard Section 66D of the Finance Act, 1994 i.e. **negative list of services** which specifically covers at clause (m) services by way of **renting of residential dwelling for use as residence**. The provision above stipulates that services by way of renting of residential dwelling for use as residence are covered under negative list and do not attract service tax. Therefore, any **residential unit** when rented out for **use as residence** only can be covered under negative list. The finding of the adjudicating authority states that *"It is not clear as to whether the residence quarter has been allotted for the purpose of commercial activity. As per condition No.4 the house is to be used for residence. It is not forthcoming from the agreement or submission made by the notice that the house was used as residence by the tenant..... But the evidence submitted by the notice does not indicate that the houses leased were used as residence.* This shows that the adjudicating authority accepts that It is not clear as to whether the residence quarter has been allotted for the purpose of commercial activity, still he concludes that the house were not used as residence. This shows that adjudicating authority himself arrived at the

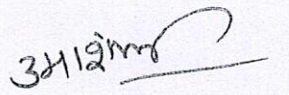


conclusion without taking on record evidence against the appellant. In this context, I observe that the adjudicating authority should bear in mind that no material should be relied in the adjudication order to support a finding against the interests of the party unless the party has been given an opportunity to rebut that material. The appellant has argued that *It is very usual to believe that the residential flat given on rent were for the purpose of residential purpose only. Mere fact that the property was rented to company cannot be said that the property is not used for the residential purpose.* I find force in said argument of the appellant. I observe that before fixing tax liability on the appellant, it needs to be ascertained that the **property is not used for the residential purpose** taking evidence if any on record. Since, the adjudicating authority has not put on record evidence to prove this fact, the matter can be justified by remitting it back for this purpose to the adjudicating authority.

8. In view of the observations above, I remand the case back to the adjudicating authority to ascertain from record whether differential value on which short payment of service tax Rs.5,03,110/- calculated forms part of amount **received as advance for booking of units** and also for ascertaining that the **property leased were not used for the residential purpose**, taking evidence in this regard on record as discussed in para 6 and 7 above and order a fresh accordingly ensuring principle of natural justice.

9. 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.

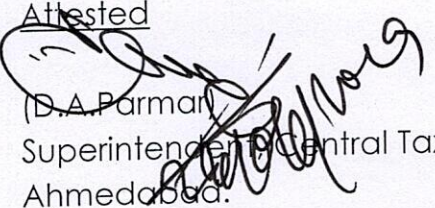


(उमा शंकर)

केंद्रीय कर, प्रधान आयुक्त (अपील्स)

Date:

Attested


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



By R.P.A.D.

To,

M/s. Omkar Corporation,
A-7, Unique City Homes, Nr-Prasang Party Plot,
Ghatlodia, Ahmedabad-380016.

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-North.
4. The Deputy/Asstt. Commissioner, Central Tax, GST Div.-VII, Ahmedabad-North.
- ✓ 5. Guard File.
6. P.A.

