आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

DIN: 20220964SW000001540B

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2393/2021-APPEAL/3626 - 30

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-40/2022-23**
दिनाँक Date : **27-09-2022** जारी करने की तारीख Date of Issue 28.09.2022

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **13/JC/MT/2021-22** दिनाँक: **13.07.2021**, issued by Joint Commissioner, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s Aroma Realities Limited,
   U.G.F 1, Milestone Building,
   Nr. Drive-In-Cinema, Thaltej,
   Ahmedabad-380052

2. Respondent
   The Joint Commissioner,CGST, , Ahmedabad North , 1st Floor, Custom House,navrangpura, Ahmedabad - 380009

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य़ाविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

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।

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

The present appeal has been filed by M/s. Aroma Realities Limited, U.G.F. 1, Milestone Building, Nr. Drive-in-Cinema, Thaltej, Ahmedabad – 380052 (hereinafter referred to as "the appellant") against Order-in-Original No. 13/JC/MT/2021-22 dated 13.07.2021 issued on 14.07.2021 (hereinafter referred to as "the impugned order") passed by the Joint Commissioner, Central GST & Central Excise, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the fact of the case is that the appellant is engaged in providing "Commercial or Industrial Construction Services" and "Construction of Residential Complex Service", etc. and holding Service Tax Registration No. AAHCA3306MST001. The jurisdiction Range Superintendent started an inquiry against the appellant and asked for the documents / details of taxable services provided by them during the period October-2013 to March-2017 vide letter dated 20.06.2017 and thereafter summons dated 20.04.2018, 15.06.2018 & 23.07.2019. During the inquiry / scrutiny of the data received from the appellant, it was noticed that the appellant had short paid Service Tax amounting to Rs. 77,04,083/- on the taxable value of Rs. 63,86,19,189/- during the period from October-2013 to March-2015.

2.1 Subsequently, the appellant was issued a Show Cause Notice No. STC/15-71/OA/2018 dated 10.12.2019 demanding Service Tax amounting to Rs. 77,04,083/- the period from October-2013 to March-2015, under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest and imposition of penalty. The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority and the demand of Service Tax amounting to Rs. 77,04,083/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994. Further (i) Penalty of Rs. 77,04,083/- was also imposed on the appellant under Section 78 of the Finance Act, 1994; (ii) Late Fee of Rs. 51,600/- confirm under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 for failure to file the Service Tax Return in time prescribed under the law; and (iii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(2) of the Finance Act, 1994.

3. Being aggrieved with impugned order, the appellant have filed the present appeal under Section 85 of the Finance Act, 1994 on 30.09.2021 on the following grounds under their Appeal Memorandum:

(1) Demand for Service tax amounting to Rs. 77,04,083/- being short paid on account of members contribution for residential complex and other than residence is not leviable on the Appellant.

- The appellant are realizing collection from customer during the course of the continuation of the construction of the residential flat. The appellant does not realize service-tax separately at the time of amount of collection received from customers before the

completion of construction of the commercial / industrial undertaking. It is only when construction of unit is completed, and sale deed is executed that customer pays the amount of complete service tax to the appellant. Hence, in the interim period before the completion of the construction of the unit, the appellant had to discharge the service-tax liability out of its own pocket. Further, the appellant being a Limited Company has to follow Accounting Standard 7 issued by the Institute of Chartered Accountants of India being mandatory standard to book and recognized the income from construction activity which is also compulsory to comply with the Companies Act, 1956. As per the said standard, if a particular customer has booked unit, then even if the construction of unit is not fully complete than also sale revenue has to be booked and recognized based on percentage of completion of construction activity. The appellant following Point of Taxation Rules discharges service-tax liability on partial sales revenue booked on such partially completed construction activity even if the payment for the same has not been realized from the respective customer.

- The amount of consideration received is not including service tax and hence any payment of service tax during the year is borne by the appellant from their own pocket. From the above, it can be seen that the appellant while booking the sale of the transaction for the year under consideration does not receive any amount separately for service tax. Further, the appellant bear the payment of service tax liability from their own pocket. Moreover, if the customer cancels the booking of the unit, then the appellant are required to repay the entire consideration received without deducting the amount of service tax. Further, the appellant collects the amount of service tax when the Final Sale Deed is executed.
- Further, the service tax being an indirect tax means that whatever amount of tax is levied on service provider is to be recovered from the service receiver. If the service receiver does not pay service tax over and above the consideration, the tax amount will reduce the net consideration / profit of service provider. Though, the service provider has to pay service tax irrespective of the fact that service receiver pays or does pay the same to him.
- Further, the appellant is not required to collect Service Tax on transaction entered after receiving Building Use (BU) permission. Thus, all transaction executed by the appellant after receipt of BU permission are exempt from service tax. Further, the appellant has received BU permission phase wise. As the appellant could not submit the bifurcation of the same, during the course of adjudication proceedings, the adjudicating officer added the entire amount and calculated the service tax on the same. Further during the course of adjudication of the appellant could not submit about the cancellation of the agreement between the parties and the appellant and since the appellant could not submit any evidences about the contribution by the members were returned to them in total the adjudicating authority did not considered the same and added the total amount to the taxable service and calculated the service tax on the same.
- Thus as the customers were not paying the amount of service tax separately, the appellant had to borne the amount of tax from their own pocket there was delay in making payment of service tax. Further, if the customer cancels the booking of the unit then the appellant

is required to return the entire consideration that has been received from the customer without deducting the amount of service tax paid on his behalf. Further, as the appellant were paying service tax from their pocket, there was shortage of funds with the appellant and thus they were not able to make the payment of service tax on time.

(2) Non-imposition of Penalty under Section 77 & 78 of the Finance Act, 1994 on them.

- The appellant paid the amount of service tax, there is no additional amount of service tax liability.
- The appellant did not need to collect service tax on transaction after receipt of BU Permission.
- The appellant had cancelled certain units and considering the same, the appellant was eligible to take the set off of the same.
- Thus, when all transaction are reported in books of accounts, all payment is made appropriately, no penalty shall be imposed.
- The provision of Section 73(4) provide that provision of Section 73(3) will not be applicable if the service tax has not been levied or paid or has been shortly levied or shortly paid or erroneously refunded by the reason of fraud, collusion, willful mis-statement or suppression of facts or contravention of any of the provisions of act or rules made there under with the intent to evade payment of service tax.
- There was no such intent to evade the payment of service tax as they have shown service tax liability in Audited Balance Sheet as well as in books of accounts under the head "Current liability and provisions"
- The appellant also make reference to Section 80 of the Finance Act, 1994 and requested to waive the entire penalty.

4. Subsequently, the appellant submitted additional submission on 08.08.2022, wherein they inter alia submitted the following grounds :

- The adjudicating authority have confirmed the service tax on collection / receipt as per the Show Cause Notice without considering the following:
    - Fresh booking received after receipt of BU Permission which is exempted from Service Tax
    - Amount of advance collection returned to the customer on account of cancellation of the booking by the customer
    - Amount of stamp duty collected from customer and deposited on behalf of customer for the execution of the sale document

They are submitted sheets showing amount of gross collection, collections received after BU permission, cancellation of booking, reduction toward stamp duty collected from customers and comparison of the same with the value as per the service tax returns.

- They submitted that this has been a case of bona fide clerical belief of claiming eligible deductions supported by legitimate evidences. There has been no intention of fraud or collusion, there has been no suppression of facts therefore, the extended period of

issuance of SCN is not applicable. In support of their arguments, they relied on the following judgments:

(i) Padmini Products v. CCE 1989 (43) ELT 195 (SC)

(ii) CCE v. Chemphar Drugs & Liniments 1989 (40) ELT 276 (SC)

(iii) Gopal Zarda Udhyog v. CCE 2005 (188) ELT 195 (SC)

(iv) MP Water & Power Management Institute v. CCE (2009) 20 STT 79 (CESTAT)

(v) Sapphire Security v. CCE (2010) 24 STT 277 (CESTAT)

(vi) Vishal Traders v. CCE (2010) 24 STT 260 (CESTAT)

(vii) Nice Colour Lab v. CCE (2013) 31 taxmann.com 407 (CESTAT)

- They submitted that the imposition of penalty under Section 78 of the Finance Act, 1994 does not arise as the above is a question of procedural lapse and there was no intention to evade payment of duty. For this reason, no penalty can be imposed on the respondents. In support of their arguments, they relied on the following judgments:

(i) Hindustan Steel Ltd. v. The State of Orissa AIR 1970 (SC) 253

(ii) Keliner Pharamaceuticals Ltd. v. CCE 1985 (20) ELT 80

(iii) Pushpam Pharmaceuticals Company v. CCE 1995 (78) ELT 401 (SC)

(iv) CCE v. Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC)

They have not suppressed any facts nor did they have any intention to evade payment of duty. They have provided all the details as and when desired by the department and at no point of time had the intention to evade the service tax or suppressed any fact wilfully from the knowledge of the department. They have inter alia place reliance upon the following decision to submit the information is available on record and no suppression can be alleged on them.

(a) Suvikram Plastex Pvt. Ltd. v. CCE, Bengalore – III 2008 (225) ELT 282 (T)

(b) Rallis India Ltd. v. CCE, Surat 2006 (201) ELT 429 (T)

(c) Patton Ltd. v. CCE, Kolkata – V 2006 (206) ELT 496 (T)

(d) CCE, Tirupati v. Satguru Engineering & Consultants Pvt. Ltd. 2006 (203 ELT 492 (T)

(e) Indian Hume Pipes Co. Ltd. V. CCE, Coimbatore 2004 (163) ELT 273 (T)

- They further submitted that the present issue involves interpretation of complex legal provisions. Therefore, imposition of penalty is not warranted in the present case. In this regard, reliance is placed on the following judgments

(i) Ispat Industries Ltd. v. CCE 2006 (199) ELT 509 (Tri.-Mum)

(ii) Secretary, Twon Hall Committee v. CCE 2007 (8) STR 170 (Tri.-Bang.)

(iii) CCE v. Sikar Ex-Serviceman Welfare Coop. Society Ltd. 2006 (4) STR 213 (Tri.-Del)

(iv) Haldia Petrochemical Ltd. v. CCE 2006 (197) ELT 97 (Tri.-Del.)

(v) Siyaram Silk Mills Ltd. v. CCE 2006 (195) ELT 284 (Tri.-Mumbai)

(vi) Fibre Foils Ltd. v. CCE 2005 (190) ELT 352 (Tri.-Mumbai)

(vii) ITEL Industries Pvt. Ltd. v. CCE 2004 (163) ELT 219 (Tri.Bang.)

- They further submitted that when no tax liability arises, no question of interest is left for determination. For this reason, the proposal made in the show cause notice demanding interest under Section 75 of the Finance Act, 1994 is not sustainable and liable to be set aside.
- They submitted self-certified copies of all the documents along with their additional reply, which they had submitted before the adjudicating authorities and also submitted below mentioned documents with reference to Shop No. 111 at Bavla District, Akruti Arkad Scheme.
  - (a) Ledger Account of the customer, Shri Samirbhai Navinchandra Shah
  - (b) BU Certificate
  - (c) Sale Agreement with party.

5. Personal hearing in the case was held on 17.08.2022. Shri Kiran Parikh, Chartered Accountant, appeared on behalf of the appellant for personal hearing. He reiterated submission made in appeal memorandum and additional submission filed by them on 08.08.2022.

6. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum & in additional submission dated 08.08.2022 and documents available on record. The dispute involved in the present appeal relates to the confirmation of demand for service tax on the income received by the appellant for construction of Commercial as well as residential complex. The demand pertains to the period October-2013 to March-2015. The adjudicating authority had confirmed the demand considering the service provided by the appellant to be covered under the taxable category as the appellant could not submit the evidences i.e. BU permission and evidence showing that the transactions were made after the receipts of BU in respect of certain amount as appearing exempt from service tax in the ledgers submitted by the appellant, and as the appellant could not produce the cancellation agreement and could not submit the evidences showing that the amount contributed by the members were returned to them on cancellation of bookings by them .

7. It is observed that the appellant is engaged mainly in providing "Commercial or Industrial Construction Services" and "Construction of Residential Complex Services". I find that main contention of the appellant that the adjudicating authority have confirmed the service tax on collection / receipt as per the Show Cause Notice without considering the following:

- Fresh booking received after receipt of BU Permission which is exempted from Service Tax
- Amount of advance collection returned to the customer on account of cancellation of the booking by the customer
- Amount of stamp duty collected from customer and deposited on behalf of customer for the execution of the sale document.

I also find that the appellant in their additional submission dated 08.08.2022, inter alia, submitted as under:

"As the appellant could not submit the bifurcation of the same, during the course of adjudication proceedings, the adjudicating officer added the entire amount and calculated the service tax on the same. Further during the course of adjudication of the appellant could not submit about the cancellation of the agreement between the parties and the appellant and since the appellant could not submit any evidences about the contribution by the members were returned to them in total the adjudicating authority did not considered the same and added the total amount to the taxable service and calculated the service tax on the same."

9. I also find that the appellant in their additional submission dated 08.08.2022 submitted sheets showing amount of gross collection, collections received after BU permission, cancellation of booking, reduction toward stamp duty collected from customers and comparison of the same with the value as per the service tax returns, which they have already submitted to adjudicating authority, however, not submitted any supporting documentary evidences for the said calculations with Appeal Memorandum or under the additional submission, though they very well knowing that the said evidence is necessary to verify the genuineness of the claim of the appellant.

10. In this regard, I find that for considering the "Fresh booking received after receipt of BU Permission", the Sale Agreements and BU permissions along with accounts / ledger is required for verifying the claim of exemption. Similarly, for considering "cancellation by the customer", the cancellation agreement or any verifiable evidence showing that the advance collected were returned to the customer on account of cancellation is required for verification. I also find that in respect of arguments with regard to stamp duty collected from customer and deposited on behalf of customer for the execution of the sale documents, the appellant is required to be submit verifiable evidence. However, in this regard, I find that the appellant failed to submit required documents viz. the documents showing that the sale has taken place after they received the BU permission, agreement showing properties booked / sold after issuance of BU permission, the cancellation of the agreement between the parties and the appellant, any evidences about the contribution by the members were returned to them in total, documents showing stamp duty collected from customer and deposited on behalf of customer for execution of the sale documents, etc. In short, the appellant failed to submit verifiable evidences and only submitted ledger copies and calculations, which resulted in issuance of SCN dated 10.12.2019. I also find that after issuance of the SCN, the appellant also failed to submit the required documents to the adjudicating authority though they were specifically asked for the same vide letter dated 18.06.2021, which has resulted in confirmation of the demand of Service Tax vide impugned order dated 13.07.2021. Further, on perusal of enclosures submitted by the appellant under Appeal Memorandum and their additional submission dated 08.08.2022, I find that the set of the documents already considered earlier by the adjudicating authority has been submitted by the appellant with this office and I also find that till date the appellant is not able to produce the required documents before this authority to justify their arguments. I also find that the appellant in their additional reply stating that they enclosed all the documents, self-certified by the

authorized person of the appellant, which they had submitted before the lower authorities, however, it is observed that no self-certified copies submitted by them, except 5 pages.

11. It is observed that simply by providing same ledgers and reconciliation statement again and again without substantiating the same with documentary evidence, the filling of appeal cannot serve the purpose in real sense. On the contrary, such vague submissions add duplication of work to the authority who deals it. On the other end, I observe that while confirming the demand, the adjudicating authority observed as under:

"20.1 The said assessee has claimed that they had sold units after obtaining the Building Use (BU) permission which was considered as sale but no service tax was applicable on such transaction. I have gone through the assessee's reply wherein they have shown certain receipt after BU permission. On going thorough available documents it has been found that the evidences / documents produced are insufficient to establish that the units were sold after obtaining the Building Use (BU) permission. The said assessee has produced annexures reflecting some of the transactions as exempted, but they cannot be treated as exempted in absence of documentary evidences such as sale deed executed with their customers. In absence of these important evidences, it cannot be concluded that the particular transaction was exempted from service tax. For Example – The said assessee had submitted ledger account for the period 1-April 2012 to 17-May 2021 in respect of Shop No. 111 of their Bavla Commercial Scheme. The first transaction for the said shop has been shown on 08.02.2013 after issuance of BU permission (BU permission given on 25.04.2012). The said assessee had claimed that the amount received on 17.10.2013 and 21.10.2013 which sums up as Rs. 58,870/- are exempted as the transaction have taken place after issuance of BU permission and are covered under the show cause notice. The said transaction claimed as exempted have taken place after issuance of BU permission but from ledger for period 1-April 2012 to 17-May 2021 it cannot be concluded that no transaction had taken place before 1-April 2012 and therefore the documents produced are insufficient to say that particular shop was booked / sold after issuance of BU permission. In short, the assessee failed to produce verifiable evidences / documents to prove their claim that the sale has taken place after they received the BU permission. Therefore, I am not inclined to accept the assessee's contention. In order to get further clarification with respect to their reply, said aseessee vid this office letter dated 18.06.2021 was requested to clarify on the following points –

1. The documents produced are insufficient to conclude that certain transactions were exempted as they have been made after receipt of BU permission. In absence of evidences which clearly indicates that sale deed execution and payment receipt was done after issuance of BU permission, the entries cannot be treated as exempted from service tax.

Further, some of the entries have been shown as "Cancel". In this regard, no correspondences / agreements with respect to the said cancellation have been produced.

Also, evidences are absent which show that cancellation amount were returned to the members.

3. The documents are not signed by you and not certified with the CA.

The said assessee vide their letter dated 26.06.2021 replied to the above queries and their reply are as under:

1. We have already submitted our various sitewise BU permission received from a competitive authority, Ahmedabad Municipal Corporation, where our project located within a corporation area. Moreover, where our project located outside the corporation area we have received a certified engineers certificate for building utilization. Hence, there is no question of not allowing us to the receipts after BU permission as a exempt services.

2. In our books of accounts, in some site we have marked a ledger by "cancel". In this regard, we hereby kindly clarify, for smoothly and easiness of tracing a cancel flats we have marked the said word "Cancel" in the respective ledgers. Please note that we have already return back the booking amount for cancellation of booking. Tracing the evidences for the same before 6-7 years to be very time taking matter, however, we can justify the same payment tracking record. We are trying to trace out the very old record, which will take some time.

3. As the all returns are been filed by learned professionals / chartered accountants there is no need for CA certification of the documents submitted. Moreover, we have already give a audited for the company for the same period.

In view of the above reply, I find that the said assessee has not provided any further clarification or some specific documentary evidence, however, repeated the same which they have already submitted. The said assessee also stated that there were certain bookings which were cancelled by their customer and the amount were returned to them on cancellation of such bookings. They claimed that the amount in respect of these bookings should not be considered as taxable. Again, no correspondences / agreements with respect to the said cancellations have been produced to substantiate their claim that the said amount were returned to their clients.

I also find that during the course of the recording of the statement of Shri Jayesh R. Shah, Authorised Signatory of the appellant recorded on 21.11.2019, he inter alia asked for two months time to submit the documentary evidences that whenever the property was booked / sold after obtaining the Building Use (BU) permission, the same is considered as sale and no Service Tax is applicable on such transactions. They further added that such entries appearing in ledger where Service Tax Exempt is mentioned signifies that these properties were sold after obtaining the BU permission. However, the assessee could not

produce specific evidences in support of their claim although they were having ample time after issuance of show cause notice."

12. I also find that while confirming the demand, the adjudicating authority has dealt with the submissions made by the appellant and made suitable observations in Para 20 to 24 of the impugned order. I find that said observations are completely sustainable, more particularly when there is no any counter argument with documentary evidence against the same has been made by the appellant to this authority.

13. It is observed that in era of self-assessment, the onus is on the appellant to assess their service tax liability correctly and make its disclosure to the department, and submit evidences regarding treating exempted income by them. I find that once investigation is initiated or when Show Cause Notice is issued on the basis of certain documents, in absence of certain further clarifications / documents called for from the appellant, onus to prove their case is shifted on the appellant. In this regard, I rely upon judgment in the case of N. D. Textiles [2004 (168) ELT 381 (Tri. - Mumbai)], wherein Hon'ble CESTAT, Mumbai has held as under:

"*6. It is a cardinal precept of law that a fraud overrules all. In the present case, the department through the statements made by the owner of the fabrics, established the non-duty paid nature of the goods. Every lead given by the owner of the seized goods was followed up. When the lead did not take the officers any further, they approached him (the shopkeeper) again and he stated that he had spoken lies when he gave the names of the processors and that he had already paid the duty on the non-duty paid fabrics. The proprietor of M/s. N.D. Textiles has the peculiar knowledge of the nature of fabrics in his possession but he refuses to part with that knowledge except saying that the fabrics are non-duty paid. In such a situation are the officers expected to leave the fabrics in question alone on the sole ground that they are not able to establish who manufactured them even though there is a clear admission on the part of the person that the fabrics are non-duty paid, is the question. Such an action may lead to absurd results. More over what is admitted need not be proved aliunde. Proof of a fact in issue may be by direct evidence as well as by circumstantial evidence. By circumstantial evidence is meant, proof of other relevant facts from which the fact in issue may be inferred. In quasi criminal cases prima facie doubt is sufficient to shift the onus to the assessee or accused (AIR 1949 Madras 116 in Narasinga Muthu Chettiar). There is sufficient circumstantial evidence in this case to establish the non-duty paid character of the fabrics.*"

13.1 I find that Hon'ble Madras High Court in the case of Lawn Textile Mills Pvt. Ltd. [2018 (362) ELT 559 (Mad.)] has held as under:

"*30. The above facts will clearly show that the allegation is one of clandestine removal. It may be true that the burden of proving such an allegation is on the Department. However, clandestine removal with an intention to evade payment of*

duty is always done in a secret manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where secrecies involved, there may be cases where direct documentary evidence will not be available. However, based on the seized records, if the Department is able to prima facie establish the case of clandestine removal and the assessee is not able to give any plausible explanation for the same, then the allegation of clandestine removal has to be held to be proved. In other words, the standard and degree of proof, which is required in such cases, may not be the same, as in other cases where there is no allegation of clandestine removal."

13.2 I find that Hon'ble Madras High Court in the case of Commissioner of Central Excise, Salem Vs CESTAT, Chennai [2019 (366) ELT 647 (Mad.)] has held as under:

"7. *The allegation against the assessee is one of clandestine removal by way of removing dutiable product namely cheese/cone yarn in the guise of exempted product-hank yarn to their buyers. The Tribunal faulted the Commissioner for confirming the duty liability on the ground that there was no acceptable evidence available with him and the assessee cannot be charged with the offence of clandestine removal of goods without payment of duty based upon confession statement, which were retracted. Further, the Tribunal opined that the registers were not properly maintained and they were unreliable and there cannot be any demand for duty, based on those* documents. *The burden of proof in a case of clandestine removal is undoubtedly on the department. It cannot be denied that clandestine removal is often done in a surreptitious and secret manner and will never be an open transaction. At times, in such cases of clandestine removal, clinching* documents *will be available. Thus, if the department is able to prima facie establish a case of clandestine removal, violation of excise procedure, the burden shifts on the assessee to prove that he is innocent. Thus, the standard and degree of proof which is required in other cases may not be the same as that of the case, where the allegation is one of clandestine removal. Similar view was taken in the case of M/s. Lawn Textile Mills Pvt. limited v. CESTAT and Others in C.M.A. No. 1011 of 2017, dated 4-9-2018. [2018 (362) E.L.T. 559 (Mad.)]*"

14. In view of the above, it is crystal clear that after initiation of inquiry and even after issuance of Show Cause Notice, it was obligatory on the part of the appellant to produce reconciliation of entire income along with all relevant documentary evidences with regard to considerations received by them against providing taxable / non-taxable services, before the Department for verification. I also find that from the initiation of inquiry till the stage of appeal, three years have lapsed and the appellant had ample time for submission of documentary evidences. However, they have failed to provide all the necessary documentary evidences to prove their case that services provided by them were exempted from payment of Service Tax,

inspite of ample opportunities with them to produce the same before the adjudication authority or before the appellate authority.

15. I also find that the appellant in their ground of appeals submitted arguments with regard to financial crisis, heavy recession, discharge the service-tax liability out of its own pocket on advance though the customer pays the amount of service tax only after construction of unit is completed, borrowing funds from banks for meeting the financial paucity and scarcity, etc., I find that such vague arguments of the appellant are not related to any way the question in hand and the appellants have very cleverly avoided main issue of not having any supporting documents with their claim of exempted income.

16. I also find that the appellant have submitted certain documents viz. ledger and Sale Deed and BU permission with regard to the Shop No. 111 at Bavla District, Akruti Arkad Scheme having value of Rs. 6,05,847/- to this office. Regarding the said Shop No. 111, the adjudicating authority has discussed in Para 20.1 of the impugned order. As per the contention of the appellant that amount received on 17.10.2013 & 21.10.2013 which sums up to Rs. 58,870/- are exempted as the transaction have taken place after issuance of BU permission. On verification of the Sale Deed, it is observed that the same is for Rs. 6,05,847/- and as per ledger, the said amount was received in February-2013 and March-2013, i.e. the period not covered under the present case. I also find that the other amount of Rs. 58,870/- was received by the appellant on 17.10.2013 & 21.10.2013, however, the appellant failed to submit any documents showing for which purpose the said amount has been received by them and how the said amount is exempted. In view of the above, it is also felt that without submitting any relevant documents, the claim of the appellant that the said amount is exempted can not be sustainable and required to be rejected.

17. In view of the above, I conclude that even at the appellate stage, the appellant is not in a position to submit verifiable evidences in support of their claim of receipt of exempted income, etc. Hence, the contention of the appellant that they have paid required service tax and no further service tax is required to be paid is not entertainable and liable for rejection.

18. Further, in the present case, it clearly transpires that the appellant has intentionally suppressed the correct taxable value by deliberately withholding of essential information from the department though they were registered under the Service Tax. They also suppressed the value of taxable services provided by them in ST-3 returns, with an intent to evade taxes. Also, the appellant has never informed the department about the short payment of Service Tax and the said fact could be unearth only upon initiation of the inquiry by the jurisdictional superintendent. Therefore, I find that all these acts of willful mis-statement and suppression of facts on the part of the appellant, with an intent to evade payment of Service Tax are the essential ingredients exist in the present case which makes them liable to raise the demand against them invoking the extended period of limitation under proviso to Section 73(1) of the Finance Act, 1994. When the demand sustains, there is no escape from the liability of interest, hence the same is, therefore, recoverable under Section 75 of the Finance Act, 1994.

19. Further, I find that the imposition of penalty under Section 78 is also sustainable, as the demands were raised based on detection noticed during the initiation of inquiry by the department. Section 78(1) of the Finance Act, 1994, provides penalty for suppressing the value of taxable services by reason of fraud or collusion' or 'willful misstatement' or 'suppression of facts' with 'the intent to evade payment of service tax'. Since the issues covered in the present appeal are on settled issues, the appellant cannot bring into play the interpretation plea to avoid penalty. After introduction of measures like self assessment etc., a taxable service provider is not required to maintain any statutory or separate records under the provisions of Service Tax Rules and private records maintained by them for normal business purposes are accepted, for all the purpose of service tax. All these operates on the basis of the trust placed on the service provider and therefore, the governing provisions create an absolute liability when any provision is contravened as there is a breach of the trust placed on them. It is the responsibility of the appellant to correctly assess their tax liability and pay the taxes. The deliberate efforts by not paying correct amount of Service Tax is utter dis-regard to the requirement of law and breach of trust deposed on them. Hence, I find that the act of willful mis-statement and suppression of facts with an intent to evade payment of tax, as discussed in Para supra, made the appellant liable to impose penalty on them under the provisions of Section 78 (1) of the Finance Act, 1994.

20. As regards the Late Fees of Rs. 51,600/- confirmed on the appellant under Rule 7C of the Service Tax Rules, 1994 read with provisions of Section 70 of the Finance Act, 1994, I find that as per the provisions of Rule 7C of the Service Tax Rules, 1994, if any person liable to file ST-3 return under Rule 7 of the Service Tax Rules, 1994, and furnished the ST-3 return after the date prescribed for submission of such return, they were liable to pay late fees as stipulate therein. Rule 7C of the Service Tax Rules, 1994 clearly stipulates about the calculation of late fee for delay in filing ST-3 returns. In the present case, it is observed that the appellant no where argued against the calculation or the imposition of late fees and also agreed that due to financial crunches they have filed required return late. Therefore, the appellant has failed to comply with the provisions of Rule 7 for filing of ST-3 return within prescribed time limit and accordingly, they are liable to pay the late fees as prescribed under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994. Hence, I find that the impugned order to the extent of confirmation of Late Fees of Rs. 51,600/- imposed on the appellant under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 is legally correct.

21. As regards the penalty of Rs. 10,000/- imposed on the appellant under Sectiion 77 of the Finance Act, 1994, as amended, for contravention of the provisions of Section 70 of the Finance Act, 1994, I find that as per the provisions of Section 70 of the Finance Act, 1994 (as amended from time to time), "every person liable to pay the Service Tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed. In the present case, it is observed that the appellant has not disclosed full and correct information about value of the services provided by them in the relevant ST-3 Returns and failed to self-assess the

correct taxable value for the services provided by them and thereby contravening the provisions of Section 70 of the Finance Act, 1994. Accordingly, as the appellant has failed to comply with the provisions of Section 70 of the said act, they are liable to the penalty under Section 77 of the Finance Act, 1994. Hence, I find that the impugned order to the extent of penalty of Rs. 10,000/- imposed on the appellant under Section 77 of the Finance Act, 1994 is legally correct.

22. The appellant has also argued that their case is covered by the provisions of Section 80 of the Finance Act, 1994 as there is reasonable cause exists. Section 80 can be invoked for waiver of penalties, if the appellant shows reasonable cause for non payment of tax. In this case, the appellant was registered with the Service Tax and known the legal position and taxability of the service provided by them and even today the appellant has not paid the applicable service tax and is not able to produce relevant documents. The appellant was well aware of the provisions of service tax law and their plea of reasonable cause exists without showing any reasonable cause is an excuse for escape from the penal liability and is, therefore, not maintainable. Accordingly, I hold that Section 80 cannot be invoked in this case

23. In view of the discussion above, I do not find merit in the grounds raised by the appellant. Accordingly, I reject the appeal filed by the appellant and uphold the impugned order.

24. अपील कर्था 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.

(Akhilesh Kumar) 27 September, 2022.

Commissioner (Appeals)

Date : 27-09-2022

Attested

(R. C. Maniyar)
Superintendent (Appeals),
CGST, Ahmedabad

By RPAD / SPEED POST

To,

M/s. Aroma Realities Limited,
U.G.F. 1, Milestone Building,
Nr. Drive-in-Cinema, Thaltej,
Ahmedabad – 380052

Appellant

The Joint Commissioner,
CGST & Central Excise,
Ahmedabad North

Respondent

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Joint Commissioner, CGST, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North
   (for uploading the OIA)
5) Guard File
6) PA file