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: 20231064SW0000813047

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/4394 /2023-APPEAL /2015 – 20

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-113 /2023-24**
दिनाँक Date : **29-09-2023** जारी करने की तारीख Date of Issue 03.10.2023

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Shiv Pratap Singh**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **44/ADC/MR/2021-22** दिनाँक:**13.01.2022** , issued by The Additional Commissioner, CGST, Ahmedabad North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant
M/s. Saumya Developers,Radhe Villa Office,Radhe Villa Society, Opp. Earth Complex, Kadi Road,Sanand-382110

2. Respondent
The Additional Commissioner, CGST, Ahmedabad North,Ist 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 (कार्याविधि) 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

M/s. Saumya Developers, Survey No. Radhe Villa Office, Radhe Villa Society, Opp. Earth Complex, Near Ghodagadi Stand, Kadi Road, Sanand-382110 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 44/ADC/MR/2021-22 dated 13.01.2022, (in short '*impugned order*') passed by the Additional Commissioner, Central GST, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*'). The appellant were engaged in providing taxable service and were not registered with the Service Tax department. They were holding PAN No. ACFFS1880B.

2. Ongoing through the data received from Income Tax department (CBDT data) for the Financial Year 2015-2016, 2016-17 and 2017-18 for un-registered service provider, it has been observed that the said service provider has shown 'Gross receipt from Service 'in their Income Tax Return, on which Service Tax was no paid. Letters were, therefore, issued to the appellant to explain the reasons for non-payment of tax and to provide certified documentary evidences for said period. The appellant neither provided any documents nor submitted any reply justifying the non-payment of service tax on such receipts. The details of the value shown in Income Tax return for F.Y 2015-16, 2016-17 and 2017-18 is furnished below:-

F.Y	Value as per ITR/ P&L Account	Service Tax not paid
2015-16	1,16,79,664	16,92,332
2016-17	3,54,20,948	51,57,288
2017-18	1,20,01,904	16,97,068
Total	**5,91,02,516**	**85,46,688**

2.1 A Show Cause Notice (SCN) No. STC/15-217/OA/2020 dated 25.03.2021 was, therefore, issued to the appellant proposing recovery of service tax amount of Rs.85,46,688/- along with interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalty under Section 77 & Section 78 of the Finance Act, 1994 was also proposed.

2.2 The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs.80,89,530/- was confirmed alongwith interest. Penalty of Rs.80,89,530/- under Section 78 and Rs.10,000/- under Section 77(1) of the F.A., 1994 was also imposed. The demand of Rs.4,57,158/- for the period July, 2017 to March, 2018 of F.Y. 2017-18 was however dropped.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant preferred the present appeal on the grounds elaborated below:-

- The SCN and O-I-O are not sustainable in this case, in the interest of justice, when there is no wilful mis-statement or suppression of facts with deliberate intention to evade Service Tax.
- The confirmation of Service Tax demand with interest and penalty was done without correctly appreciating facts and law applicable in such facts. The SCN

suffers from incurable defects. Reliance placed on the decision passed in the case of M/s Larsen and Toubro - 2014 (303) ELT 3 (SC) 3).

- SCN has not specified under which clause Appellant's Service activity falls, for determining taxability of the services. In absence of exact sub-heading under which service falls, taxability of service cannot be decided. Decisions in the United Telecoms Ltd. v. CST – 2011(22)STR571 (TRI), Swapnil Asnodkar-2018(10)GSTL-479(Tri-Mumbai), Balajr Enterprises - 2020(33)GSTL-97 and ITC Ltd. -2014(33)STR-67(Tri-Del) support this.

- Department has not brought out any independent facts or evidence as to what was the service provided and how it was provided to whom. Thus, entire demand was raised on assumptions and presumptions. It is settled principal of law that Service Tax demand cannot be raised on the basis of assessment made by Income tax Authorities or income data shared by the IT Authorities. Appellant places reliance on the following decisions/Judgments in support of above contention :-

  - 2022 (63) G.S.T.L. 64 (Tri. - Ahmd.) - J.P. ISCON PVT. LTD vs CCE, Ahmedabad-I
  - 2023 (68) G.S.T.L. 143 (Tri. - Ahmd.) - SHRESTH LEASING & FINANCE LTD vs CCE&ST, Surat-I
  - 2023 (69) G.S.T.L. 76 (Tri. - Ahmd.) - FORWARD RESOURCES PVT. LTD vs CCE&ST, Surat-
  - 2023 (68) G.S.T.L. 292 (Tri. - Ahmd.) - REYNOLDS PETRO CHEM LTD vs CCE&ST, Surat-I

- Appellant have developed land as per drawings and directions of the land owners and have carried out further activities to develop residential complex namely "Sharnam Vill" and "Radhe Villa". Such Residential Complexes were created as Co-Operative housing societies later on, wherein Members were given residential rights by the land lord and by the Society by sale deed executed on completion of the complexes. Until execution of the sale deed, the buyer had no rights to the said residential houses, till they were completed. Hence, it was a sale of residential houses and there was no service tax levy on such sale of immovable property. For being chargeable to tax in relation to construction of a complex under section 65(105)(zzzh) of Finance Act, a person should render service to another person in to construction of complex. When a sale deed is executed and only then, the ownership of the property gets transferred to the ultimate buyer, in such a case, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed, would be in the nature of self-service and consequently, would not attract Service Tax. In the present case, since Appellant has provided services to Land owners till execution of sale deed of residential units, no service tax is attracted. Decision in 2013 (31) S.T.R. 523 (Guj.) - CST vs Sujal Developers and in 2011 (23) S.T.R. 439 (Guj.) - CST vs Shrinandnagar-IV Co. Op. Housing Society Ltd supports this submission.

It is settled by the Hon'ble Supreme Court in 2007 (209) E.L.T. 321 (S.C.) - SHARE MEDICAL CARE vs UOI that "even if an applicant does not claim benefit under a particular notification at the initial stage, he is not debarred, prohibited or stopped from claiming such benefit at a later stage". This decision is also squarely applicable in the facts of this case for claiming the benefit of any exemption in this

appeal proceeding and to allow the same. This decision is also followed in many other subsequent cases.

- Adjudicating authority has simply noted contention of Appellant in para 9 of O-I-O that "they are eligible to avail abetments applicable to them vide various notification from time to time under the Finance Act 1994". However, the adjudicating authority has brushed aside this contention simply saying in para-15 that "they had not claimed any exemption for the said charges collected and provisions of 'taxable services' during the aforesaid period.

- Exemption to specified services mentioned in Notification No. 9/2013-S.T. dated 8-5-2013 provided abetment of 75% and to charge 25% of the taxable value. Thus on Total Rs. 5,58,69,436/- as quantified in O-I-O [page 5] received for the FY 2015-16 to 2017-18 [upto 30-06-2017] charging Service Tax @ 25 % could be simply quantified as under :-

F.Y.	Amount Received	Abatement 75%	Taxable Value on 25%	S.Tax rate	S.Tax payable
2015-16	1,16,79,664	87,59,748	29,19,916	14.50%	4,23,388
2016-17	3,54,20,948	2,65,65,711	88,55,237	15%	13,28,286
2017-18	87,68,824	65,76,618	21,92,206	15%	3,28,831
Total	**5,58,69,436**	**4,19,02,077**	**1,39,67,359**		**2080505**

- The Notification No. 9/2013-S.T. dated 8-5-2013 provided abatement of 75 % and to charge 25 % of the taxable value under the following conditions :-

(i) the carpet area of the unit is less than 2000 square feet.
(ii) the amount charged for the unit is less than rupees one crore.
(iii) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004.
(iv) The value of land is included in the amount charged from the service receiver.

- As the carpet area of residential unit is less than 2000 square feet, in both schemes and amount charged for each such unit is less than rupees one crore, they were not registered, they have not availed any credit of input or input services used. The value of land is also included in amount collected from the Buyer. All the above four conditions of Notification No. 9/2013-ST have been fully satisfied hence the appellant is clearly eligible for the abetment of 75 % as per Notification No. 9/2013-ST dated 8-5-2013. Accordingly, the service Tax liabilities as quantified comes to Rs. 20,80,505/- as against confirmed demand by the impugned O-I-O.

- The appellant is not likely to receive any amount of service tax in question from persons from whom they have received amount initially when account transactions are finalized. Quantum of service tax requires to be recalculated after granting available benefit of "Cum-tax-value" and to quantify amount of the service tax payable thereon, even if it is held to be payable. This will be in consonance with terms of under section 67(2) of the Finance Act 1994 and taxable value and service

tax thereon requires to be re-quantified and accordingly the tax liability shall come to Rs.18,10,742/-.

- Mega Service Tax Exemption Notification No. 25/2012-S.T., dated 20-6-2012, Clause Sr. No. 14(b), provided exemption from whole of Service Tax to a single residential unit otherwise than as a part of a residential complex. In present case, appellant constructed residential houses, each block, being residential unit which is the fact. Appellant is eligible for exemption of Service Tax, apart from other grounds like invocation of time limitation etc, against this demand of Service Tax.

- The law on invocation of extended period is well settled by now. Appellant have relied upon the following decisions : -
  a) Reliance Industries Ltd- 2015 (325) ELT 223 (SC)
  b) Pushpam Pharma Co. - 1995 (78) ELT 401 (SC)
  c) Cosmic Dye Chemicals – 1995 (75) ELT 340 (SC)
  d) H.M.M. Ltd – 1995 (76) ELT 497 (SC)
  e) Padmini Products - 1989 (43) ELT 195 (SC)
  f) Chemphar Drugs & Liniments -d 1989 (40) ELT 276 (SC)
  g) Continental Foundation Jt. Venture - 2007 (216) ELT 177 (SC)

- This being case of interpretation of provisions, no penalty could be imposed in the facts of this case. Appellant was under bonafide belief that since they had constructed complex for and on behalf of the land lords and Co-operative society under agreement, they were not liable to service tax and the concerned land lords and the Co-operative society were liable to service Tax, Appellant had neither obtained Service Tax registration or paid service tax, if any, on their activity. It is also settled law that a person can have bonafide belief of not liable to duty/tax, even if such belief may also be incorrect. There is no essential ingredient or element or evidence for imposition of the penalty imposed. There is nothing in this case to show the contravention of provisions is with intent to evade Service Tax. It is legally settled by reported case laws that penalty is not impossible in a situation of interpretational issues like in this case as to levy of service tax if payable, who has to pay it. There is no situation for imposing any penalty in the facts of this case. Therefore, in the facts of this case, the penalty proposed in this SCN dated 25-03-2021 and imposed by O-I-O said to have been issued on 13-01-2022 deserves to be set aside considering the totality of the case.

- The Appellant pray to set aside demands of Service Tax with interest and penalty, as confirmed in the impugned O-I-O.

5. Personal hearing in the matter was held on 22.09.2023. Shri P.P.Jadeja, Consultant appeared on behalf of the appellant. He reiterated the submissions made in the appeal and handed over additional written submissions dated 15.09.2023 and affidavit from the appellant. He reiterated the submissions therein and those in appeal dated 31.08.2023 and in the additional submissions. He submitted that the appellant's address had changed after completion of the site work. Therefore, the impugned order was not delivered to them and they had written four letters to the adjudicating authority to provide the same. Ultimately, the impugned order was collected and then appeal was filed within time from the receipt of the order. He submitted that the appellant is eligible

for abatement of 75% on the construction work carried out by them under Notification No.09/2013-ST as they have met with all the conditions stipulated in the notification. He further submitted that the appellant is eligible for 'cum tax value' benefit. He undertook to provide copies of sale deed and sales register in this regard. Therefore, he requested to set-aside the impugned order.

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum and in the additional submissions, as well as the submissions made at the time of personal hearing. The issue to be decided in the present case is as to whether the service tax demand of Rs.80,89,530/- confirmed alongwith interest and penalties in the impugned order passed by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise?

The demand pertains to the period F.Y. 2015-16 to 2017-18.

7. It is observed that the entire demand has been raised in the SCN based on the income data shared by the CBDT on which no service tax was paid by the appellant. The adjudicating authority, confirmed the demand on the sole grounds that the services rendered by them are covered under declared services defined in Section 66E (b) of the F.A, 1994.

7.1 The appellant before the appellate authority have submitted documents like Income Tax Returns and Form 26AS filed for FY 2015-16 to 2017-18; Balance Sheet with Profit and Loss Account for FY 2015-16 to 2017-18, Agreement with the Society; Sale deed by the Society FOR Members; Details of society members of "**Sharnam Villa**"; Details of society members of "**Radhe Villa**"; Affidavit - Declaration that Cenvat not availed; Affidavit - Declaration that value of land included in consideration. They claim to have developed land as per drawings and directions of the land owners and have carried out construction activities to develop residential complex namely "Sharnam Villa" and "Radhe Villa". These Residential Complexes were created as Co-Operative housing societies later wherein members were given residential rights by the land lord and by the Society by sale deed executed on completion of the complexes. Until execution of the sale deed, the buyer had no rights to the said residential houses, till they were completed. Hence, they claim that it was a sale of residential houses and there was no service tax levy on such sale of immovable property as for being chargeable to tax in relation to construction of a complex under section 65(105)(zzzh) of Finance Act, a person should render service to another person in to construction of complex. When a sale deed is executed the ownership of the property gets transferred to the ultimate buyer, in such a case, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed, would be in the nature of self-service and consequently, would not attract Service Tax. They placed reliance on the decision passed and reported in 2013 (31) S.T.R. 523 (Guj.) - CST vs Sujal Developers and in 2011 (23) S.T.R. 439 (Guj.) - CST vs Shrinandnagar-IV Co. Op. Housing Society Ltd supports of above submission.

7.2 Further the appellant have made alternative contention that if the above ser[illegible] considered taxable then they are eligible for exemption under Notification No. 09/2013-

ST dated 08.05.2013. They have submitted affidavits declaring that carpet area of residential unit is less than 2000 square feet, in both schemes and amount charged for each such unit is less than rupees one crore. They also declared that they have not availed any credit of input or input services used therein and that the value of land is also included in amount collected from the buyer. They therefore claimed abatement of 75% as per Notification No. 9/2013-ST dated 8-5-2013 and claim that the service tax liability therefore shall come to Rs. 20,80,505/- as against confirmed demand by the impugned O-I-O.

7.3 On going through the documents submitted by the appellant, I find that the appellant is a partnership firm and was engaged in construction of complex. They have constructed residential complex namely "**Sharnam Villa**" (Row houses) and "**Radhe Villa**" (flats). I find that construction of complex, civil structure, building intended for sale to a buyer (except where the entire consideration is received after issuance of completion-certificate by the competent authority) is covered under clause (b) of Section 66E defining '**Declared service**'. The text is reproduced below.

> *"(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. "*

As per the Sale Deed, the appellant is developer and have constructed the Flats/Row Houses which were subsequently sold to prospective buyers. For such construction services the appellant have charged a consideration from the buyer. As the above service is a declared service as was carried for another person against a consideration, therefore, in terms of definition of '**service**' defined under clause (44) of Section 65B, I find that the same shall be considered as a taxable service.

7.4 Coming to the alternate contention of the appellant is that if the service is considered taxable, then they are eligible for exemption under Notification No. 9/2013-ST. They claim that the entire consideration received from buyers was prior to B.U./Completion certificate issued by concerned authority and they claim to have fulfilled all the conditions prescribed in the Notification No. 9/2013-ST hence are eligible for the abatement granted in the aforesaid notification. To examine whether the appellant is eligible for exemption claimed under Notification No. 9/2013-ST dated 8-5-2013 or not? Relevant text of the notification is produced below:-

[Notification No. 9/2013-S.T., dated 8-5-2013]

Construction of a complex, building, civil structure for residential unit — Abatement — Amendment to Notification No. 26/2012-S.T.

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 26/2012-Service Tax, dated the 20th June, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 468(E), dated the 20th June, 2012, namely :-

In the said notification, in the TABLE, for serial number 12 and the entries relating thereto, the following serial number and the entries shall be substituted, namely :-

"12.	*Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly, except where entire consideration is received after issuance of completion certificate by the competent authority,-*		*(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules,*
	(a) for a residential unit satisfying both the following conditions, namely :-	*25*	*2004;*
	(i) the carpet area of the unit is less than 2000 square feet; and		*(ii) The value of land is included in the amount charged from the ser-*
	(ii) the amount charged for the unit is less than rupees one crore;		*vice receiver.".*
	(b) for other than the (a) above.	*30*	

7.5 The appellant submitted a sample sale deed. I have gone through the sale deed of Flat No-504 of **Radhe Villa** Co-Operative Housing Society Ltd. which has the unit carpet area of 75 square yards i.e (**630 Square foot**); the flat has been sold for Rs.7,00,000/-. The appellant have also provided a list showing the details of name of other members to whom other units/flats were sold, flat area, flat number, amount recovered for construction and amount recovered on land portion of the flat. I find that the area of each flat in the above scheme is less than 2000 sq.feet and the total amount recovered is less than rupees one crore.

7.6 In respect of **'Sharnam-Villa'** Row Houses also, the appellant has submitted sample sale deed of Row House No.09 (A/7). I find that the single unit admeasured 130 sq.meter i.e. (**1399.31 sq. foot**) and was sold for Rs.16,90,000/-. Similarly, the appellant has also provided the list showing the details like name of members to whom the Row Houses were sold, unit area, House number, amount recovered for construction and amount recovered on land portion of the Row houses. The area of each house / unit measures 1399.31 sq. foot which is less than 2000 sq.feet and the total amount recovered is also less than rupees one crore as the amount charged is somewhere around Rs.1 lac to Rs.2 lacs.

7.7 As regards the conditions of the notification that **(i)** CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004 and **(ii)** that the value of land is included in the amount charged from the service receiver, I find that the appellant has submitted an Affidavit dated 22.9.2023 by Shri Sidhrajsinh Dilipsinh Sisodiya, Partner of the Appellant Firm. In the said affidavit, he has declared that as they were not registered under Service Tax, they have not availed any CENVAT Credit Rules, 2004. Further, it is also declared that the value of land is also included in the amount collected from the buyer.

7.8 In view of above facts and findings, I find that the appellant is eligible for the abatement of 75% granted vide Notification No. 09/2013-ST and their tax liability shall accrue only on the 25% of the gross amount charged. However, the appellant has claim cum tax benefit also. It is observed that Hon'ble Tribunal in the case of ***Commissioner***

Advantage Media Consultant [2008 (10) S.T.R. 449 (Tri.-Kol.)] held that Service tax being an indirect tax, was borne by consumer of goods/services and the same was collected by assessee and remitted to government and total receipts for rendering services should be treated as inclusive of Service tax due to be paid by ultimate customer unless Service tax was paid separately by customer. The Tribunal had noted that cum-tax value has been incorporated in Section 67 of Finance Act, 1994 vide amendments made subsequently. This decision has been maintained by the Apex Court as reported in **2009 (14) S.T.R. J49 (S.C.).** Further, the issue was also settled by the Apex Court in the case of *Maruti Udyog Ltd.* - 2002 (141) E.L.T. 3 (S.C.) wherein it was held that the sale price which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which are included in the wholesale price are to be excluded in arriving at the assessable value. Since there is nothing on record to show that after the demand was raised by the Department, the appellant has collected the service tax from their customers, therefore the amount which they have collected need to be taken as cum-tax value and correspondingly the amount of service tax needs to be re-computed. Hence, I find that this benefit is required to be extended to the appellants and service tax demand is required to be re-worked out accordingly.

F.Y.	Amount Received	Abatement 75%	Taxable Value on 25%	S.Tax rate	Taxable Value after cum tax benefit	S.Tax payable
2015-16	1,16,79,664	87,59,748	29,19,916	14.50%	2550145	3,69,771
2016-17	3,54,20,948	2,65,65,711	88,55,237	15%	7700206.1	11,55,031
2017-18	87,68,824	65,76,618	21,92,206	15%	1906266.1	2,85,940
Total	**5,58,69,436**	**4,19,02,077**	**1,39,67,359**		**12156617**	**18,10,742**

8. In view of my above findings, I, therefore, uphold the Service tax demand of **Rs.18,10,742/-** only, after granting abatement and cum tax benefit to the appellant.

9. When the demand sustains there is no escape from interest, the same is therefore recoverable with applicable rate of interest on the tax held sustainable in the para supra.

10. I find that the imposition of penalty under Section 78 is also justifiable as it provides penalty for suppressing the value of taxable services. Hon'ble Supreme Court in case of *Union of India* v/s *Dharamendra Textile Processors* reported in [2008 (231) E.L.T. 3 (S.C.)], concluded that the section provides for a mandatory penalty and leaves no scope of discretion for imposing lesser penalty. I find that the appellant was rendering a taxable service but did not obtain registration and neither filed the statutory returns. This act thereby led to suppression of the value of taxable service and such non-payment of service tax undoubtedly brings out the willful mis-statement and fraud with intent to evade payment of service tax. If any of the circumstances referred to in Section 73(1) are established, the person liable to pay tax would also be liable to pay penalty equal to the tax so determined.

11. As regards, the imposition of penalty under Section 77 (1) is concerned; I find that the same is also imposable. The appellant were rendering the taxable service and were liable to pay service tax, however, they failed to self-assess their tax liability. As such they failed to obtain registration and thereby failed to file ST-3 Return. I, therefore, find that all such acts make them liable to a penalty. However, considering the reduction in tax liability, I reduce the penalty imposed under Section 77(1) of the Finance Act, 1994 from Rs.10,000/- to Rs.5,000/-.

12. In view of the above discussion, I partially uphold the impugned order confirming the service tax demand of **Rs.18,10,742/-** alongwith interest and penalties.

अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

13. The appeal filed by the appellant stands disposed off in above terms.

29-9-23

(शिव प्रताप सिंह)
आयुक्त (अपील्स)

Date: 29.9.2023

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Saumya Developers, - **Appellant**
Survey No. Radhe Villa Office,
Radhe Villa Society, Opp. Earth Complex,
Kadi Road, Sanand,
Ahmedabad-382110

The Additional Commissioner - **Respondent**
CGST, Ahmedabad North

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner, CGST, Division-III, Ahmedabad North.
4. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
5. Guard File.