केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
7th Floor, Central Excise Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

सत्यमेव जयते
केंद्रीय कर शुल्क भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

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क फाइल संख्या : File No : **V2(ST)0239/A-II/2016-17** /3070 to 3075

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-0108-17-18**

दिनाँक Date :27-09-2017 जारी करने की तारीख Date of Issue 1-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **STC/16/KMM/AC/D-III/16-17** Dated **19.01.2017**

Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Uday Buildcon Pvt. Ltd.
Ahmedabad

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 मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी 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 विरूद्ध 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 वहां 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 वहां 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 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

OFFICE OF THE COMMISSIONER (APPEALS) CENTRAL EXCISE BUILDING AHMEDABAD अहमदाबाद

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 A2I9k 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 शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/-- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है –

(i) धारा 11 डी के अंतर्गत निर्धारित रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇨ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

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.

M/s. Uday Builcon Pvt. Ltd., 704, Saffron, Nr. Bank of Baroda, Panchvati, Ellisbridge, Ahmedabad- (STR AAACU 1979M ST 001) *(hereinafter referred to as 'appellants')* have filed the present appeals against the Order-in-Original number STC/16/KM /AC/D-III /16-17 dated 19.01.2017 *(hereinafter referred to as 'impugned orders')* passed by the Asst. Commissioner, Service Tax Div-III, APM Mall, Sattellite, Ahmedabad *(hereinafter referred to as 'adjudicating authority')*.

2. The facts of the case, in brief, are that, appellant had not paid Service Tax of Rs. 12,34,389/-on freight incurred during 2009-10(Oct. to March) to 2013-14 as required to pay as service receiver under Reverse Charge Mechanism (RCM) in terms of Sub-Clause (B)(v) of Rule 2(1)(d) of SER, 1994. Appellant stated that expenses accounted under the head transportation/carting expenses pertains to material consumable purchased on FOR basis and that there were no ingredient of transportation but only supply of material during the courses of trade. Adjudicating Authority concluded that charges shown as freight are "freight charges" as invoices are issued by transporter and not by material supplier. Vide impugned OIO duty of Rs. 12,34,389/- has been confirmed u/s 73(1) with interest liability u/s 75 and with equal penalty u/s 78. Penalty of Rs. 10,000/- was imposed u/s 77(2) for failure to self assess correctly

3. Being aggrieved with the impugned order, the appellants preferred an appeal on 06.02.2017 before the Commissioner (Appeals-II) wherein it is contended that transportation charges shown in accounts are in fact consumable material charges i.e. sand, greets, Kapchi etc. None of the Bills has mention of details of transportation charges, Kilometer to be transported and place of origin to destination. All bills are in nomenclature mentioning the supply of consumable material i.e. brass of greet/kapchi multiply rate of kapchi. Appellant relied upon following judgments in his appeal memo-

a. Popular Vehicle & Services Ltd [2010(18) STR 493 (Tri.- Bang.)]
b. Dineshchandra Agrawal Infracon Pvt. Ltd. [2010 (18) STR 39 (Tri. Ahmd.)]
c. Shakthi Auto Comp[onents Ltd. [2009 (14) STR 694 (Tri. Chennai)]

4. It is further contended that demand issued is time barred and penalty u/s 78 can not be imposed as once penalty u/s 77 is imposed as 77 and 78 penalty are mutually exclusive w.e.f. 16.05.2008. Provisions of section 80 are applicable in this case and bonafide lapse occurred can be condoned.

5. Personal hearing in the case was granted on07.09.2017. Shree Vipul Khandhar, CA, appeared before me and reiterated the grounds of appeal. He further stated that appellant is not providing GTA service and bills are not Killometer basis rather FOR basis. He stated that he would submit citation of Surya Construction (OIA) within seven days.

DISUSSION AND FINDINGS

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the all five appellants at the time of personal hearing.

7. Question to be decided is whether expense recorded under heading "freight expense" is in fact "material purchase" expense like bricks, kapchi and sand. Adjudicating authority vide para 26 of impugned OIO has concluded said expense as "freight expense" on following two reasons-

a. From observation of invoices issued by the Transporter it is noticed by the adjudicating authority that charges are for transportation of bricks, sand and Kapchi.
b. It is observed by the adjudicating authority from bills for transportation of Kapchi that irrespective of quantity/size of kapchi, the rate charged is same.

I find that appellant has not stated anything either in appeal memo or also during the course of personal hearing, against above two observations drawn by the adjudicating authority.

8. Appellant have contended that they have purchased sand, grit, kapchi and bricks on FOR basis and said expense is recorded as a "freight charge" in their accounting and in trial balance. Supply of goods on FOR where single price is charged inclusive of transportation charged is a composite supply. In such composite supply there are two supplies, one is supply of goods and another is supply of transportation service. These two supplies are naturally bundled and supplied in conjunction to each other in ordinary course of business and hence it is composite supply. In such composite cases, supplies are from traders and not from transporters. Invoices of traders carries applicable VAT. Appellant has argued that they have purchased the material (though recorded as freight in accounting) but they have not produced any evidence to establish that they have paid the VAT on it. Appellant has not produced any convincing reason as to how so called "material purchase" is

recorded as "freight charges". Without producing corroborative facts like VAT payment and simply forwarding lame argument as "freight charges" recorded in accounting is in fact "material purchase" expense, I am not convinced that it was "material purchase". Citations stated in appeal memo are not squarely applicable to present case. I hold that service received is taxable service under "Goods Transport Agency" and appellant is liable to pay service tax u/r 2(1)(d)(v) of SER, 1994.

9. Had the audit [AR No. 33/15-16, RP-4] not been conducted then such non-payment of service tax would not have come to notice of department. Appellant had not produced any evidence to show that subject receipt has been shown or declared to department. I hold that extended period u/s 73 of FA 1994,for recovery is correctly invoked.

10. Appellant`s contented that penalty u/s 78 can not be imposed as once penalty u/s 77 is imposed as 77 and 78 penalty are mutually exclusive w.e.f. 16.05.2008. Appellants contention is vague and without any support. No where in section 77 or in section 78 or in any section of Act it is mentioned that penalty u/s 77 and 78 are mutually exclusive. I presume appellant is misunderstanding section 77 as section 76. I find that after amendment of Finance Act, 2008 w.e.f 16.05.2008 there were no two penalty provision can be invoked simultaneously under section 76 & 78 of finance Act, 1994. I hold that penalties u/s 77 and 78 are correctly imposed.

11. It has been contended by the appellant that no penalty should have been imposed upon them in view of the Section 80 of the Finance Act, 1994 and that mere failure to pay service tax cannot be ground for not invoking the provisions of Section 80. I have gone through the provisions contained in Section 80 which stipulate not to impose penalties prescribed under Sections 76,77 and 78, if the assessee proves that there was 'reasonable cause' for the failure which attracted the said penalties. The Hon'ble High Court of Karnataka in the case of Motor World reported in 2012 (27) S.T.R. 225 (Kar.) has elaborated the term "reasonable cause" and outlined the circumstances / ingredients which merit invocation of provisions contained in Section 80. It is therefore pertinent to first examine the relevant portion of the said judgments of the Hon'ble High Court, which is reproduced as under:

12. Therefore, given the language of Section 80 of the Act, which confers discretion on the Service tax authorities not to impose penalty if there is reasonable cause in given case, the imposition of penalty under Sections 76,

77 and 78 is not automatic. The existence of grounds/ingredients postulated in the said provisions is a condition precedent for attracting penalty. Therefore, first, we have to find out whether in the facts of a given case whether those ingredients exist. Once it is held that those ingredients exist and the provisions are attracted, then if the language used in the said provisions does not leave any discretion in authority in the matter of imposition of penalty, penalty is to be imposed in terms of the said provision. However, if any discretion is left, then the said quasi judicial discretion is to be exercised reasonably. Before levying penalty, the authority is required to find out whether there was any failure referred to in the concerned provision and the same was without a reasonable cause. The initial burden is on the assessee to shown that there existed reasonable cause, which was the reason for the failure referred to in the concerned provision. Thereafter the authority has to consider the explanation offered by the assessee for failure and whether it constitutes a reasonable cause. "Reasonable cause" means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautions man, to come to the conclusion that the same was the right thing to do. Only if it found to be frivolous, without substance or foundation, the question of imposing penalty would arise."

13 In backdrop of the above judgment, I am not convinced by the justification/reason submitted by the appellant for failure to pay service tax on the said expenditure despite they were registered with service tax Department. One can have bona fide doubt due to any decision of any appellate authority holding that service tax was not payable or any instructions / Circular issued by the Board on the subject matter. However, the appellant fails to stand justified on the grounds given under the appeal memo and as to why they did not pay service tax. After carefully analyzing the facts of the case vis-à-vis the appeal memorandum, I have come to conclusion that the failure on the part of the appellant of not depositing service tax was not caused by any reasonable cause. I rely on the Order passed by the Hon'ble CESTAT, Chennai, in the case of TVS Motor Co. Ltd. reported in 2012 (28) S.T.R. 127 (Tri. - Chennai), held as under:

14. So far as ground of no penalty advanced by learned counsel is concerned there is nothing on record to show that the appellant avoided its liability bona fide when it is an established business concern with vast

experience in application of provisions of Finance Act, 1994. Its returns did not disclose bona fide omission. Rather facts suggest that knowable breach of law made the appellant to suffer adjudication. Accordingly, no immunity from penalty is possible to be granted on the plea of tax compliances made which was found to be a case no payment of tax on the impugned services provided during the relevant period."

15. Considering the facts of the case and evidences available on record, I hold that the present case does not merit invocation of provisions of Section 80. I therefore do not subscribe to the contention of the appellant and reject the same being devoid of merits.

16. In view of above discussion and findings, I reject the appeal filed by appellant asseessee and up-hold the impugned OIO.

17. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

17. The appeals filed by the appellant stand disposed off in above terms.

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD

To,

M/s. Uday Builcon Pvt. Ltd.,

704, Saffron, Nr. Bank of Baroda,

Panchvati, Ellisbridge, Ahmedabad.

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad.
2) The Commissioner Central Tax, GST South,,Ahmedabad-.

3) The Additional Commissioner, Central Tax , GST South, Ahmedabad
4) The Asst. Commissioner, S.Tax., Div-III, Ahmedabad-I(old jurisdiction).
5) The Asst. Commissioner(System), GST South, Hq, Ahmedabad.
6) Guard File.
7) P.A. File.