


केन्द्रीय कर आयुक्त (अपील)		
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX		
केन्द्रीय कर शुल्क भवन		7 th Floor, Central Excise Building
सातवीं मंजिल, पॉलिटेक्निक के पास		Near Polytechnic
आम्बावाडी, अहमदाबाद-380015		Ambavadi, Ahmedabad-380015
☎ 079-26305065		☎ 079-26305136

क फाइल संख्या : File No : **V2(ST)069/A-II/2017-18 / 10h57 to 10502**
 ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-176-17-18**
 दिनांक Date : 21-11-2017 जारी करने की तारीख Date of Issue **21-12/17**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **STC/28/KM/AC/D-III/16-17** Dated **28.03.2017**
Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Shail Enterprise

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 विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फॉर्म 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 शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014) की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल हैं -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
 - (ii) सेनवैट जमा की ली गई गलत राशि
 - (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- ⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

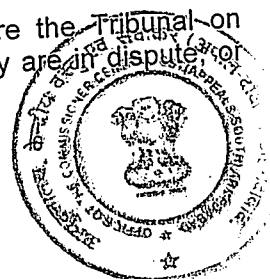
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute or penalty, where penalty alone is in dispute.



ORDER IN APPEAL

1 M/s. Shail Enterprises (Prop. Devang Chandrakant Safi) P-3, 10th floor, Shyam Tower, Parth Sarthi Avenue, Shyamal Cross road, Satellite, Ahmedabad- 380 015 (hereinafter referred to as 'appellants') holding Service Tax Registration No. AGSP S6756M ST001, have filed the present appeals against the Order-in-Original number STC/28/KM/AC/D-III/16-17 dated 28.03.2017 (hereinafter referred to as 'impugned orders') passed by the Asst. Commissioner, Service Tax Div- III, APM Mall, Satellite, Ahmedabad (hereinafter referred to as 'adjudicating authority');

2.1 The facts of the case, in brief, are that the appellant had not paid service tax of Rs. 15,20,013/- on construction service rendered during October -2010 to March-2015 to Gujarat Harijan Sevak Sang and Sabarmati Harijan Ashram Trust.

2.2 Further during 2013-14 and 2014-15 appellant had claimed abatement of 70% of gross receipt by wrongfully classifying the service rendered as "Construction Service other than Residential Complex, including Commercial/Industrial Building or civil structure". Land value is not included in cost on complex built by them and service rendered falls under "works contract service" wherein 60% abatement is eligible. Differential amount (service tax 70% abatement - 60% abatement value) comes to Rs. 1,87,662/-

2.3 Total short payment of duty Rs. 17,07,675/- (Rs. 15,20,013/- + Rs. 1,87,662/-) was confirmed vide impugned OIO u/s 73(1) r/w Section 68 of FA, 1994 by invoking extended period along with imposition of penalty of Rs. 17,07,675/- u/s 78 of FA, 1994 and penalty of Rs. 10,000/- was imposed u/s 77 of FA, 1994.

3. Being aggrieved with the impugned order, the appellant filed an appeal wherein it is stated that-

- i. Service tax demand of Rs. 1,87,662/- arising out of differential abatement value has been paid before issuance of SCN, therefore no SCN should have been issued in terms of Section 73(3) of FA, 1994.
- ii. Service tax demand of Rs. 15,20,013/- as shown in para 6 of OIO pertains to repair, renovation and construction of Sabarmati Ashram, therefore same does not fall under "commercial and industrial construction service". Gujarat Harijan Sevak Sang and Sabarmati Harijan Ashram being trust is not used for commerce or industry,



therefore service rendered is not taxable in terms of para 13.2 and 13.3 of Circular No. 80/2004- ST dated 17.09.2004 and para 13(c) of Notification No. 25/2012- ST dated 20.06.2012.

- iii. Construction services are provided to an entity registered u/s 12AA of Income Tax Act, 1961 and entity meant predominantly for religious use by general public, there is exemption from service tax.
- iv. Gujarat Harijan Sevak Sang is registered u/s 12AA of Income Tax Act, 1961 vide registration No. HQ.III/12AA-32/H 61/73-74 dated 21.12.2014 and Sabarmati Harijan Ashram Trust are registered u/s 12AA of Income Tax Act, 1961.
- v. As per para (zb) of Notification No. 25/2012- ST dated 20.06.2012, "religious place" means a place which is primarily meant for conduct of prayers or worship pertaining to a religion, meditation, or spirituality. Sabarmati ashram is used for prayers. By virtue of para 13(c) of Notification No. 25/2012- ST dated 20.06.2012, service rendered is not taxable.

4. Personal hearing in the case was granted on 10.10.2017. Shri Rohan Thakkar, CA, on behalf of appellant, appeared before me and reiterated the grounds of appeal.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants.

6. I find that total demand has been confirmed in OIO as below for two different issues-

Period Covered	ISSUE	Amt. confirmed
Oct. 2010 to March-2015	Exemption is not available	15,20,013/-, (Table-1 of OIO)
FY 2013-14 , FY 2015-15	Abatement rate wrongly taken	1,87,662/-,(Table-2 of OIO)
Total		17,07,675/-

7. I shall first take up the matter related to amount 15,20,013/-. Appellant was not paying service tax under presumption that they being registered trust and having income tax exemption under section 80G of the Income Tax Act, 1962, service tax is not payable.



8. I find that the appellant has resorted to circular No 80/10/2004-ST dated 17/09/2004 to claim exemption from payment of service tax. The said circular is on applicability of service tax on commercial and industrial buildings or civil structures wherein it has been clarified that there is no service tax on construction service, if construction of building is of non-commercial in nature. Thus, I note that normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax. Para 13.2. and 13.3 of said circular are reproduced as below-

"13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is "used, or to be used" for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.

13.3 In case of multi-purpose buildings such as residential cum commercial construction, tax would be leviable in case such immovable property is treated as a commercial property under the local/ municipal laws."

9. Department has not produced any evidence to establish that said premises are commercial and it is used for commercial purpose. From para 29 of OIO it is gathered that appellant has produced before adjudicating authority copy of letter dated 22.09.2009 issued by the Director of Income Tax (Exemption), Ahmedabad wherein it is certified that donation made to said trust/institution (i.e. Gujarat Harijan Sevak Sang) shall qualify for



deduction under section 80G(5) of Income Tax Act, 1961. Said exemption was valid from 01.04.2009 to 31.03.2012.

10. Therefore for period 2010-11, 2011-12 and pre-negative period of 2012-13 i.e. up to 30.06.2012, services rendered on said premises is not required to pay service tax in view of para 13.02 and 13.3 of circular No. 80/2004-ST dated 20.06.2012. I hold that demand of duty (out of Rs. 15,20,013/-) for period up to 30.06.2012 is not required to be paid. I also hold that proportional penalty imposed u/s 78 corresponding to demand pertaining to period up to 30.06.2012 is required to be set aside and I do so.

11. Further, for period after 30.06.2012, appellant has relied upon sr. No. 13(c) of Notification No. 25/2012-ST dated 20.06.2012 for claiming exemption from payment of service tax for F.Y. 2012-13 and 2013-14. Para 13(c) of Exemption Notification No. 25/2012-ST dated 20.06.2012 is as below

"13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

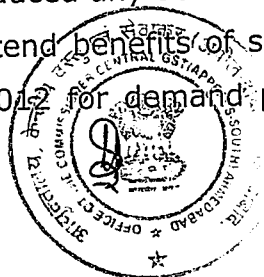
(a);

(b).....;

(c) a building owned by an entity registered under section 12 AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;"

As per para (zb) of Notification No. 25/2012- ST dated 20.06.2012 "religious place" means a place which is primarily meant for conduct of prayers or worship pertaining to a religion, meditation, or spirituality. Appellant has produced as evidence that Sabarmati ashram is used for prayers.

12. Appellant has stated that Gujarat Harijan Sevak Sang is registered u/s 12AA of Income Tax Act, 1961 vide registration No. HQ.III/12AA-32/H 61/73-74 dated 21.12.2014 and Sabarmati Harijan Ashram Trust are registered u/s 12AA of Income Tax Act, 1961. The name suggest that the organization must be involved in public service, but the benefits can not be extended on the basis of name. Appellant has not produced any documentary evidence to this effect, therefore I am unable to extend benefits of sr. No. 13(c) of Notification No. 25/2012-ST dated 20.06.2012 for demand period



covered (i.e. from 01.07.2012) under notification for FY 2012-13 and for period 2013-14.

13. Adjudicating authority has held (at para 31 of OIO)that appellant is not eligible for exemption as per sr. No. 4 of Notification No. 25/2012-ST dated 20.06.2012. Sr. No. 4 of Notification No. 25/2012- ST is as below.

"G.S.R.....(E).- In exercise of the....., the Central Government,, hereby exempts the following taxable services leviable thereon under section 66B of the said Act, namely:-

1.....

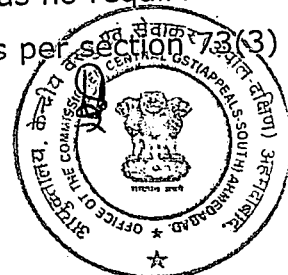
2.

3.

4. **Services by an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) by way of charitable activities;"**

14. I find that said exemption under Sr. No. 4 above is not admissible to appellant as appellant is not registered under section 12AA of the Income tax Act, 1961 (43 of 1961) by way of charitable activities, however appellant is eligible for exemption of sr. No. 13(c) of Notification No. 25/2012-ST dated 20.06.2012 for demand period covered under notification for FY 2012-13 and for period 2013-14 but same also can not be granted as documents not produced before me. I hold that demand of duty (out of Rs. 15,20,013/-) for period beyond 30.06.2012 is required to be paid with interest. Further it being suppression of facts penalty equal to duty is required to be paid u/s 78.

15. Now I come to next issue pertaining to demand of Rs.1,87,662/- ,(Table-2 of OIO). Appellant has accepted the issue on merit but it is contested that the, service tax demand of Rs. 1,87,662/- arising out of differential abetment value has been paid before issuance of SCN, therefore no SCN should have been issued in terms of Section 73(3) of FA, 1994 and consequently no penalty should have been imposed. Appellant's contention that since duty is paid before issuance of notice there was no requirement to issue the notice as matter is deemed to be concluded as per section 73(3) is



not acceptable as section 73(3) is applicable only where there is no fraud, no suppression or no mis-statement of facts as per 73(4). It was only during the course of audit proceedings that the entire event of non payment of tax had come to the knowledge of department. Had it not been the audit scrutiny of the financial statements of the appellant conducted, the payment/non payment of Service tax would have gone unheeded. I hold that instant case is not covered under section 73(3) of Finance Act 1994. My view is supported by decision in the case of Machino Montel (I) Ltd.[2006 (202) ELT 398 (P&H)], wherein it was stated that mere deposition of the duty demand before issuance of SCN cannot give the benefit to the Assessee for non-imposition of penalty. I uphold the impugned OIO imposing penalty u/s 78 for this abatement matter.

16. I find that appellant has failed to assess duty correctly and filed to file return in time and have failed to declare taxable value in ST-3 return. I uphold the OIO imposing penalty of Rs. 10,000/- u/s 77 of FA, 1994 r/w rule 7 of Service Tax Rules, 1994. I uphold the interest payment u/s 75, on duty, wherever OIO is upheld in this order.

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

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

उमा शंकर
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

M.R. Patel
(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD.

By R.P.A.D.:

To,

M/s. Shail Enterprises
(Prop. Devang Chandrakant Safi)
P-3, 10th floor, Shyam Tower,
Parth Sarthi Avenue, Shyamal Cross road,
Satellite, Ahmedabad- 380 015



Copy To:

The Chief Commissioner, Central Tax, Ahmedabad.

The Commissioner Central Tax, GST South, Ahmedabad-.

The Additional Commissioner, Central Tax , GST South, Ahmedabad

The Asst. Commissioner, Ser. Tax Div-III, APM Mall Ahmedabad-I(old jurisdiction).

The Asst. Commissioner(System), GST South, Hq, Ahmedabad.

Guard File.

P.A. File.

