

 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर शुल्क भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015 079-26305065	 7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015 टेलीफैक्स : 079 - 26305136
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क फाइल संख्या : File No : V2(ST)0233/A-II/2016-17 / 10660 को 10664
 ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-001-APP-192-17-18
 दिनांक Date : 30-11-2017 जारी करने की तारीख Date of Issue 11-12-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No STC/10/KMM/AC/D-III/16-17 Dated 28.12.2016
 Issued by Assistant Commr STC, Service Tax, Ahmedabad

ध 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 मेंटल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग 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 भेजी 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, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त 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 बशर्त 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 होगा।

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

M/s. Uday Buildcon Pvt. Ltd., 704, Saffron, Nr. Bank of Baroda, Panchvati, Ellis bridge, Ahmadabad- (STR AAACU1979MST001) (hereinafter referred to as 'appellants') have filed the present appeals against the Order-in-Original number STC/10/KM/AC/D-III/16-17, dated 28.12.2016 (hereinafter referred to as 'impugned orders') passed by the Asst. Commissioner, Service Tax Div-III, APM Mall, Satellite, Ahmadabad (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that, during the audit of the appellant it was noticed that they had discharged less service tax liability during the year 2009-10, 2010-11 and 2012-13 on some portion of taxable value which had been noticed on reconciliation of figures of taxable income as reflected in their books of accounts viz. Balance sheet/income ledger, viz-a-viz taxable value declared in their Half yearly ST-3 returns filed. A SCN F.No.ST/15-28/C-IV/APXV/FAR-33/R.P.05/15-16 dated 25.08.2015 was issued to them for demanding service tax to the tune of Rs.8,43,094/- which was confirmed vide impugned OIO. 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 the appellant has filed the present appeal on the grounds;

- (i) Whether service tax demand on the basis of reconciliation difference is justifiable or not,
- (ii) While reconciling for the year 2009-10 once gross bill has been taken into account, again inclusion of TDS receivable amount in gross amount which was part of gross amount, demand on that basis is justifiable or not,
- (iii) While reconciling for the year 2010-11 once gross bill has been taken into account, again inclusion of TDS receivable amount in gross amount which was part of gross amount, demand on that basis is justifiable or not,
- (iv) While reconciling for the year 2012-13, while preparing the reconciliation statement details up to net taxable income has to be taken from books of accounts or ST-3 return, demand on the basis of details has not been taken properly is justifiable or not,
- (v) Whether the demand on the reconciliation of renting of immovable properties service for the year 2009-10 & 2010-2011 on the basis of bill/charged or receipt basis.
- (vi) Whether extended period can be invoked or not.
- (vii) Whether penalty u/s 77(2) & 78 of Finance Act, 1994.

4. Personal hearing in the case was held on 14.11.2017 wherein Shri Vipul Kandhar, CA, appeared on behalf of the appellants and reiterated the grounds of appeal.



5. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum. On examination of their grounds of appeal it is noticed that;

5.1 For the year 2009-10 at page 12 of their submission at Sr.No.4 the taxable income after adjustment reconciled by the auditors as well by the service provider are same and tallied. However after permissible abatement of 67% net taxable income inclusive of Service Tax differs due to the reason that the service provider has made calculation error, it seems that just to arrive at a figure to prove that there is no difference in reconciliation hypothetical figure has been shown at sr no.5 and 6 at column 7.

5.2 For the year 2010-11 at page No.15 of their submission at Sr.No.4 the taxable income after adjustment reconciled by the auditors as well by the service provider are same and tallied. However after permissible abatement of 67% net taxable income inclusive of Service Tax differs due to the reason that the service provider has made calculation error, it seems that just to arrive at a figure to prove that there is no difference in reconciliation hypothetical figure has been shown at sr no.5 and 6 at column 7.

5.3 For the year 2012-13 at page 17 of their submission it is observed that as per financial records Gross income with material as per balance sheet and without material differs and the appellants has not given any reason for the said difference.(Row-1 Col-5/6 & 7/8 of the table.) Even again the service provider has made calculation error, it seems that just to arrive at a figure to prove that there is no difference in reconciliation hypothetical figure has been shown at sr no.10 at column 7. Also they have shown exempt income as Rs.5,96,11,808/- instead of Rs. 3,89,66,256/- as per books of accounts. They have not produced any plausible reasons evidences/documents to prove the exempted income shown by them in reconciliation is correct. More over it is evidenced that in reconciliation for all the disputed period they have made calculation errors, they have claimed excess abatement.

5.4 As regards difference in taxable income for rent the gross income as per books of accounts is Rs.2,25,010/- and 2,64,000/- for the years 2009-10 and 2010-11 is correct. Whereas the net taxable income as per ST.3 Returns for the respective years is Rs.1,64,004/- and RS.2,37,599/- as reconciled by the department based on records. The appellants have not produced any evidence to prove the correctness of their reconciliation.

5.5 The reconciliation done by the department and the reconciliation done and submitted by the appellant in their appeal memorandum from page no 24 and 25 has been comparatively analyzed year wise and the placed at below. Here the appellant has not shown any plausible reasons and evidence to prove their correctness.



Reconciliation by department					By Party
2009-10					2009-10
		with material	without	Total	Total
1	Gross Income Ledger (Cr.Side)	104864280	9942210	114806490	115012454
	Add ST.	3119303	1061786	4181089	4200135
A	Gross Ledger Income Incl.ST	107983583	11003996	118987579	119212589
2	Gross Income as per B/S (P & L)	104864280	9942210	114806490	115012454
B	Add ST.	3119303	1061786	4181089	4200135
	Gross Income as per B/S (P & L) incl st.	107983583	11003996	118987579	119212589
3	Additions				
i	Opening Balance of Debtors.	11150414	6627170	17777584	17777584
ii	TDS Received for the previous year	594534	86218	680752	680752
iii	Value of material supplied by client	1044952	0	1044952	0
C	Total Addition	12789900	6713388	19503288	18458336
4	Deductions				
i	Sundry debtors write off	440140	181222	621362	621362
	Closing Balance of Debtors	14611842	2318225	16930067	16930067
	Exempt income	15736462	0	15736462	15736462
D	Total deductions	30788444	2499447	33287891	33287891
5	Taxable income as per income ledger (Inclusive of ST) (A+C-D)	89985039	15217937	105202976	104383034
6	Taxable Income as per Balance Sheet incl ST (B+C-D)	89985039	15217937	105202976	104383034
7	Taxable income 5 or 6 whichever is higher (Incl ST)	89985039	15217937	105202976	104383034
8	Abatement admissible,if any (Notifi.1/2006)	60289976	0	60289976	59715638
9	Net Taxable Income (Incl.ST) as per ST 3 returns after abatment	29695063	15217937	44913000	44667396
10	Taxable Value (Incl ST) as per ST-3 Returns.after abatment	30157339	14346712	44504051	44668055
11	difference in taxable value inclusive ST.	-462276	871225	408949	-659
	Taxable value			370761	
	Service Tax Liability			38188	



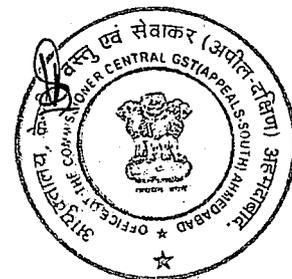
Reconciliation by department					By Party
					2010-11
2010-11					Total
		with material	without	Total	Total
1	Gross Income Ledger (Cr.Side)	170172540	1896189	172068729	172308069
	Add ST.	4866837	248867	5115704	5140364
A	Gross Ledger Income Incl.ST	175039377	2145056	177184433	177448433
2	Gross Income as per B/S (P & L)	170172540	1896189	172068729	172308069
B	Add ST.	4866837	248867	5115704	5140364
	Gross Income as per B/S (P & L) incl st.	175039377	2145056	177184433	177448433
3	Additions				
i	Opening Balance of Debtors.	14611842	2318225	16930067	16930067
ii	TDS Received for the previous year	531406	74307	605713	605713
iii	Value of material supplied by client	3690003	0	3690003	0
C	Total Addition	18833251	2392532	21225783	17535780
4	Deductions				
i	Sundry debtors write off	1351020	0	1351020	1351020
	Closing Balance of Debtors	26154768	660868	26815636	26815636
	Exempt income	30833063	0	30833063	30833063
D	Total deductions	58338851	660868	58999719	58999719
5	Taxable income as per Income ledger (Inclusive of ST) (A+C-D)	135533777	3876720	139410497	135984494
6	Taxable Income as per Balance Sheet incl ST (B+C-D)	135533777	3876720	139410497	135984494
7	Taxable income 5 or 6 whichever is higher (Incl ST)	135533777	3876720	139410497	135984494
8	Abatement admissible,if any (Notifi.1/2006)	90807631	0	90807631	93357450
9	Net Taxable Income (Incl.ST) as per ST 3 returns after abatment	44726146	3876720	48602866	42627044
10	Taxable Value (Incl ST) as per ST-3 Returns.after abatment	39426397	2961149	42387546	42625146
11	difference in taxable value Inclusive ST	5299749	915571	6215320	1898
	Taxable value			5634923	1702
	Service Tax Liability			580397	196



Reconciliation By department					By Party
2012-13					2012-13
		with material	without	Total	Total
1	Gross Income Ledger (Cr.Side)	131770247	3648697	135418944	135733797
	Add ST.	3567514	450979	4018493	4057415
A	Gross Ledger Income Incl.ST	135337761	4099676	139437437	139791212
2	Gross Income as per B/S (P & L)	131770247	3648697	143455930	135733797
B	Add ST.	3567514	450979	282893367	4057415
	Gross Income as per B/S (P & L) incl st.	135337761	4099676	426349297	139791212
3	Additions				
i	Opening Balance of Debtors.	8762268	399693	9161961	9161961
ii	TDS Received for the previous year	325877	0	325877	325877
iii	Value of material supplied by client	0	0	0	0
C	Total Addition	9088145	399693	9487838	9487838
4	Deductions				
i	Sundry debtors write off	148350	0	148350	148350
	Closing Balance of Debtors	2016250	367840	2384090	2384090
	Exempt income	38966256	0	38966256	59611808
D	Total deductions	41130856	367840	41498696	62144248
5	Taxable income as per income ledger (Inclusive of ST) (A+C-D)	103295050	4131529	107426579	87134802
6	Taxable Income as per Balance Sheet incl ST (B+C-D)	103295050	4131529	107426579	87134802
7	Taxable income 5 or 6 whichever is higher (Incl ST)	103295050	4131529	107426579	87134802
8	Abatement admissible,if any (Notifi.1/2006)	61977030	0	61977030	43295063
9	Net Taxable Income (Incl.ST) as per ST 3 returns after abatment	41318020	4131529	45449549	43839739
10	Taxable Value (Incl ST) as per ST-3 Returns.after abatment	39383146	4099676	43482822	43836598
11	difference in taxable value inclusive ST.	1934874	31853	1966727	3141
	Taxable Value			1750380	
	Service Tax Liability			216347	388

The said appellants have simply repeated the tables and the part of OIO in their defense reply and did not substantiate their reconciliation with documentary evidences. They relied upon the following judgments.

1. 2013 (31) STR 673 (Tri.- Bang),
2. 2010 (20) STR 789 (Tri. Mumbai)
3. 2010 (19) STR 242 (Tri.-Ahmd)



4. 2009 (16) STR 63 (Tri.-Chennai)
5. 2013 (30) STR 62 (Tri.-Ahmd)

5.6 I have carefully gone through the above case laws and it is felt that the appellant has not made a case wherein they could prove the error in reconciliation made by the department thus cited case laws are of no rescue to them. On going through the reconciliation tabulated above, it is proved that the appellants have no evidence to show the reasons for difference in taxable value. I hold that the demand is correctly confirmed.

6. As regards the contention of appellant that the entire demand is time barred, as there is no suppression of facts, I found that had the audit [AR No. 33/15-16, RP-5] 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 difference in taxable value as reconciled by them has been shown or declared to department. I hold that extended period u/s 73 of FA 1994, for recovery is correctly invoked.

7. Appellant's contented that penalty u/s 78 and section 77 cannot be imposed as they have not suppressed any information and there is no short payment of service tax hence they are not liable for penalty. Appellants contention is vague and without any support. It is established that the difference in taxable value was unearthed during audit and they have not produced any evidence to prove their stand, I hold that penalties u/s 77 and 78 are correctly imposed.

8. 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 assesses 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:

9. 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 the language



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

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

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

उमा शंकर

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

K.H. Singhal

(K.H. Singhal)
SUPERINTENDENT (APPEAL),
CENTRAL TAX, AHMEDABAD

To,

M/s. Uday Bulcon 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, Ahmadabad-.
- 3) The Asst. Commissioner, Central Tax., Div-VI, Ahmadabad-South .
- 4) The Asst. Commissioner (System), GST South, Hq, Ahmadabad.
- 5) Guard File.
- 6) P.A. File.

