



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

7th Floor, Central Excise Building,
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Ambavadi, Ahmedabad-380015



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क फाइल संख्या : File No : V2(ST)088/A-II/2017-18 / 227-231
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-001-APP-227-17-18
दिनांक Date : 27-12-2017 जारी करने की तारीख Date of Issue 17/01/18

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-05/20/DKI/DC/2016-17 Dated 30.03.2017
Issued by Deputy Commr STC, Service Tax, Ahmedabad

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

M/s. Varniraj 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 :-

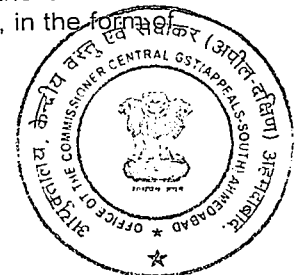
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 83 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



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 A219K 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 लगाना 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1988 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 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 अर्ज़ों 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,

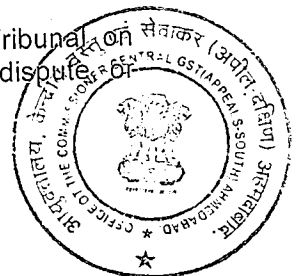
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

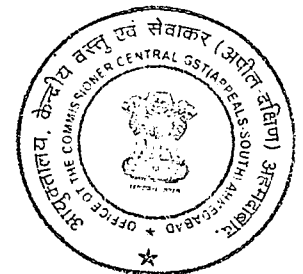
This appeal has been filed by M/s. Vaniraj Buildcon Private Limited, 1, Samkeet Bungalows, B/h The Grand Bhagwati Hotel, SG Highway, Bodakdev, Ahmedabad 380 051 [for short – ‘appellant’] against OIO No. SD-05/20/DKJ/DC/2016-17 dated 30.3.2017, passed by the Deputy Commissioner, Service Tax, Division V, Service Tax Commissionerate, Ahmedabad [for short – ‘adjudicating authority’].

2. A show cause notice dated 31.7.2015 was issued by the Additional Commissioner, Service Tax, Ahmedabad *inter alia*, proposing to consider the amount of Rs. 4.16 crores + 2.44 crores, received by the appellant during the period from 2010-11 to 2014-15 as taxable income under *construction of residential complex service*; demanding service tax of Rs. 17,41,161/- along with interest and further proposing penalty under sections 76, 77 and 78 of the Finance Act, 1994. The adjudicating authority vide his impugned OIO dated 30.3.2017, confirmed the demand along with interest and further imposed penalty on the appellant.

3. Feeling aggrieved the appellant has filed this appeal on the grounds that:

- the impugned OIO is non reasoned and non speaking; the adjudicating authority has not followed the binding precedence;
- that the project was started in 2008; that they had brought all the details to the knowledge of the department vide their letter dated 11.1.2012;
- that as far as construction of residential construction service is concerned, the said service was received by the appellant from the contractor who was registered with the department and had paid entire amount of service tax;
- that no where the impugned OIO points to malafide intention;
- that the appellant vide his letter dated January 2012 had informed that they are outsourcing the construction activity and service tax was paid by their service provider;
- that the show cause notice dated 31.7.2015, is barred by limitation;
- that it is not even in dispute that the contractor who actually undertook the construction activity has paid entire amount of service tax; that confirmation of service tax again on the appellant would amount to double taxation on the same service;
- the levy is only on actual construction service being undertaken: that in the present case, actual construction service is provided by M/s. Shree Riddhi Builders who has discharged service tax on construction activity;
- that the entire construction service to the appellant was provided inclusive of raw materials; that the construction activity has already attracted service tax; that even if it was to be paid by the appellant the amount of tax would not change;
- that the construction activity started in October 2008 was completed in October 2011; that the bungalow sold after 1.11.2011 does not attract service tax as the entire construction activity is performed prior to sale to ultimate buyer;
- the construction cost is available as per the invoices raised by the service provider; the service provider has charged service tax at the rate of 33% availing abatement of 66% on value of taxable service being provided to the appellant under serial no. 10 of notification no. 1/2006; that no construction activity has been undertaken which has not attracted service tax; there is no tax on value addition like VAT on services;
- that penalty is not imposable in cases where dispute is pertaining to levy on services;
- that the appellant entertained a bonafide belief that no tax is required to be paid by them

4. Personal hearing in the case was held on 1.12.2017 wherein Shri Nirav Shah, Advocate appeared on behalf of the appellant. He reiterated the grounds of appeal. He further stated that since 2010 the definition changed and hence the demand. The appellant also



submitted written submission dated 3.12.2017, received on 15.12.2017, reiterating the grounds of appeal.

5. I have gone through the facts of the case, the grounds raised in the appeal, and the oral submissions raised during the course of personal hearing. I find that the issue to be decided is whether the appellant is liable to pay service tax as has been held by the adjudicating authority.

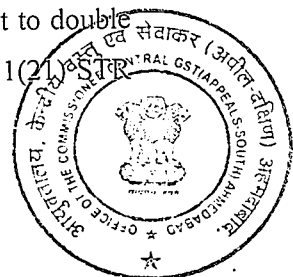
6. On going through the table under para 5 of the show cause notice dated 31.7.2015, I find that the service tax that is demanded is on advances received during the years 2010-11 [from 1.7.2010] to 2014-15 and on construction income disclosed to the Income Tax department in respect of the FY 2010-11 and 2011-12. The summary of the charges against the appellant is that they had purchased the land for construction of bungalows & had their plans approved by the appropriate authority; that they had outsourced their work to M/s. Shree Riddhi Builders [sub contractor]; that they had not obtained the completion certificate/BU permission from the competent authority. The appellant was not registered with the department and hence had not filed any returns and had also not paid the service tax.

7. I find that the appellant's main contention is that since they had outsourced the work to M/s. Shree Riddhi Builders, who had constructed the bungalows and had subsequently discharged the service tax liability, they were not required to pay any service tax.

8. On going through the issue I find that advances were brought under the service tax net on 1.7.2010. Advances were earlier exempted from service tax vide notification No. 36/2010-ST dated 28.6.2010. In the Finance Act, 2010, an explanation has been added wef 1-7-2010, to definition of commercial or industrial construction and construction of residential complex, as follows –

Explanation.— For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer.

9. Now on going to the primary contention that since the sub contractor to whom the construction services were outsourced, had discharged the service tax, the demand against the appellant would lead to double taxation, I find that the appellant has relied upon the case of M/s. Urvi Construction [2010(17) STR 302]. On going through the said judgement, I find that in this case the sub contractor was claiming exemption from tax on the plea that main contractor had paid the service tax. The Tribunal allowed the plea on the grounds that since the main contractor had paid the tax, demanding service tax again from the sub contractor, would amount to double taxation. The appellant has further relied upon the case of M/s. Viral Builders [2011(21) STR 457], wherein the Hon'ble Tribunal held as follows :



5. There is a fallacy in above reasoning of Commissioner (Appeals). The same service for which the contractor has procured an order, does not stand actually provided by him but is passed on to sub-contractor, who provided the actual service, it cannot be said that the contractor is liable to pay duty on the same. Service definitely stands provided only once. As such by no stretch of imagination service tax in respect of the same service can be paid for the second time. It is not a case where the service provided by sub-contractor is further used by him for providing services to his buyers. As such, the example of inputs being used in the final product and both leviable to excise duty is not apt.

Admittedly, the service in the present case stands provided by the sub-contractor through the main contractor i.e. appellant. It stands clarified by the Board also that there cannot be double taxation in cases where services are rendered by a person through another person to the ultimate consumer as long as the main person who has the contract with the customer is paying the service tax on the gross amount. Reference in this regard can be made to the following circulars :-

- (a) TRU letter F. No. 341/18/2004-TRU (Pt.) dated 17-12-2004
- (b) Circular No. 23/3/97-S.T., dated 13-10-1997
- (c) Master Circular No. 96/7/2007-S.T., dated 23-8-2007

6. In fact the issue is no more *res integra* and stands settled by various decisions of the Tribunal :-

- (a) *Urvi Construction v. CST, Ahmedabad* - 2010 (17) S.T.R. 302 (Tri. Ahmd.)
- (b) *CCE, Indore v. Shivhare Roadlines* - 2009 (16) S.T.R. 335 (Tri.-Del.)
- (c) *Harshal & Company v. CCE, Vadodara* - 2008 (12) S.T.R. 574 (Tri.-Ahmd.)
- (d) *Semac Pvt. Limited v. CCE, Bangalore* - 2006 (4) S.T.R. 475 (Tri.-Bang.)
- (e) *Shiva Industrial Security Agency v. CCE, Surat* - 2008 (12) S.T.R. 496 (Tri.-Ahmd.)
- (f) *Synergy Audio Visual Workshop P. Ltd. v. CST, Bangalore* - 2008 (10) S.T.R. 578 (Tri.-Bang.)
- (g) *OIKOS v. CCE, Bangalore* - 2007 (5) S.T.R. 229 (Tri.-Bang.)

Both the case laws were distinguished by the Hon'ble Tribunal in the case of Engineers India Technical Services [2014(34) STR 358], wherein it was held as follows:

Demand - Sub-contractor, liability of - Commercial or Industrial Construction service - Remittance of Service Tax by principal contractor on consideration received from eventual service recipient - HELD : Finance Act clearly enjoins remittance of Service Tax by every taxable service provider at every stage of taxable service - Fact of rendering of service at various stages or by various agencies not to alter trajectory of legal provisions - No legislative or normative basis for principle of remittance of Service Tax extinguishes sub-contractor liability same may render concept of Cenvat credit nugatory - Assessee not to claim being misled by Board Circular issued generic jural principles from circulars - No error in impugned order - Appeal without merits - Section 73 of Finance Act, 1994. [paras 9, 11, 12, 13, 14]

In the aforementioned cases, the dispute was whether the sub contractor is liable to discharge service tax, when the principal contractor had paid the tax. The present dispute is however the reverse, wherein the appellant claims exemption from tax on the reasoning that since the sub contractor has discharged the service tax, his payment of service tax would lead to double taxation.

10. As is already mentioned in the OIO, upto 30.6.2012, the service rendered fell under the category of *construction of residential complex* and thereafter from 1.7.2012, it fell under the purview of *declared services*. The appellant's claim that his sub contractor had paid the service tax is not supported by any documentary proof in the first place. There was no written contract with the subcontractor, neither has the sub contractor provided relevant documents to prove that the entire service tax has been discharged by him. Even otherwise, sub contractor was required to pay the service tax in respect of the services rendered to the appellant. The appellant has confused this with the demand against him ignoring the fact that what has been

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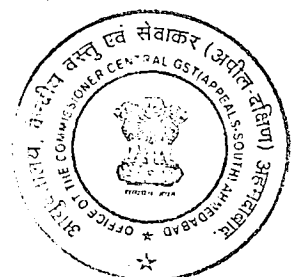


demand is in respect of services rendered by the appellant to the buyers/customers. The Hon'ble Tribunal in the case of Engineers India Technical Services, *ibid*, has held that the sub contractor is not absolved from paying service tax on the ground that the main contractor discharged the service tax. Going by this analogy, the appellant too is not absolved/cannot take a plea of not paying tax because the sub contractor has paid the service tax, which as I have already held is not supported by any documentary proof, etc.. The activity of building a residential unit on an earmarked plot in the complex and making construction thereon as per the plan, design and specifications, obtaining various permissions and providing amenities as contemplated in the agreement, apart from the provision of common infrastructural facilities before handing over the building to the customers undoubtedly constitutes 'services provided or to be provided' by the appellant. The engagement of sub-contractor to do a substantial part of the construction work, in my opinion, does not absolve the appellant of the responsibility of providing services in relation to the construction of residential unit agreed to be sold to the customer ultimately. Hence, in view of the foregoing, I find that the appellant, who purchased the land for the construction of the bungalows, floated the project named Sahaj Bungalows, accepted deposits from the buyers/members of the bungalows, cannot shift the burden of service tax on M/s. Shree Riddhi Builders, to whom the construction work was outsourced. Therefore, I find that the adjudicating authority has correctly confirmed the service tax along with interest. Hence, the contention, that since M/s. Riddhi Builders, has discharged the service tax at the rate of 33% availing abatement of 66% on value of taxable service being provided; that since no construction activity has been undertaken which has not attracted service tax there is no tax on value addition like VAT on services, is not a tenable argument.

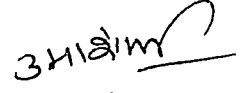
11. The appellant has also stated that since some of the documents were provided in 2012, the notice is barred by limitation. I do not agree with the contention. The orders of the Income Tax department in respect of disclosed income is of the year 2014, though pertaining to 2010-11 and 2011-12. Further, since the matter had all the elements pertaining to invocation of extended period, I find that the notice demanding service tax for the period from 2010-11 to 2014-15, issued on 31.7.2015, has been issued within time. Hence, the contention that the notice is barred by limitation is without merit.

12. The appellant has further not produced anything as far as imposition of penalty is concerned, which forces me ^{not} to interfere with the penalty imposed in the matter. As far as the contention that the appellant was under a bonafide belief, that no tax is payable is concerned, the law was very clear. In-fact, it is already recorded that as per the letter dated 30.7.2015, that even the sub contractor has not discharged the entire service tax as advised by the appellant. Therefore, the plea that he was under a bonafide belief, appears to be untenable. As there was no doubt whatsoever that the appellant was liable to service tax, I uphold the impugned OIO dated 30.3.2017 and reject the appeal.





13. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
13. The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

आयुक्त (अपील्स - I)

Attested



(Vinod Lunkose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad.

BY R.P.A.D.

To,

M/s. Vaniraj Buildcon Private Limited,
1, Samkeet Bungalows,
B/h The Grand Bhagwati Hotel,
SG Highway, Bodakdev, Ahmedabad 380 051

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, Central Excise, Ahmedabad-I.
3. The Deputy/Assistant Commissioner, Central Excise, Division-VI, Ahmedabad--I.
4. The Assistant Commissioner, System-Ahmedabad
5. Guard File.
6. P.A..

