केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर भवन, 7th Floor, GST Building,

सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,

आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

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7747 to 7751

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)07/EA-2/Ahd-South/2018-19
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-123-2018-19**
दिनाँक Date : **22-11-2018** जारी करने की तारीख Date of Issue 31-12-2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **MP/05/Dem/2018-19** दिनाँक: **26.04.2018** issued by Assistant Commissioner, Div-V, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Span(Kathwada) Commercial Co-Operative Society Ltd
Ahmedabad

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.

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

...2...

(ख) 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।

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) 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।

(d) 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 ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. 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 not withstanding 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.

(6) 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 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

This appeal has been filed by the Assistant Commissioner of Central GST, Division-V, Ahmedabad South Commissionerate [hereinafter referred to as "department"], in view of Review Order No.03/201819 dated 24.08.2017 of Commissioner of CGST, Ahmedabad North, against Order-in-Original No.MP/05/Dem/2018-19 dated 26.04.2018 [hereinafter referred to as "impugned order"] passed by the Assistant commissioner of CGST, Division-V, Ahmedabad North [hereinafter referred to as "adjudicating authority"] in respect of M/s Span (Kathwada) Commercial Co-Operative Society Ltd, Plot No.537, GIDC, Kathwada, Opp.Pashupatinath Mandit, Ahmedabad [hereinafter referred to as "respondent"].

2. Briefly stated, the facts of the case is that based on information collected by the Directorate of General of Central Excise Intelligence, Ahmedabad [for short-DGCEI] to the effect that the respondent were engaged in providing taxable services under Construction Services other than Residential Complex including Commercial/Industrial Buildings or Civil Structures and had evaded payment of Service tax, the office premises of the appellant was visited by the DGCEI on 28.01.2014 and started further investigation. Further investigation revealed that the respondent had received taxable amount in the form of advances from various prospective buyers/members against the commercial property in respect of "Span Arcade" –a commercial project and they did not get themselves registered with Service Tax and did not pay due amount of service tax. Since it appeared the Services of 'Commercial or Industrial construction and construction of complex as provided by the appellant is taxable under sub-clause (zzq) and (zzzh) of clause 105 of Section 65 of the Finance Act, 1994 (FA) from 01.07.2010 as well as also remained taxable from 01.07.2012 and they did not pay service tax for the period from 2011-12 to 2014-15 (September), a show cause notice dated 23.03.2016 was issued to the respondent for demanding Rs.26,40,668/- with interest and imposition of penalty under Section 77 and 78 of FA. Vide the impugned order, the adjudicating authority has dropped the proceedings of the said show cause notice on the grounds that the appellant is co-operative society and the activity undertaken by the Co.op Society for and on behalf of members is not taxable.

3. Being aggrieved with the impugned order, the department has filed the instant appeal on the grounds that:

- From the definition of term 'service', it is clear that the activity would become service only if it is provided by a person to some other person for a consideration; thus if an activity cannot be construed to be service, the provider and recipient of the said activity have to be two distinct person; that the activity done by the association or body of person whether incorporated or unincorporated, for any individual member thereof for some consideration would amount be terms as 'service'.
- In the instant case, the respondent as a cooperative society, has provided taxable services to its members is undisputable; that the adjudicating authority has failed to appreciate the fact that [i] the appellant was registered with District Registrar, Co-Operative Society vide registration dated 07.01.2012 as a co-operative society and was distinct legal entity

from its members; [ii] the society was sponsored by 11 members and none of these members were allotted any commercial unit in the project; [iii] the construction is completed and the units are being allotted to the buyers as and when the units being sold out and the buyers are then made the members of society.

- In view of specific entry in the section 65 B (44) by way of explanation 3, the said activity of 'construction of commercial complex' rendered by the respondent to its so called member would fall squarely within the four corners of the definition of 'service'.
- The adjudicating authority has placed reliance on the decision of Hon'ble High Court of Gujarat in case of Commissioner of ST V/s Shrinandnagar IV Cooperative Housing Society [2011 (23)SRT-439]; that the facts of the said case were altogether different from the case on hand.

4. A personal hearing in the matter was held on 24.10.2018. Shri Bishan Shah, Charterred Accountant appeared for the same and reiterated the grounds of appeal. He further submitted copy of decision in case of Shrinandnagar Co-op Housing Sciety; Tribunal's order No.A/10785/2018 dated 26.04.2018 in case of Rajpth Club and Suresh Kumar Bansal [2011 (23)STR 449-Guj].

5. I have carefully gone through the facts of the case and submissions made by the department in the appeal memorandum and submissions made by the respondent during the course of personal hearing.

6. At the outset, I observe that the adjudicating authority has dropped the proceedings against show cause notice dated 23.03.2016 entirely on the basis of Hon'ble High Court of Gujarat's order in case of M/s Shrinandnagar-IV case supra. The department in the appeal memorandum has contended that the said decision not applicable to the instant case.

7. On close perusal of the said decision, I observe that the Hon'ble High Court has decided the issue in favour of the service provider for the period of prior to 01.07.2010. The Hon'ble Court has answered following question of law in the said decision.

> *(i) In view of the facts of this case whether the Co-operative Housing Society and its members are different legal entity or otherwise?*
>
> *(ii) Whether the construction activity being performed/undertaken by the Society as a service to its members, is a taxable activity or not?*
>
> *(iii) Whether Hon'ble CESTAT has committed error in interpreting the Board's Circular No. 108/2/009-S.T., dated 29-1-2009 by not distinguishing a co-operative housing society, which is providing service to its members from a developer/promoter?*

By answering above stated question of law, the Hon'ble court has relied on decision of M/s Suja; Developers which reads as under:

> *4. Counsel for the respondent drew our attention to the judgment of Division Bench of this Court rendered in Tax Appeal No. 1550 of 2010 dated 22nd April, 2011 in case of Commissioner of Service Tax v. M/s. Sujal Developers in which, judgment of the Tribunal impugned in the present appeal, was also under challenge. The Bench upheld the view of*

the Tribunal where the respondent-assessee was developer who had developed housing complexes for future sale. The Bench held and observed as under :

"13. From the statutory provisions, circulars as well as clarifications issued by the Board referred to hereinabove, it appears that for being chargeable to tax under section 65(105)(zzzh) of the Act is that the person concerned should render service to another person in relation to construction of complex. Thus the basic requirement for falling within the ambit of the said provision is that there has to be a service provider and a service receiver. In the present case as noticed earlier, the land on which the residential complex has been constructed belongs to the society. The society has entered into a development agreement with the respondent. Under the agreement between the society and the respondent-developer, the work of construction and development of the housing project has been entrusted to the respondent. The respondent-developer has agreed to develop the said land by attending to construction and development work and to complete the scheme duly and diligently on the terms and conditions contained in the agreement. Under the agreement, the developer is required to carry out every act necessary to complete construction and development of the project directly or indirectly, which includes preparation and approval of plans, getting the buildings constructed directly or by sub-contracting and/or purchase of material, hiring labour, arrangement of finance, marketing and advertising the project, enroll members, collect money, etc. The respondent is permitted to use the property in question for the purposes mentioned in the agreement. The respondent is entitled to construct and/or arrange to construct the building as per the plan and specifications prepared by the Architects. Thus, as per the agreement, the respondent-developer is entitled to make construction on the land in question, enroll members as well as collect amounts towards the units allotted to such members. The finances for the purpose of development are to be arranged by the respondent-developer. In the circumstances, from the development agreement, it does not appear that the respondent-developer is a contractor who is executing the construction work on behalf of the society. Here, the developer is using its own finances and developing the land in question and selling the property constructed thereon to the members of the society. Thus, in the light of the clarification issued by the Board, viz., when it is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then, the ownership of the property gets transferred to the ultimate owner, 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.

14. In the facts of the present case, there is nothing to indicate that the respondent has been hired as a contractor by the society so as to bring the activities of the respondent within the ambit of taxable services as contemplated under section 65(105)(zzzh) of the Act. In the absence of there being any service provider and service recipient in relation to the transaction in question, the Tribunal was justified in holding that the transaction in this case cannot be considered as taxable".

8. In the said case, the department has vehemently contended that the explanation to clause (zzzh) of Section 65(105) of Finance Act, 1994 was not noticed by the Tribunal. The Hon'ble Court finally held that:

7. From the record, we find that the impugned judgment of the Tribunal came to be upheld by the Division Bench in case of M/s. Sujal Developers (supra), relevant portion of which, we have already quoted in this order. We notice that in the said case before the Division Bench, it was a developer who was contending that not having provided any services he was not liable to pay any services tax. Only point of difference in this case is that it is a housing society who is putting forth a similar claim on the premise that the contractor who undertakes the construction work, would be liable to pay service tax but the society in turn, cannot be said to have supplied any services to its members. We are of the opinion that the question is substantially covered by the decision of Division Bench; wherein, similar questions were framed and answered against the revenue. Insofar as the explanation relied on by the counsel for the revenue is concerned, the same reads as under :

(e) in sub-clause (zzzh), the following Explanation shall be inserted, namely-

"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."

8. *We are not inclined to discuss whether by virtue of such explanation legal situation in factual background arising in present appeal, would or would not be any different. Suffice it to note that the explanation was brought in the statute book long after the taxing event in the present case had arisen.*

9. *In absence of any indication in the amendment to make it either retrospective or explanation being merely declaratory or clarifiacatory in nature, such statutory change cannot be made applicable to the long past events.*

9. From the above decision, it is very much clear that the explanation to sub-clause (zzzh) supra was not made applicable to the said case as the taxing event pertains to the said case is prior to the said explanation. With effect from the said explanation inserted, construction of a complex which is intended for sale, by a builder or any person authorized by the builder before, during or after construction shall be deemed to be service provided by the builder to the buyer. In view of above such explanation, the contention raised by the department is correct and acceptable. Accordingly, the respondent is liable to pay service tax.

10. Further, I observe that CBEC's clarification circular No.151/2/2012-ST dated 10.02.2012 regarding service tax on construction services. Para 2.1 of the said clarification states as under:

2.1 ***Tripartite Business Model (Parties in the model :*** *(i) landowner; (ii) builder or developer; and (iii) contractor who undertakes construction) : Issue involved is regarding the liability to pay service tax on flats/houses agreed to be given by builder/developer to the land owner towards the land /development rights and to other buyers.*

Clarification : Here two important transactions are identifiable : (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers: (a) from landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.

(A) Taxability of the construction service :

(i) For the period prior to 1-7-2010 : construction service provided by the builder/developer will not be taxable, in terms of Board's Circular No. 108/2/2009-S.T., dated 29-1-2009 [2009 (13) S.T.R. C33].

(ii) For the period after 1-7-2010, construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner.

11. From the above, it is very much clear that the construction service rendered by the respondent for period in dispute i.e 2011-12 to 2014-15 is taxable as contended by the department. Accordingly, I set aside the impugned order and allow the appeal filed by the department.

12. The appeal stands disposed of in above terms.

आयुक्त (अपील्स)
Date : .11 .2018

Attested

(Mohanan V.V)
Superintendent (Appeal),
Central Tax,Ahmedabad.

By RPAD.

To,
M/s Span (Kathwada) Commercial Co-Operative Society Ltd,
Plot No.537, GIDC, Kathwada,
Opp.Pashupatinath Mandit, Ahmedabad

The Assistant Commissioner
CGST, Division-V, Ahmedabad South.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad-South.
3. The Assistant Commissioner, System, Central Tax, Ahmedabad South.
4. Guard File.
5. P.A.