



सत्यमेव जयते

आयुक्त(अपील) का कार्यालय,  
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद  
Central GST, Appellate Commissionerate, Ahmedabad  
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५,  
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
☎ 07926305065 - टेलिफैक्स 07926305136



DIN : 20220964SW000000CE38

**स्पीड पोस्ट**

क फाइल संख्या : File No : GAPPL/COM/STP/2316/2021

13454-58

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-51/2022-23  
दिनांक Date : 16-09-2022 जारी करने की तारीख Date of Issue 27.09.2022

आयुक्त (अपील) द्वारा पारित  
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of OIO No. 16/AC/Div-I/RBB/2021-22 दिनांक: 06.07.2021 passed by Assistant  
Commissioner, CGST & Central Excise, Division-I, Ahmedabad South

घ अपीलकर्ता का नाम एवं पता Name & Address

**Appellant**

1. M/s Mahavir Developers  
55, Tirupati Complex, Danapith,  
Kalupur, Ahmedabad - 380002

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 पूर्वोक्त 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, 4<sup>th</sup> 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 हानिकार खाने 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 प्रक्रिया 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.



(क) 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।

(A) 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.

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

(B) 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 ड्यूटी क्रेडिट 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।

(c) 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 दिनांक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ.का मुख्य शीर्ष 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- n-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 रुपये या उससे कम होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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 2<sup>nd</sup> माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> Floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. 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. Registrar 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 आदेश 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 है।

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 notwithstanding 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु.6.50 पैसे कान्यायालय 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (28) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर 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.

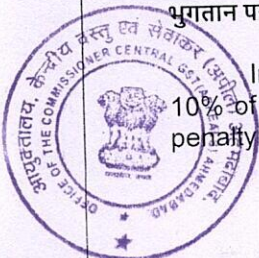
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (lxvii) amount determined under Section 11 D;
- (lxviii) amount of erroneous Cenvat Credit taken;
- (lxix) amount payable under Rule 6 of the Cenvat Credit Rules.

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

The present appeal has been filed by M/s. Mahavir Developers, 55, Tirupati Complex, Danapith, Kalupur, Ahmedabad – 380 002 (hereinafter referred to as the appellant) against Order in Original No. 16/AC/Div-I/RBB/2021-22 dated 06.07.2021 [hereinafter referred to as “*impugned order*”] passed by the Assistant Commissioner, Division – I, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as “*adjudicating authority*”].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. ACWFS0618JSD001 and engaged in providing Construction of Residential Complex Service. During the course of audit of the financial records of the appellant for the period F.Y. 2015-16 to F.Y. 2017-18 (up to June, 2017) conducted by the officers of Central Tax Audit, Ahmedabad, it was observed that the appellant had entered into a Development Agreement with the Society i.e. Sai Status Tagore Residency for reconstruction of their 12 flats. As per the agreement, the 12 flats would be assigned in favour of the Society and 30 additional flats would be sold for consideration received from buyers. The appellant received development rights for construction of additional saleable flats, which would be sold to prospective buyers. It appeared that the value of construction services provided by the appellant to the Society will be a consideration and taxable. In terms of Circular No. 151/2/2012-ST dated 10.02.2012, where the value of land/development rights are not ascertainable ordinarily, the value of flats given to the first category of service receiver, i.e. the land owner, is determinable in terms of Section 67(1)(iii) of the Finance Act, 1994 read with Rule 3(a) of Service Tax (Determination of Value) Rules, 2006. Accordingly, the value of the flats would be equal to the value of similar flats charged by the appellant from the second category of service receiver.

2.1 It appeared that the appellant had charged Rs.45,00,000/- for each member falling under the second category. Thus, the total consideration from all 12 members of the Society amounted to Rs.5,40,00,000/- and the



taxable value, after abatement, was worked out as amounting to Rs.1,62,00,000/- on which service tax amounting to Rs.23,49,000/- was payable by the appellant. However, the appellant had not paid the said service tax.

3. The appellant was, therefore, issued a Show Cause Notice bearing No. VI/1(b)-97/Cir-I/AP-III/2018-19 dated 11.03.2020 wherein it was proposed to :

- a) Demand and recover service tax amounting to Rs.23,49,000/- under the proviso to Section 73 (1) of the Finance Act, 1994.
- b) Recover Interest under Section 75 of the Finance Act, 1994.
- c) Impose penalty under Section 78 (1) of the Finance Act, 1994.

4. The SCN was adjudicated vide the impugned order wherein the demand for service tax was confirmed along with interest. Penalty equivalent to the service tax confirmed was imposed under Section 78 (1) of the Finance Act, 1994.

5. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

- i. The SCN has been issued without authority of law as the provisions of the Finance Act, 1994 have been invoked wrongly for demanding service tax. As per Section 173 of the CGST Act, 2017, Chapter V of the Finance Act, 1994 has been omitted. The issue involved in the SCN and consequent demand of service tax is not covered in the saving clauses of Section 174 as no service tax was required to be paid by them for the period prior to 30.06.2017 and there was no short payment/ non-payment.
- ii. The Department has failed to appreciate that by invoking the provisions of the Finance Act, 1994 only that amount of service tax can be demanded which pertains to the period up to 30.06.2017 and remains unpaid for any reason whatsoever. Any tax payable after 30.06.2017 is required to be paid as GST and not as service tax and if



there is short payment, the provisions of CGST Act, 2017 are required to be invoked.

- iii. Even if the contention of the Department to pay service tax, if any, is accepted, as per Para 3 of CBIC Instruction No. 354/311/2015-TRU dated 20.01.2016, the service tax is to be paid at the time when the possession or right in the property is transferred to the land owner by entering into conveyance deed or similar instrument.
- iv. In the instant case, they had issued allotment letters/executed sale deeds only after receipt of completion certificate (B.U. permission) from AMC, Ahmedabad on 27.04.2018. Therefore, if any service tax was to be paid, it was to be paid only in April, 2018. Hence, no service tax was unpaid as on 30.06.2017 and the tax, if any, payable w.e.f April, 2018 falls under the GST regime.
- v. It has been provided in Section 142 of the CGST Act, 2017 that goods or services supplied on or after 01.07.2017 in pursuance of a contract entered into prior to 01.07.2017 shall be liable to tax under CGST Act, 2017.
- vi. Even for the period up to 30.06.2017, no service tax was required to be paid after receipt of completion certificate/ BU certificate. They had issued the allotment letters only in April, 2018 after receipt of completion certificate on 27.04.2018. Therefore, no service tax was required to be paid for the period up to 30.06.2017.
- vii. They also rely upon the decision in the case of Krishi Constructions Pvt. Ltd. Vs. Commissioner of C.T, Hyderabad (Final Order No. A/30922/2020 dated 22.09.2020.
- viii. The judgment in the case of Maharashtra Chamber of Housing Industry Vs. UOI relied upon in Para 16.8 of the impugned order is not applicable to the facts and circumstances of the instant case as it does not discuss the issue of taxability on re-development and Development agreements.
- ix. They had, before the adjudicating authority, relied upon the order of the Commissioner of Central Tax and GST, Thane, Mumbai in the case of Ethics Infra Developments P. Ltd. However, the adjudicating authority has not discussed the said case.



- x. Since no demand of service tax is tenable, the question of interest and penalty does not arise as there is no late payment nor there is any contravention of the provisions of service tax laws nor evasion of service tax.
- xi. For the period up to 30.06.2017 there was no contravention, suppression of facts, no mis-statement on their part. Therefore, invoking penal provisions of the Finance Act, 1994 for the period covered under GST is not legal and tenable.

6. Personal Hearing in the case was held on 29.08.2022. Shri Lachhman Vishindas Chawla, Chartered Accountant, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the material available on records. The issue before me for decision is whether the appellant are liable to pay service tax in respect of the service of re-construction of flats provided to the members of the society. The demand pertains to the period F.Y. 2015-16 to F.Y. 2017-18 (up to June).

9. I find that the appellant have challenged the confirmation of demand of service tax on the grounds that no service tax was payable by them prior to 30.06.2017, as the allotment letters were issued and sale deeds executed only after receipt of completion certificate (B.U. permission) from AMC, Ahmedabad on 27.04.2018 i.e. in the GST regime. The appellant have submitted copies of the B.U. Permission dated 27.04.2018 and Property Index Copy in respect of 11 original members of the Society. On a perusal of the Property Index Copy, it is observed that the date of registration is mentioned as 27.08.2018. Therefore, the contention of the appellant that the flats were allotted to the members of the society after receipt of B.U. Permission is substantiated.



9.1 The CBIC had vide Instruction issued from F.No. 354/311/2015-TRU dated 20.01.2016 clarified the issue of valuation of flats for levy of service tax. At Para 3 of the said Instruction, it was clarified that :

“Service tax is liable to be paid by the builder/developer on the ‘construction service’ involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (e.g. allotment letter).”

In the instant case, the appellant have substantiated with documentary evidence that flats were allotted to the original members of the society after receipt of B.U. Permission on 27.04.2018. It is also a settled legal position that flats sold after issue of completion certificate/Building Use permission are not chargeable to service tax. Therefore, in terms of the aforesaid Instruction issued by CBIC, the liability to pay service tax, if any, arose after 27.04.2018. However, w.e.f. 01.07.2017, the provisions of Chapter V of the Finance Act, 1994 were omitted and CGST Act, 2017 came into force. Consequently, the question of levy or payment of service tax on the part of the appellant does not arise.

10. The appellant have also relied upon the judgment in the case of Krishi Constructions Pvt. Ltd. Vs. Commissioner of C.T., Hyderabad – 2020 (43) GSTL 236 (Tri.-Hyd.) wherein the issue before the Hon’ble Tribunal was :

“It was further observed that during the period 2011-12 to 2013-14, appellant entered into ‘development agreement’ with landlords for ‘construction of residential complex’ services, but had not paid appropriate Service Tax amounting to Rs. 5,55,458/- by not including the value of constructed area handed over to the land owner, while they discharged Service Tax liability on the flats falling under the share of the appellant (as builder), which they sold to individual buyers etc.”

In the context of the above, it was held by the Hon’ble Tribunal at Para 15 of their judgment that :

“Having considered the rival contentions, we find that the construction of flats under the ‘development agreement’ with the land owner by the appellant is on principal to principal basis. In such transaction, there is neither any element of service provided to the land owner, nor any element of sale. Accordingly, we hold that Service Tax is not imposable on this transaction and accordingly set aside the demand of Rs. 5,55,458/-.”

11. Considering the facts of the case as well as Instruction dated 20.01.2016 and the judgment of the Hon’ble Tribunal supra, I am of the considered view that the impugned order confirming demand of service tax





is not legally sustainable. Accordingly, the impugned order is set aside and the appeal filed by the appellant is allowed.

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

The appeal filed by the appellant stands disposed of in above terms.

*Akhil Kumar*  
16 September,  
( Akhilesh Kumar ) 2022-  
Commissioner (Appeals)  
Date:16.09.2022.

Attested:

*(Signature)*  
(N.Suryanarayanan. Iyer)  
Superintendent(Appeals),  
CGST, Ahmedabad.



**BY RPAD / SPEED POST**

To

M/s. Mahavir Developers,  
55, Tirupati Complex,  
Danapith, Kalupur,  
Ahmedabad – 380 002

Appellant

The Assistant Commissioner,  
CGST, Division- I,  
Commissionerate : Ahmedabad South.

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South.  
(for uploading the OIA)
4. Guard File.
5. P.A. File.

