सत्यमेव जयते

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

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलेफैक्स07926305136

DIN : 20230464SW0000777B3D

स्पीड पोस्ट

क फाइल संख्या : File No.: GAPPL/COM/STP/2726/2022 /620-24

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-05/2023-24**
दिनाँक Date : **19-04-2023** जारी करने की तारीख Date of Issue 24.04.2023

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of OIO No. **19/CGST/Ahmd-South/AC/PMC/2022-23** दिनाँक: **18.07.2022** passed by Assistant Commissioner, CGST, Division-V, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Shivalik Developers
Common (Survey No. 249), Kahan Residency,
B/5, Girivar Pride, Ring Road,
Odhav, Ahmedabad - 382415

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 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 मे 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.

(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 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।

(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 दिनाँक 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-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 होतो रूपये 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 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 2nd माला, बहुमाली भवन , असरवा , गिरधरनागर, अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd 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. 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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.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.

15ण 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)-

a. *(Section)* खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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:
(cxlii) amount determined under Section 11 D;
(cxliii) amount of erroneous Cenvat Credit taken;
(cxliv) 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. Shivalik Developers, Common (Survey No.249) Kahan Residency, B/5, Girivar Pride, Ring Road, Odhav, Ahmedabad – 382 415 (hereinafter referred to as the "appellant") against Order in Original No. 19/CGST/Ahmd-South/AC/PMC/2022-23 dated 18.07.2022 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, Division-V, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case are that the appellant were holding Service Tax Registration No.ACOFS6845FSD001 and engaged in providing Construction of Residential Complex Services, Construction Service other than Residential Complex, including Commercial/Industrial buildings or Civil Structures as defined under Section 65B(44) of the Finance Act, 1994. During the course of audit of the records of the appellant for the period from April, 2014 to June, 2017, conducted by the officers of Central Tax Audit Commissionerate, the following Revenue Paras were raised.

2.1 Revenue Para 1 : The appellant had shown an amount of Rs. 30,04,000/- under Construction of Residential Complex Service in their ST-3 returns for F.Y. 2014-15. However, as per the Balance Sheet, the appellant had received only an amount of Rs. 5,03,000/- towards the said service. It appeared that the appellant had availed abatement of 75% instead of 70% on the taxable value amounting to Rs. 25,01,000/- received towards construction of commercial units and had, thereby, availed excess abatement and short paid service tax amounting to Rs. 15,456/-.

2.2 Revenue Para 2 :- It was observed on reconciliation of the taxable income as per the ST-3 Returns with their financial statements, that the

appellant had short paid service tax amounting to Rs. 6,52,499/- during F.Y. 2015-16 and F.Y. 2016-17.

2.3 Revenue Para 3 :- It was observed on verification of the Trial Balance that the appellant had not discharged service tax on the amount of Rs. 78,61,000/- received by them towards Construction Service other than residential complex and had also not paid service tax on Rs. 1,38,83,748/- received by the appellant towards Construction of Residential Complex services during F.Y. 2017-18 (up to June, 2017). The Service Tax totally amounting to Rs. 9,78,514/- appeared to be recoverable from the appellant.

2.4 Revenue Para 4 :- It was observed that the appellant had not filed the ST-3 return for F.Y. 2017-18 (up to June, 2017) and, therefore, they were required to pay penalty amounting to Rs. 20,000/- under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994. Further, the appellant had filed the ST-3 return for April to September, 2016 after 178 days from the due date for which they were required to pay penalty amounting to Rs. 15,800/-. However, the appellant paid only Rs. 14,700/-. Therefore, the differential amount of Rs.1,100/- was required to be recovered from them.

2.5 Revenue Para 5 :- It was observed that the appellant had short paid/not paid service tax amounting to Rs. 2,56,712/- in the GTA services availed by them during F.Y. 2015-16 to F.Y. 2017-18 (up to June) and the same was required to be recovered from them.

2.6 Revenue Para 6 :- It was observed that the appellant had applied for Service Tax Registration only on 07.02.2015 and obtained registration on 20.02.2015. However, the appellant had started providing taxable services during July, 2014 to September, 2014. Therefore, the appellant was liable to a penalty amounting to Rs. 10,000/- under Section 77(1) of the Finance Act, 1994.

2.7 Revenue Para 7 :- It was observed that the appellant had not paid service tax amounting to Rs. 4,545/- under reverse charge, in respect of the Legal Services availed by them during F.Y. 2014-15 and F.Y. 2016-17.

2.8 Revenue Para 8 :- It was observed that the appellant had, during F.Y. 2015-16 and F.Y. 2016-17, availed total cenvat credit amounting to Rs. 40,02,086/- but they could produce documents only in respect of cenvat credit amounting to Rs. 25,98,977/-. It, therefore, appeared that the appellant had wrongly availed cenvat credit amounting to Rs. 14,03,109/- without having any supporting documents as required under Rule 9(1) of the CCR, 2004.

3. The appellant were subsequently issued Show Cause Notice bearing No. 232/2019-20 dated 27.12.2019 from VI/1(b)-323/Cir-III/AP-15/18-19 dated 21.05.2021, wherein it was proposed to :

a) Demand and recover the service tax totally amounting to Rs. 19,07,726/- under the proviso to Section 73 (1) of the Finance Act, 1994.

b) Recover the wrongly availed cenvat credit amounting to Rs. 14,03,019/- under the proviso to Section 73 (1) of the Finance Act, 1994 read with Rule 14 (1)(ii) of the CCR, 2004.

c) Impose and recover the penalty amounting to Rs. 21,000/- under Section 70 (1) of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.

d) Impose and recover penalty amounting to Rs. 10,000/- under Section 77(1) of the Finance Act, 1994.

e) Charge and recover interest under Section 75 of the Finance Act, 1994.

f) Impose penalty under Section 78(1) of the Finance Act, 1994.

4. The SCN was adjudicated vide the impugned order wherein :

I. The demand of service tax amounting to Rs. 16,47,843/- was confirmed under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.

II. Penalty amounting to Rs. 21,100/- was confirmed under Section 70(1) of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.

III. Penalty amounting to Rs. 10,000/- was imposed under Section 77(1) of the Finance Act, 1994.

IV. Penalty amounting to Rs. 16,47,843/ was imposed under and 78(1) of the Finance Act, 1994.

V. The demand of service tax amounting to Rs. 2,59,883/- and cenvat credit amounting to Rs. 14,03,109/- was dropped.

5. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the following grounds :

i. The rate of service tax changed several times during the period under dispute. However, while computing and confirming the demand of service tax, the effect of the changed rate of service tax was not given. This has resulted in excess confirmation of demand.

ii. The working of short payment for F.Y. 2015-16 and F.Y. 2016-17 is arrived at by applying a single rate of 14.50%, though there were three different rates which were applicable. In their written submission, they had brought this fact to the notice of the department, however, no efforts were made to re-quantify the period wise demand of service tax.

iii. For Commercial and Residential construction services, different rate of abatement was prescribed vide Notification No. 26/2012. However, while raising objection, an uniform rate of abatement was applied for both service and, accordingly the demand was confirmed. This has resulted in confirmation of excess demand of service tax.

iv. The advance received for Commercial Construction and Residential Construction has not been bifurcated and abatement at a flat rate of 70% has been applied. For residential construction, the rate of abatement is 75%.

v. The adjudicating authority has ignored the fact that they were also engaged in Residential Construction for which abatement @75% is applicable.

vi. The quantification of demand is based upon abated value @ 30% instead it has to be bifurcated into 30% for commercial construction and 25% for residential construction.

vii. They had applied wrong rate of abatement, i.e. 70% instead of 75%, in their ST-3 returns for F.Y. 2016-17 for Residential Construction which resulted in excess payment of service tax.

viii. While dropping the demand of cenvat credit amounting to Rs. 14,03,109/-, the adjudicating authority has concluded that there remains a closing balance of Rs. 18,17,701/- at the end of March, 2017 which was not carried forward as the returns for F.Y. 2017-18 was not filed, therefore, the said amount is deemed to be reversed. However, the findings of the adjudicating authority is not correct.

ix. They had not utilized nor carried forward wrongly availed credit of Rs.23,44,359/- though mentioned in the ST-3 returns. Thus, this is only a clerical mistake and has no bearing on the cenvat credit balance.

x. The closing balance has to be re-computed and adjusted against the demand of service tax arising out of Commercial and Residential construction service for F.Y. 2015-16 to F.Y. 2016-17. However, the adjudicating authority has simply dropped the demand without considering the correct fact.

xi. They are discharging service tax on the advance received and have not collected service tax separately from their buyers. Similarly, in the case of GTA, the service tax has been discharged under reverse charge, i.e. the service tax is borne by them. Under these

circumstances, the amount collected by them is to be considered inclusive of service tax. However, the same has not been considered.

xii. Reliance is placed upon the judgment in the case of SRC Projects Pvt. Ltd. Vs. Commissioner of Central Excise, Salem – 2014 (35) STR 808 (Tri.-Chennai); Speedway Carriers Pvt. Ltd. – 2013 (30) STR 657 (Tri.-Del.).

xiii. Considering their submissions regarding infirmities in the SCN and the impugned order, it is requested that the working of service tax be re-quantified and also consider appropriating unutilized balance in cenvat credit against the short payment of service tax being confirmed.

xiv. Against the liability for F.Y. 2015-16, they have paid Rs. 1,99,298/- on 29.09.2016 and informed the same to the adjudicating authority on 03.02.2020. However, the same has not been taken note of in the impugned order. This Challan dated 29.09.2016 is not reflected in the ST- returns filed by them.

xv. Considering the correct rate of abatement and cum tax benefit, the re-quantified demand of service tax, for F.Y. 2017-18, would show that there is excess confirmation of demand of service tax amounting to Rs. 1,39,970/-.

xvi. Incorrect rate of service tax has been applied for quantifying the demand of service tax in respect of GTA services. Further, cum tax benefit was not considered. This has resulted in excess confirmation of service tax amounting to Rs. 35,727/-.

xvii. They had wrongly availed cenvat credit amounting to Rs. 23,44,359/- during April-September, 2016. However, realizing the same, they had not utilized it nor carried it forward. This wrongly availed credit is to be ignored as there was actual opening balance of Rs. 17,86,534/- at the close of F.Y. 2015-16 against which the utilization of cenvat credit of Rs. 5,26,658/- has to be accommodated. In other words, no wrongly availed credit was utilized nor carried forward. Therefore, demand of Rs. 14,03,109/- was even otherwise not sustainable.

xviii. The adjudicating authority has, however, by arriving at wrong conclusions, wiped out the legitimate closing balance of Rs. 12,59,876/- which was available for legitimate utilization against the demand finally confirmed.

xix. The adjudicating authority has, while confirming demand of service tax amounting to Rs. 7,18,631/-, also not considered that there was a cenvat credit closing balance of Rs. 12,59,876/- of F.Y. 2016-17 and fresh cenvat credit of Rs.1,72,746/- which were available for utilization.

xx. The service tax confirmed under GTA is available to them as cenvat credit for utilization towards the service tax confirmed.

xxi. There was no intention on their part to evade payment of service tax and the aforesaid discrepancies are bonafidely occurred. Hence, no penalty under Section 78 is imposable.

xxii. As there is sufficient balance in the cenvat credit account to cover the service tax liability, no interest is liable to be paid.

6. Personal Hearing in the case was held on 09.02.2023. Shri Vijay N. Thakkar, Consultant, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum. He also submitted additional written submission during the hearing.

7. In the additional written submissions filed on 09.02.2023, the appellant submitted that they were also issued another SCN bearing No. Div-V/SCN-SHIVALIK/FAR-819/21-22 dated 15.04.2021 proposing recovery of cenvat credit amounting to Rs. 43,22,099/- on account of non reversal of cenvat credit in respect of sale/booking of units where entire consideration was received after BU permission. The said SCN was adjudicated vide OIO No. 16/CGST/Ahmd-South/AC/PMC/2022 dated 21.03.2022. The appellant submitted that the issue of cenvat credit in the instant case is linked to that in OIO dated 21.03.2022 and, therefore, requested that both the appeals be decided considering the submissions in the present appeal.

8. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the additional written submissions, the submissions made during the personal hearing and the materials available on records. The dispute involved in the present appeal relates to the confirmation of demand of service tax amounting to Rs. 16,47,843/-. The appellant have also raised the issue of the adjudicating authority not considering the unutilized cenvat credit at the end of F.Y. 2016-17. The demand pertains to the period F.Y. 2014-15 to F.Y. 2017-18 (upto June, 2017).

9. It is observed that the appellant have *per se* not contested the confirmation of demand of service tax and are in appeal on the grounds that excess service tax has been demanded and confirmed. The appellant have in their appeal memorandum contested the confirmation of demand of service tax basically on the grounds that the service tax confirmed is in excess of the actual amount of service tax payable. It is the contention of the appellant that despite there being different rate of service tax, the demand of service tax raised against them and confirmed vide the impugned order has been calculated at an uniform rate of 14.50% for the period from F.Y. 2015-16 and F.Y. 2016-17. The appellant have further contended that though there are different rates of abatement applicable to Construction of Commercial Complex services and Construction of Residential Complex service, the demand has been raised and confirmed on the abated value of 30% instead of 30% for commercial construction and 25% for residential construction. It has also been contended by the appellant that they had paid service tax amounting to Rs. 1,99,298/- vide Challan dated 29.09.2016, which was not reflected in the ST-3 return filed by them, and the same was informed to the adjudicating authority but the same was not considered while passing the impugned order.

9.1 It is observed that the appellant had in their written submissions dated 03.02.2020 made before the adjudicating authority raised the

above contentions. However, the adjudicating authority has not given any findings on the issues raised by the appellant. I find merit in the contention of the appellant that though there existed different rates of service tax during the period under dispute, the demand has been computed by applying an uniform rate of 14.50%. The demand of service tax, therefore, requires to be re-computed by applying the prevailing rate of service tax applicable at the relevant point of time. As regards the contention of the appellant that an uniform abatement of 70% was applied for calculating the differential service tax payable, the adjudicating authority has observed that the appellant did not provide any evidence to substantiate their claim. In this regard, it is observed that the fact of the appellant providing Commercial as well as Residential Construction services is not disputed by the department. Therefore, while computing the service tax payable by the appellant, the taxable value ought to have been bifurcated separately for Commercial Construction and Residential Construction and the applicable rate of abatement applied for determining the service tax payable by the appellant. However, this exercise has not been done by either the Audit officers or the adjudicating authority. Consequently, I am left with no option but to remand the matter back to the adjudicating authority for the limited purpose of re-quantifying the demand of service tax by applying the correct rate of service tax as well as the correct rate of abatement. The appellant is directed to co-operate with the adjudicating authority and provide all necessary documents and details for re-computation of the service tax payable by them.

10. The appellant have also raised the issue that the adjudicating authority has not considered the unutilized cenvat credit at the end of F.Y. 2016-17. In this regard, it is observed that that the SCN issued to the appellant also demanded wrongly availed cenvat credit amounting to Rs. 14,03,109/-. The adjudicating authority has vide the impugned order dropped the demand on the grounds that the appellant had, during the period April, 2016 to September, 2016, not carried forward the cenvat

credit amounting to Rs. 13,56,314/- lying in balance at the end of March, 2016. Similarly, the appellant did not carry forward the cenvat credit amounting to Rs.18,17,701/- lying in balance at the end of September, 2016. Considering this, the adjudicating authority has held that the availment of cenvat credit amounting to Rs. 14,03,109/-, without invoices, stands nullified.

10.1 The appellant have in their appeal memorandum contended that the adjudicating authority has in the impugned order wiped out the legitimate closing balance of Rs. 12,59,876/- which was available for legitimate utilization against the demand finally confirmed and that the adjudicating authority has, while confirming demand of service tax not considered that there was a cenvat credit closing balance of Rs. 12,59,876/- of F.Y. 2016-17 and fresh cenvat credit of Rs.1,72,746/- which were available for utilization. In this regard, it is observed that the adjudicating authority has, in the impugned order, not passed any order as regards the cenvat credit claimed by the appellant to be in balance with them. The adjudicating authority has limited himself to the issue of wrong availment of cenvat credit amounting to Rs. 14,03,109/-, without having invoices, and dropped the demand. Therefore, the appellant cannot have any cause to be aggrieved on this count. In any event, the issues raised by the appellant in their appeal memorandum as regards the cenvat credit are totally extraneous to the issue raised in the SCN and which was adjudicated vide the impugned order. Therefore, these issues not being a subject matter of either the impugned SCN or the impugned order, cannot be raised by way of the present appeal. Hence, I do not find any reason to discuss or deliberate on these issues.

11. As regards the request of the appellant to club the other appeal filed by them against OIO No. 16/CGST/Ahmd-South/AC/PMC/2022 dated 21.03.2022 on the grounds that the issue in the said OIO dated 21.03.2022 is linked to that of the present appeal, I do not find any merit in the contention of the appellant in view of my findings at Para 10 and

10.1 above. In any case, the appeal filed by the appellant against OIO dated 21.03.2022 is the subject matter of a different appeal which has no bearing on the issues involved in the present appeal. Consequently, the request of the appellant does not merit any favourable consideration.

12. In view of the above findings, I set aside the impugned order to the extent it pertains to confirmation of demand of service tax amounting to Rs. 16,47,843/- and allow the appeal filed by the appellant in this regard by way of remand.

13. 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.

19th April, 2023..

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 19.04.2023

Attested:

(N.Suryanarayanan. Iyer)
Assistant Commissioner (In situ),
CGST Appeals, Ahmedabad.

BY RPAD / SPEED POST
To

M/s. Shivalik Developers,
Common (Survey No.249) Kahan Residency,
B/5, Girivar Pride, Ring Road, Odhav,
Ahmedabad – 382 415 — Appellant

The Assistant Commissioner,
Division- V, CGST,
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.