

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद— 380015.

क फाइल संख्या : File No : V2(ST)152 /A-II/2015-16 2055 to 2060
ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-0109 -16-17
दिनांक Date : 29.09.2016 जारी करने की तारीख Date of Issue 05/10/16

श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

ग _____ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं
_____ दिनांक : _____ से सृजित

Arising out of Order-in-Original No SD-05/12/DKJ/AC/2015-16 Dated 30.11.2015

Issued by Assistant Commissioner, Div-V, Service Tax, Ahmedabad

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

M/s. Swastik Construction 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 :-

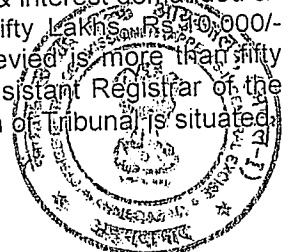
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल
हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

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 न्यायापीठ
स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक
ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 5 लाख या उससे कम
है वहाँ रूप 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना
रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की
मांग और लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहाँ रूप 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the
Appellate Tribunal, Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule
9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order
appealed against (one of which shall be certified copy) and should be accompanied by a
fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of
Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded &
penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/-
where the amount of service tax & interest demanded & penalty levied is more than fifty
Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the
bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

C. J. Jha



(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 फार्म 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 लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रुपए 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 बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जों 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,

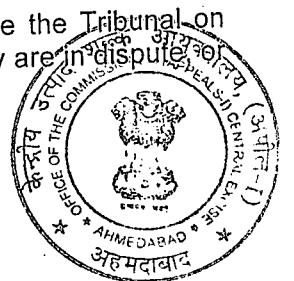
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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, penalty, where penalty alone is in dispute.



ORDER IN APPEAL

M/s. Swastik Construction, 291, New cloth Market, O/s Raipur Gate, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number SD-05/12/DKJ/AC/2015-16 dated 30.11.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-V, APM Mall, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellants were engaged in providing taxable service under the category of 'Construction Service other than Residential Complex/ including Commercial/ Industrial Building of civil structure' and holding Service Tax registration number ADQP J4145G ST002. During the course of audit of the records for period 2008-09 to 2010-11, it was noticed that they had rendered construction service to Shree Nilaben Manubhai Padaliya Pharmacy College, Navapura, Ahmedabad (*hereinafter referred to as 'college'*) working under Shree Shaurashtra Patel Sewa Samaj Trust, Ahmedabad (*hereinafter referred to as 'Trust'*) but had not paid service tax of Rs. 4,00,687/-. Appellant contended that service was rendered to Pharmacy College run by Trust, Ahmedabad (i.e. charitable institution). Since No document to substantiate that said trust is undertaking non- commercial activity, service was considered to be given to a commercial concern. Appellant was denied benefit of CBEC circular No. 80/10/04-ST dated 17.09.2004. Therefore Show cause notice dated 10.10.2013 demanding Rs. 4,00,687/-, was issued invoking extended period.

3. Adjudicating Authority, relying on D.O.F.No. 334/1/2010-TRU dated 26.02.2010, held the activity of said college as commercial activity as the college was collecting fees of Rs. 59,000/- from students. Impugned OIO confirmed demand under section 73(1) of FA 94 along with interest under Section 75 and also imposed penalty under Section 76 and 77(2).

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 16.02.2016 wherein it is contended that-

- I. Service receiver (college) is registered with the Income Tax under Section 12A(a) of the Income Tax Act, 1961 as charitable trust and therefore service provided to a charitable institute meant for non-commercial in nature would not be liable to service tax.
- II. Constructed building is used for education purpose and the object of use of building is not for commercial purpose. So long as the purpose does not involve the carrying on any activity for profit, even though some fees are charged, the service can not be charged as the dictionary meanings of "commerce" is to do trading for motive of profit.



- III. Any surplus amount left after having adjusted the expenses from fees charged would be used for object the trust for which it is incorporated. Surplus money is not distributed to members.
- IV. Extended period can not be invoked as service tax returns are filled regularly and moreover there is no suppression of facts with intention to evade tax. Appellant was under bonafide impression that they are not liable to pay tax in terms of service tax of Circular No. 80/10/2004-ST. Duty, Penalty and Interest is required to be set aside.

5. Personal hearing in the case was granted on 17.08.2016. Shri Amit Loddha, Advocate appeared before and reiterated the grounds of appeal. He showed the Income Tax Office letter dated 21.04.1976 and 13.04.2007 issued under Section 12A (a) of Income Tax Act, 1961 to substantiate that the recipient of service is undertaking charity work i.e. non- commercial activity. He requested to for 7 days to submit other document to show that they are charitable organization. Vide additional submission dated 26.08.2016 appellant submitted certificate of registration No. A-2307 -Amdavad dated 30.10.1969 issued in favor of Shree Saurashtra Patel Seva Samaj by Deputy Charity Commissioner, Ahmedabad. Moreover he submitted constitution of Trust to substantiate that motive is charity.

DISCUSSION AND FINDING

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. Moot question to be decided is whether or not , the recipient of service i.e. said trust is undertaking non-commercial activity and further whether or not college is providing taxable service.

7. For College, the recipient of "construction service", to be out of ambit of service tax in category of "Commercial Training and Coaching Service" as a service provider both the following two conditions should be satisfied simultaneously-

- Institution (college) should have non-commercial nature and
- Institution (college) should award education recognized by Government.

However, Appellant, as a provider of "construction service", to be out ambit of service tax in category of "Construction Service" as a service provider only one condition i.e. condition (a) above, that Institution (college) should have non-commercial nature to be satisfied.

8. I find from para 3 of show cause that appellant was called upon to show that above condition (a) is satisfied i.e. college is non-commercial concern to be out of ambit of service tax as a service provider. It was never alleged in show cause that since the college, the recipient of service, is imparting taxable service




construction service provided to college by appellant is taxable. I find that impugned OIO has travelled beyond show cause notice.

9. Now since documents of Trust, recipient of service, to substantiate above condition (a) are submitted, I take up the documents for scrutiny. I have perused certificate of registration dated 30.10.1969 issued by The Deputy charity commissioner, constitution of trust and Income Tax Office letter dated 21.04.1976 and 13.04.2007 issued under Section 12A (a) of Income Tax Act, 1961 issued to the recipient of service Shree Saurashtra Patel Seva Samaj. Even, para 2 of the SCN also recognizes that Shree Saurashtra Patel Seva Samaj, Ahmedabad is a charitable trust. It is an established fact that charitable trusts are non-profitable organizations. I find that the institution is working in a non-commercial nature. Condition (a) above is satisfied; therefore service rendered to college is non-taxable in terms of CBEC circular No. 80/10/04-ST dated 17.09.2004.

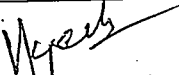
10. It was not a fallacy required to look into the nature of service provided by college as to whether it is taxable or non-taxable as it does not alter the status of college as a non-commercial entity and resultantly it also does not alter the non-taxability of service rendered to college by appellant. It seems that the adjudicating authority has misinterpreted para 6.2 of D.O. dated 26.02.2010 to prove that the recipient of service i.e. college is a commercial concern providing taxable service under the category of "Commercial Training and Coaching Service". I find that this conclusion is also wrong as para 6.2 is that any TRAINING such as management, marketing, engineering etc. and COACHING such as coaching for examinations (not the Government recognized EDUCATION) even if imparted by a non-commercial concern (trust) is taxable. I find that Government recognized EDUCATION imparted by the Trust/ College i.e. non-commercial concern is non-taxable as per para 6.1 of D.O. dated 26.02.2010.

11. In view of the above I set aside the impugned OIO and appeal filed by the appellants is allowed.


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(R.R. PATEL)

SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.



To,
M/s. Swastik Construction,
291, New cloth Market,
O/s Raipur Gate,
Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Additional Commissioner, Service Tax, Ahmedabad
- 4) The Dy./Asst. Commissioner, Service Tax, Div-V, APM mall, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad-I.
- 6) Guard File.
P.A. File.

