

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

2083

क फाइल संख्या : File No : V2(ST)157 /A-II/2015-16 / 2078 to 2083
ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-0121 -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-02/REF-195/DRM/2015-16 Dated 15.12.2015

Issued by Asstt. Commr., STC, Div-II, Service Tax, Ahmedabad

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

M/s. J B R Nirmaan Pvt Ltd Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-

Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

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

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

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना 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 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.

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(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 A219r 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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) 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 रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

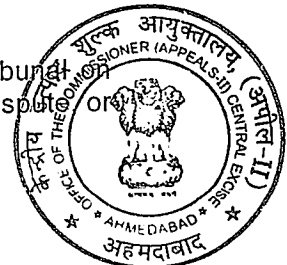
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute or penalty, where penalty alone is in dispute.



ORDER IN APPEAL

M/s JBR Nirmaan Pvt. Ltd., JBR Corporate House, B/h Tej Motors, S.G. Highway, Bodakdev, Ahmedabad- 380 059 (*hereinafter referred to as 'appellants'*) holding service tax registration No. AABC J9174G ST001, have filed the present appeals against the Order-in-Original number SD-02/REF-195/DRM/2015-16 dated 15.12.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-II, APM Mall, Ahmadabad (*hereinafter referred to as 'adjudicating authority'*);

2. Briefly stated facts of the case are that appellant had filed a refund claim of ₹ 1,90,517/- under their application dated 18.09.2015. The respondent is providing the service of 'Construction of Residential Complex' and paying Service Tax on the booking amount received from prospective eight customers. Booking amount received is cum duty amount. The appellant had paid Service Tax on actual advance (arrived by back calculation of advance) received from prospective customers after claiming abatement of 75%.

2.1 On receipt of BU Permission on 21.07.2014 appellant paid service tax payment out of his own pocket on entire outstanding amount from eight prospective buyers. Prospective buyers cancelled their booking on 25.08.2014. The respondent had refunded to the prospective customers an amount along with service tax on 31.03.2015. As a result, the respondent had filed a refund application of ₹ 1,90,517 on 08.09.2015. After scrutiny of the claim, adjudicating authority resorting to Service Tax Rule 3 of point of Taxation Rules 2001, has rejected the above claim vide impugned order.

3. Being aggrieved by the impugned order, the appellant has filed an appeal against the impugned order wherein it is contended that in case of UOI Vs. Delhi Chit Fund Association [(2014) 42 taxman.com52 (sc)] is held that for levy of service tax there should be (i) service provider, (ii) service receiver, (iii) actual rendering of service and (iv) consideration service. There is no consideration. Moreover since flat booking is cancelled there is no rendering of service. Therefore service tax is not applicable. In absence of service receiver it is self service which is not taxable as per circular No. 108/02/2009-ST dated 29.01.2009. Appellant has further argued that they have paid tax from their pocket so there is no unjust enrichment. Appellant are eligible to take credit under rule 6(3) of service tax rule 1994 but Appel'ant's project being completed instead of taking credit refund claim was filed. Appellant has produced the calculation sheet where in it is worked out that Rs. 88,832/- has been paid prior



to BU permission and Rs. 1,01,685/- has been paid after receipt of BU permission.

4. Personal hearing in the case was granted on 17.08.2015 wherein Shri Bishan Shah, CA on behalf of the said appellant, appeared before me and reiterated the contention of their submission

DISCUSSION AND FINDING

5. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, the Written Submission filed by the respondent and oral submission made at the time of personal hearing. The adjudicating authority has held that the point of taxation shall be the date of receipt of each advances in terms of rule 3 of Point of taxation of rules 2012 and therefore the appellant has discharged their liabilities of service tax correctly. He has also held that cancellation of booking after B.U. Permission will not affect such contract. In this matter regarding customers, question to be decided is whether or not appellant is eligible for

(A) refund of service tax paid out of own pocket on amount received from prospective customers prior to receipt of BU permission and advance payment returned later (along with service tax collected) on as booking was cancelled.

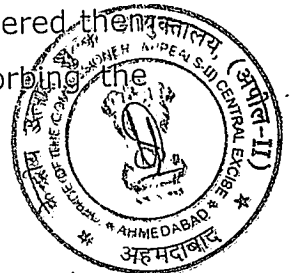
(B) refund of service tax paid out of own pocket on amount out standing from prospective customers on date of BU permission and advance payment returned later on as booking was cancelled.

6. I take up the issue (A) As the complex/building constructed by appellant was intended for sale and part consideration was received before issuance of the completion certificate, service tax was rightly collected and deposited by appellant at that time for which there is no dispute. For any service to be taxable service, a service receiver should be there and consideration should have received. I find that since the booking is cancelled on 25.03.2015 there is no service receiver and no consideration also. My view is supported by circular No. 108/02/2009-ST dated 29.01.2009 wherein it is stated that-




"3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). **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. Therefore, 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.** Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax."

I agree with the Appellant resorting to judgment in case of case of UOI Vs. Delhi Chit Fund Association [(2014) 42 taxman.com52 (sc)] wherein it is held that since amount has been returned back there is no consideration and since there is no service receiver, the service in nature of self service, service tax can not be levied. Said judgment is squarely applicable to appellant. I am not in agreement with the adjudicating authority relying upon Rule 3 of the Point of Taxation of Services Rules, 2011 for rejecting the claim attributed to amount returned before BU permission. Point of taxation rules 2012 is for collecting the tax. When service itself is not rendered, then where is the question of resorting to point of taxation for absorbing the service tax so collected.



Appellant, having returned the whole amount to customers without handing over of constructed house, has rightly claimed the refund as adjustment of tax paid is not possible under rule 6(3) of service tax rule 1994.

8. In light of the above discussion, appeal filled by appellant is allowed.


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(R.R. PATEL)

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

To
M/s JBR Nirmaan Pvt. Ltd.,
JBR Corporate House, B/h Tej Motors,
S.G. Highway, Bodakdev,
Ahmedabad- 380 059

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
 - 2) The Commissioner, Service Tax., Ahmedabad-II.
 - 3) The Additional Commissioner, C.Ex, Ahmedabad-II
 - 4) The Asst. Commissioner, Service Tax, Div-II, APM Mall, Ahmedabad.
 - 5) The Asst. Commissioner (System), Service Tax, Ahmedabad.
 - 6) Guard File.
- P.A. File.

