

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)05/A-II/2016-17 / 189-194
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-194-16-17
दिनांक Date : 23.12.2016 जारी करने की तारीख Date of Issue 14/02/17

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

Passed by Shri Uma Shanker Commissioner (Appeals-II)

Ch. file

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

Arising out of Order-in-Original No AHM-SVTax-000-JC-021 to 023-15-16 Dated 29.01.2016 Issued
by Joint Commissioner STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. RJP Infrastructure 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 :-

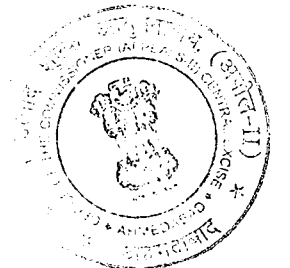
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, 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 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 रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 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 accompany ed 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.



(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 A219 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 (सीस्तेत) 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 रुपए से अधिक न हो

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

- (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 अर्जा 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,

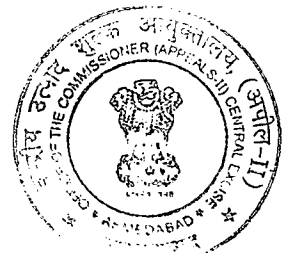
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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. RJP Infrastructure Pvt. Ltd., 206, Shefali Centre, Nr. Paldi Cross Roads, Ellisbridge, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number AHM-SVTAX-000-IC-021 to 023-15-16 dated 29.01.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Joint Commissioner, Service Tax HQ, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellants had executed Ahmedabad Municipal Corporation's (AMC in short)-

- I. Housing project under JnNURM scheme for construction of 2976 houses for urban poor at various locations in Ahmedabad and
- II. construction of 960 houses for AMC safai Kamdar

Service tax of Rs. 1,48,13,468/- for "construction of residential complex service" falling under erstwhile Section 65(105)(zzzh) of FA, 1994, rendered during period October 2007 to 2011-12 was not paid therefore Show cause notice dated 24.10.2013 which was decided by Commissioner of Service tax for recovery of service tax not paid.

3. Subsequent notices for dated 13.05.2014, 02.12.14 and 14.10.2015 for amount Rs. 10,01,561/-, 29,11,220 and 12,13,337 (total Rs. 51,26,118) respectively covering period from 01.04.2012 to 31.03.2015 were issued for above second project at para 2(II) i.e. construction of 960 houses for AMC safai Kamdar. Impugned OIO confirmed demand of Rs. 51,26,118/- under section 73(1) of FA 94 along with interest under Section 75 and also imposed penalty of Rs. 10,000/- under Section 77(1)(a) for failure to self assess service tax liability and penalty of Rs. 5,12,612/- (10% of 51,26,118/-) under section 76 was imposed on appellant.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 07.04.2016 before the Commissioner (Appeals-II) wherein it is contended that-

- I. Residential complex meant for employees of AMC are exempt vide sr. No.12(f) of Notification 25/2012-ST as AMC is local self Government constituted under article 243Q(1)(C) of Constitution of India. Article 243P(e) of constitution explains that "Municipality" meant an institution or self-Government constituted under Article 243Q.
- II. Adjudicating authority has referred to section 65B(31) of Finance Act because the term "local authority" is defined there under, but it is



clear from section 65B(31) also that a municipality referred to clause (e) of Article 243P of constitution is a "local authority".

- III. Explanation-1 of clause (44) of section 65B has nothing to do with exemption allowed under clause 12(f) of notification 25/2012-ST. The adjudicating authority has misdirected himself in holding that exemption was not available because AMC had charged a highly subsidized rates from their safai kamdar while selling the houses because the nature of arrangement between AMC (i.e. service receiver) and their employees was not relevant for considering the admissibility of exemption of Sr. 12(f) of notification 25/2012-ST. exemption of Sr. 12(a) of notification 25/2012-ST is also available to them as residential houses were predominantly meant for use of AMC's employees.
- IV. Government, as clarified by the circular dt. 24.05.2010 that construction of residential houses for Central Government officers is not liable to service tax as the quarters constructed to Government personnel by the Government is out of the purview of definition of residential complex.
- V. It is clarified by CBEC vide para 13.2 of circular No. 80/10/2004-ST dated 17.09.2004 that Government constructions would be subject to service tax only if such constructions were for commercial purpose local Government bodies getting shops constructed for letting them out, but otherwise Government construction being non-commercial in nature were not subjected to service tax.
- VI. Judgment in case of Khurana Engg. Ltd. v. Commr.of C. Ex., Ahmedabad - 2011 (21) S.T.R. 115 (Tri.-Ahmd.), Nitesh Estates Ltd. - 2012(26) STR 587 (Tri. Bang.) , East coast Constructions & Industries ltd. 2013 (29) STR 391 (Tri. Kolkatta) are applicable to appellant. That construction of quarters for Government employees and also for personal use of army or a Government corporation were services provided directly to the Government.
5. Personal hearing in the case was granted on 08.11.2016. Shri Shilpa P. Dave, Advocate, appeared before me and reiterated the grounds of appeal. She submitted compilation of court case and stated that AMC is local self Government and houses are constructed for their employees.



DISUSSION AND FINDINGS

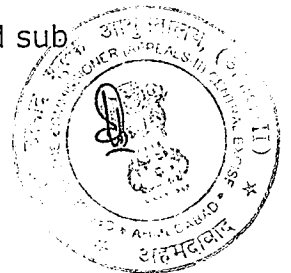
6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing.

7. I observe that first SCN dated 24.10.2013 covering period up to 2011-12 was adjudicated and confirmed by Commissioner, Service Tax, Ahmedabad vide order dated 27.08.2014 wherein the issue was non-payment of service tax on following two housing projects executed for Ahmedabad Municipal Corporation (AMC) under the category of 'construction of complex service' falling under Section 65(105) (zzzh) of the Finance Act, 1994.

- (a) Housing project under JNNURM scheme for construction of 2976 houses for urban poor at various locations in Ahmedabad.
- (b) Construction of 960 houses for Safai Kamdars at various locations in Ahmedabad.

8. Subsequent three SCN's, covering period 01.4.2012 to 31.03.2015, issued under Section 73(1A) of FA, 1994, adjudicated and confirmed vide impugned OIO is for the same service but only for the Construction of 960 houses for Safai Kamdars project. Another project under JNNURM scheme is no more relevant after 01.7.2010 as same was covered under exemption grant under notification 28/2010-ST w.e.f. 01.07.2010. First SCN is covering period prior to 01.07.2012 (i.e. pre-negative era) when said service was covered under Section 65(105)(zzzh) of the Finance Act, 1994 and other remaining subsequent SCN are issued for period after 01.07.2012 (i.e. negative regime) herein said service is covered broad category "service" defined under section 65B(44) of FA, 1944.

9. Taxable service in relation to construction of complex was introduced with effect from 16.6.2005 as defined under Section 65(105)(zzzh) of the Finance Act, 1994 as any service provided or to be provided to any person, by any person, in relation to construction of complex. Further, with effect from 01.07.2010, following explanation was inserted below the aforesaid sub clause of taxable service -



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.

10. 'Construction of complex' was defined under Section 65(30a) of the Finance Act, 1994 as follows-

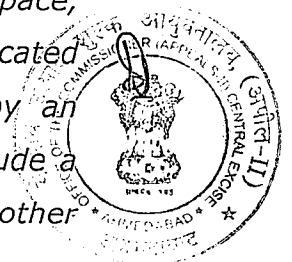
"Construction of complex" means —

- (a) construction of a new residential complex or a part thereof; or
- (b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or
- (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;

"Residential Complex" was defined under Section 65(91a) of the Finance Act, 1994 as follows-

"residential complex" means any complex comprising of—

- (i) a building or buildings, having more than twelve residential units;
- (ii) a common area; and
- (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other



person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

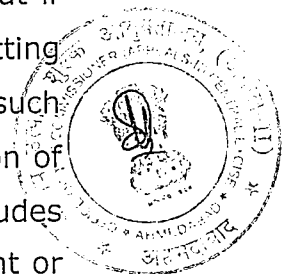
(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

11. In view of aforesaid provisions inserted with effect from 16.6.2005, construction of a new residential building or buildings, having more than 12 residential units with a common area and any one or more of the facilities or services such as park, lift, parking space, etc got covered under the taxable category of 'construction of complex' service in terms of sub-clause (105)(zzzh) of Section 65 of the Finance Act, 1994, with an exclusion that the services relating to *a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and when the construction of such complex is intended for personal use as residence by such person, will not be covered* under sub-clause (105)(zzzh).

12. The purpose of construction is to cater to the housing needs of the urban poor; it needs no elaboration that the construction was meant for residential use and not for commerce or industry. The services of construction provided by the appellant to AMC, therefore, are covered under the category of 'construction of complex' service and so is the entire demand of service tax. Further, as the categorization of services provided has not been disputed by the appellant, the same is not being discussed any further.

13. From the definition of "residential complex" given under Section 65(91a), it is clear that the definition does not include such complex which a person gets constructed for his personal use. It broadly signifies that if the ownership of the entire complex is to be retained by the person getting the complex constructed and to be used by him for his own purposes, such construction is not taxable. Further, as per Explanation to the definition of "residential complex" given under Section 65(91a), "personal use" includes permitting the complex for use as residence by another person on rent or



without consideration. Considering that housing scheme developed by AMC is with a view to provide affordable housing to urban poor, such an objective cannot be termed as personal use in any sense of the term. By appellant's own admission, the houses are given to the employees of AMC (Safai Kamdars) at highly subsidized rates, which means that AMC would be selling the houses to Safai Kamdars, though at much lower prices than the actual cost of the houses, it cannot be said that the houses are for personal use of AMC, even in the sense of renting to their own employees without consideration. The houses got constructed by AMC for Safai Kamdars are neither for the own use by AMC nor for use as residence by another person under rent or without consideration and therefore, exclusion provided under the definition of "residential complex" under Section 65(91a) of the Finance Act, 1994 is not applicable to the present case.

14. For negative regime period Notification No.25/2012-ST dated 20.6.2012, also known as mega exemption notification is to be considered. Said notification provides for exemption to various services from the whole of service tax leviable and under Sr.No.12 of this notification, exemption has granted to the services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession:

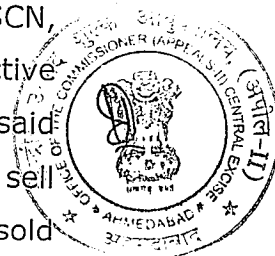
(b) ...

...

...

(f) a residential complex predominately meant for self use or the use of their employees or other personal specified in the Explanation 1 to clause 44 of Section 65B of the said Act;

14.1 The appellant is arguing that their case, for subsequent two SCN, is covered under Sr.No. 12(a) and 12(f) of the said notification effective from 1.7.2012. I find that in any case exemption granted under said notification is not available to them as residential complex is built "to sell to employee" and not "to use by employee". Once these houses are sold



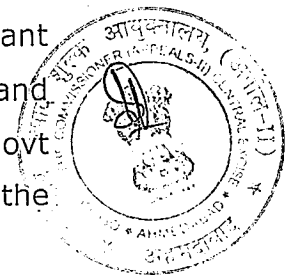
to their employee, then it is not for use but for sell, which is commerce. In that cases the mischief of notification is attracted. Although the AMC is covered under municipality defined under constitution but notification 25/2012- ST but the activity of "selling of residential complex to employee" takes it out from the exemption allowed under notification 25/2012- ST. Intention of said notification can only be implemented when not sold to employee and can be implemented only when ownership rest with the AMC.

15. The appellant, has relied on following three case laws in support of their defense -

- I. Sandeep Vilas Kotnis vs Commissioner of Central Excsie, Kolhapur - cited as 2012(27) STR 51(Trib.-Mumbai).
- II. Khurana Engg Ltd vs Commissioner of Central Excise, Ahmedabad - cited as 2011(11) STR 115 (Trib.-Ahmd.)
- III. East Coast Constructions & Industries LTd vs Commssioner of Service Tax, Kolkata- cited as 2013(29) STR 391 (Tri.-Kolkata)

16. In the first case, the show cause notice was for recovery of service tax under the category of 'construction service' in respect of services rendered to MHADA for construction of flats under redevelopment scheme, civil construction for MTDC and for BSNL. The case on hand is different in the sense that the demand raised here is not under industrial or commercial construction but under the category of 'construction of complex' service. Here, the nature of construction is not under dispute. The present case is based on the premise that the constructions are for residential purposes and therefore views expressed by Hon'ble Tribunal in the context of commercial or industrial construction are irrelevant here and so is the appellant's argument.

17. Second and third case laws cited by the appellant are in the context of 'personal use'. In case of Khurana Engg Ltd, residential complex constructed and meant for use by Income Tax department to provide the same on rent to the employees was and was never to be sold under any scheme. In case of East Coast Constructions & Indus. Ltd, the applicant was engaged in construction of residential quarters for Indian Army and West Bengal Power Development Corpn Ltd (A West Bengal Govt Undertaking). Hon'ble Tribunal in case of Khurana Engg Ltd held that the



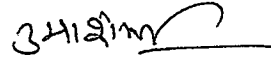
service cannot be covered in the definition of residential complex and decision cited in case of East Coast Constructions & Inds. Ltd is only a stay order based on the decision in case of Khurana Engg Ltd. Construction under the schemes are for AMC who is not using the housing complexes for renting out to the employees of AMC so as to draw similarities between the cases cited and the case on hand. Since the aspect of 'personal use' is not at all involved in the present matter, the case laws cited by the appellant in the context of personal use have no applicability.

18. I, therefore, find that the services provided by the appellant to AMC for construction of 960 houses for Safai Kamdars at various locations in Ahmedabad fall under the taxable service of 'construction of complex' in terms of Section 65(105)(zzzh) of the Finance Act, 1994 and is covered under definition of "service" post 01.07.2012 period, and the exemption of notification 25/2012-ST is not available to appellant. I am in complete agreement with adjudicating authority confirming duty under Section 73(1) of the Finance Act, 1994, recovery with interest under section 75 and imposing penalty.

19. In view of above, appeal filed by the appellants is not allowed.

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

20. The appeals filed by the appellant stand disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

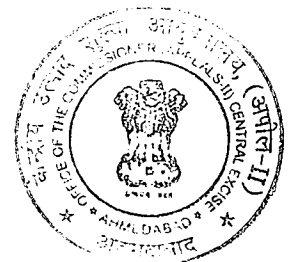
ATTESTED


(R.R. PATEL)

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

To,

M/s. RJP Infrastructure Pvt. Ltd.,
206, Shefali Centre,
Nr. Paldi Cross Roads,
Ellisbridge, 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 Joint Commissioner, Service Tax HQ, , Ahmedabad:
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.



