

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)93/A-II/2015-16 & V2(ST)94/A-II/2015-16 ^{783/788}

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-045 to 046-16-17

दिनांक Date : 21.07.2016 जारी करने की तारीख Date of Issue 25/07/16

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 STC/Ref/67/HCV/CNSDiv-III/15-16 Dated 21.07.2016

Issued by Additional Commissioner, Service Tax, Ahmedabad

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

**M/s. Nitin Construction Limited Ahmedabad & M/s. Nitin Patel,
Director Of Nitin Construction Limited 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, मेधाणी 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर 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 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.

(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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) 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, बशर्ते 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 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 बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी 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,

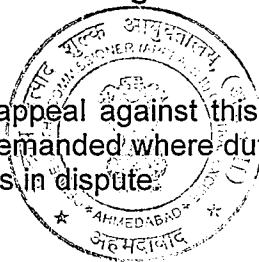
Under Central Excise and Service Tax, "Duty demanded" shall include:

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



ORDER IN APPEAL

1. This order arises out of the appeal filed by M/s. Nitin Construction Limited, Ahmedabad-380009 (hereinafter referred to as 'the appellant') against the OIO No. AHM-SVTAX-000-15-16 dated 16.09.2015 (hereinafter referred to as 'the impugned OIO') passed by the Additional Commissioner, Service Tax, HQ, Ahmedabad (hereinafter referred to as 'the adjudicating authority'). Appellant are having service tax registration w.e.f. 05.09.2008 and are providing various services. Shri Nitin Patel, Director has also filed separate appeal against personal penalty imposed on him under section 78A.

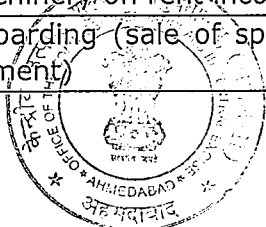
2. Preventive Wing of Service Tax visited premises on 26.02.2014 and certain incriminating documents/records were found. A statement of Shri Nitinbhai Govindbhai Patel, Director of M/s. Nitin Construction Limited was recorded. Show Cause Notice dated 16.10.2014 was issued whereby following demands were made.

Sr.	Service	SCN demanded	Amount	Amt. paid before SCN and subsequent
1	supply of machinery on rent income of Rs. 37,48,279/-	4,25,996/-		4,25,396/-
2	Renting of hoarding (sale of space and time for advertisement) income of Rs. 4,25,914/-	46,465/-		46,465/-
3	renting of office income of Rs. 40,10,862/-	Rs. 4,45,411/-		4,16,034/-
4	Site Formation And Clearance, Excavation And Earthmoving And Demolition Services income of Rs. 2,53,42,902/-	29,25,259/-		nil
5	Carting / Transportation services- Expense GTA- income of Rs. 10,01,251/-	Rs. 69,755		69,755/-
6	Carting-income Rs. 6,66,757/-	Rs. 1,07,983/-		0
		40,20,869/-		

3. SCN dated 16.10.2014 was adjudicated by impugned by the Additional Commissioner, Service Tax, Ahmedabad, Ahmedabad-380015 whereby total SCN demand Of 40,20,869/-duty was confirmed invoking extended period under proviso to Section 73(1) and was ordered to be recovered with interest under Section 75 of the Finance Act, 1994. Imposed penalty of Rs.10,000/- on the noticee under Section 77(2) ,penalty of Rs.10,000/- under Section 77(1)(a) of the Finance Act, 1994 for failure to obtain service tax registration within the stipulated time, penalty equivalent to duty of Rs.40,20,869/- on the noticee under amended Section 78 of the Finance Act, 1994. Penalty of Rs.1,00,000/- on Shri Nitin Patel, Director of M/s Nitin Construction Ltd under Section 78A of the Finance Act, 1994 was imposed.

4. Being aggrieved with the impugned order, the appellant filed an appeal on 23.01.2015 whereby following relief has been sought.

Sr.	Service	Duty	Penalty
1	supply of machinery on rent income	nil	4,25,996/-
2	Renting of hoarding (sale of space and time for advertisement)	nil	46,465/-



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3	renting of office income	29,377/-	4,45,411/-
4	Site Formation And Clearance, Excavation And Earthmoving And Demolition Services	29,25,259/-	29,25,259/-
5	Carting / Transportation services- Expense GTA- income of Rs. 10,01,251/-	0	69,755/-
6	Carting-income Rs. 6,66,757/- Business support service	1,07,983/-	1,07,983/-
7	Penalty u/s 77(2) of FA 1994	10,000/-	
8	Penalty u/s 77(1)(a) of FA 1994	10,000/-	
9	Penalty u/s 78A of FA, 1994 on Sh. Nitinbhai patel	1,00,000/-	

5. It is contended that Rs. 29,377/- being Municipal tax on property given on rent is applicable as deduction from service tax under Notification 29/2012/-, that Rs. 29,25,259/- is not payable on site formation service as service is rendered in relation to agriculture and department has issued instruction vide F. No. B1/6/2005/-TRU dated 27.07.2005; that Rs. 1,07,983/- is not payable as carting income was liable to service tax at relevant time and tax is only on GTA.

5.1. Appellant is also contesting that-

- (i) Amount received to be treated as cum-duty as they have neither charged nor collected from customers.
- (ii) interest is not chargeable and penalty is not imposable in any cases involving interpretation of law
- (iii) Extended period can not be invoked as as u/s 73(1) time limit to serve SCN is 18 months from relevant date and as there is no evidence that there is willful suppression of facts.
- (iv) No penalty is imposable under section 78A on Shri Nitinbhai Patel as there is no any willful contravention of provisions of Finance Act with view to evade the duty.

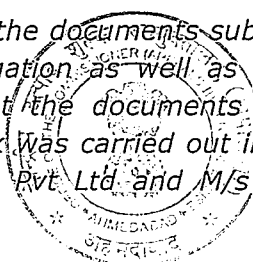
6.0 Personal hearing in the case was granted on 04.07.2015 wherein Shri Ajay Kariya, Chartered Accountant, on behalf of the appellant appeared before me and reiterated the contents of appeal memorandum. Further, submitted the summary of facts and explained the details .He reiterated the contents of the appeal memo.

DISCUSSION AND FINDING

7. Regarding renting service exemption of Rs. 29,377/- availing Notification 24/2007/ST dated 22.05.2007 it is allowed on merit in impugned OIO but rejected as tax bills are in joint name. I have perused municipal tax bill and I find that bill are in joint name.

8. Adjudicating authority at para 23.6 and 23.7 of impugned OIO has brought out that appellant has not produced concrete document evidencing service rendered in relation to agriculture. Paras reproduced as below-

"23.6 I have gone through the documents submitted by the noticee in this regard, during investigation as well as with reply to the show cause notice, and find that the documents lack the description to conclude that the earthwork was carried out in relation to agriculture. In case of M/s Neo Impex Pvt Ltd and M/s Yash Corporation, only



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copies of invoices raised on the service recipients have been made available by the noticee and there is nothing in these invoices to conclude that the work was performed in relation to agriculture. In case of Shri Dhaval Vijaybhai Shah, Shri Prakash Devsilal Sheth and Shri Jitendra Devsilal Sheth, copies of letters of award and invoices are available on record. The letters of award mention that the work was to be carried out on agricultural land for carrying out farming activity. The letters further mention that the completion of work was to result into a land capable of harvesting and farming. So the letters of award of work indicate that the earthwork to be carried out by the noticee was in relation to agriculture. However, this description given in the letters of award cannot be taken on the face value when there are no supporting documents to show that the land use was agriculture. Hence, I am unable to grant the benefit of exclusion available in case of services provided in relation to agriculture. In case of M/s Savita Govind Construction Pvt Ltd and M/s Hiral Pipe Pvt Ltd, the noticee has supplied the copies of letters of award, invoices and village land record form 7 and /or 12. From the invoices and letters of award, it is not ascertainable whether services were provided in relation to agriculture. As regards the village land records in the form of Form 7/12, some of the land records have a mention of land use as agricultural land (Khetilayak upyog), which certainly suggests that the land was meant for agricultural use and hence, any earthwork carried out on this land should qualify as a service in relation to agriculture. However, since such forms 7/12 are not available in respect of all survey numbers, it is not possible to conclude that the entire earthwork carried out by the noticee for the said clients was in relation to agriculture and in absence of such a verification, I am unable to grant exemption for the entire service amount. Therefore, I am in favour of granting the benefit of exemption where land records suggest that the land was an agricultural land, in practice I am unable to do so as the amount earned against these land pieces is not available separately.

23.7 Thus, I find that the noticee has been unable to produce before me the evidence to state conclusively that the earthwork performed by them was in relation to agriculture. Insufficient and sketchy details cannot be read in favour of the noticee when the burden to prove exclusion from applicability of service tax rests with the noticee. I, therefore, conclude that the earthwork services provided by the noticee are well within the ambit of definition of site formation and clearance, excavation and earthmoving and demolition services and consequently, the income earned on this count is liable to payment of service tax.

8.1 No income tax papers have been submitted for showing agriculture income. Evidence such as sale bill of agriculture product after land filling, patwari Certificate regarding agriculture farming etc. to prove as to service receiver are performing agriculture activity are not produced. Site forming activity in relation to agriculture is unconditionally exempted/no taxable but the service provider has to satisfy himself that service provided is in relation to agriculture. It is common sense that farmer would prefer to have alluvial and loamy soil for filling and certainly they would not demand for watering, rolling and compacting. Compacting reduces the porosity of soil. Porous soil is must for seepage of water inside soil and spreading of root. Filling of building plinth is done with yellow soil (sub-starta gravel soil) and in



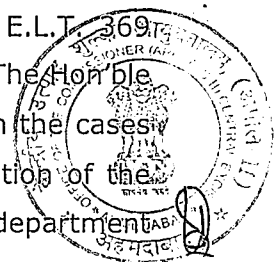
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plinth Rolling and compacting is done to attain required density and to increase bearing capacity of soil.

8.2 Normally farmer intending farming would not procure "non agriculture" permission from revenue authority. Some of the 7/12 revenue records shows that farm is "Non Agriculture". It is common knowledge that converting agriculture land to "Non Agriculture" entails heavy cost therefore no farmer would like increase such cost on land which will be used for agriculture. No income tax papers have been submitted for showing agriculture income. Sub let income received is for earthwork of canal of Sardar Sarovar Nigam Ltd. (SSNLL) and road work embankment at "Nano" Site. Both works is exempted if directly provided to client but appellant has provided service to private entity who has procured contract from SSNL and "Nano" road. Hence otherwise also said sub let work can not be said as "in relation to agriculture" and does not qualify for exemption.

9. Regarding carting service appellant has contended that they are covered under GTA. Impugned OIO has accepted on merit that service rendered is not GTA. I find duty has been demanded and correctly conformed under Business Auxillary service.

10. Further, the appellant contended that they are eligible for the Cum-Tax benefit when they neither collected nor charged the amount of service tax from the customers is not acceptable. I find that the said contention of Cum-Tax value is not acceptable in view of the provisions of the Section 67(2) of the Finance Act, 1994. Unless the invoice does not specifically indicate/mention that the gross amount charged includes service tax, it can not be treated as Cum-Tax value. I find that annexure -A of letter of award from various persons shows that agreement is of ex-service tax. The appellant has not produced any evidences which specify that the gross amount charged includes Service Tax. Therefore, in absence of any cogent evidences showing the gross value inclusive of Service Tax, the benefit of the Cum-Tax value can not be extended in view of the relevant provisions of the Section 67(2) of the Finance Act, 1994. I am in complete agreement with Adjudicating authority relying on the decision of the Hon'ble Tribunal in the case of M/s Shakti Motors- 2008 (12) STR 710 (Tri.Ahmedabad) to reject cum duty benefit (para 26 of OIO). Further, I do not find any infirmity in the impugned order regarding invocation of the extended period of limitation in as much as the present matter is pertaining to the case of deliberate service tax evasion and hence, benefit of Cum-Tax value can not be extended to the appellant. In this regard reliance is placed upon the judgement of Hon'ble Tribunal, Delhi reported at 2011(268) E.L.T. 369 (Tri. Del.) in the case of M/s Pinkline Exim. Pvt. Ltd. V/s CCEX, Jaipur-I. The Hon'ble Tribunal held that benefit of the Cum-Duty Price can not be extended in the cases of deliberate duty evasion by clandestine clearances. Thus, this contention of the appellant is also rejected being not sustainable in the eyes of law. The department has rightly calculated the service tax on the actual receipt payable basis



11. With regard to the contention that the extended period of limitation is wrongly invoked as there was no suppression or willful misstatement on their part, I find that it is a fact that the said non payment of service tax/evasion was unearthed / noticed only when the details were unearthed by the Hdqr's Preventive Section of the department. Had the said exercise been not conducted, the same would have gone unnoticed. Further, being holder of the service tax registration, the appellant was very much aware of the provisions of the Service Tax Act and Rules however, the appellant suitably preferred neither to make payment of service tax on the said services nor to file the ST-3 Returns. Appellant has not discharged their service tax till the visit of service tax officer on 26.02.2014. Had there been any confusion on the issue, it was open for the appellant being holder of the service tax registration, to approach the department for suitable clarification. I find that no such efforts have been put forth by the appellant. Thus, the appellant has not disclosed the taxable amount received from customers and not filed the ST-3 Returns in spite of their clear knowledge that the said services are taxable.

12. I find that in the present case the Adjudicating Authority has at Para-27.1 of the impugned order has very categorically justified the suppression with intent to evade the service tax by the appellant. Hence, I reject the said contention of the appellant being not sustainable in the eyes of law.

13. Thus, I hold that the appellant has deliberately suppressed the transactions and did not pay the service tax deliberately in time in respect of the said services. In view of the facts and discussion above, the reliance by the appellant on the various decisions of the higher judicial forum is of no help to them. Thus, I uphold the impugned order invoking the extended period.

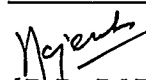
14. In view of the facts and discussion in foregoing paras, reliance placed on various decisions of the higher judicial forum by the appellant are of no help to them. Shri Nitin Patel, Director has not filed any reply to SCN proposing penalty on him u/s 78A. From his statements recorded I find that he is fully aware of service tax laws and procedure. I hold that he has played active role in evading duty. Thus, I uphold the order imposing the penalty under Section 77(1), 77(2) , 78 and 78A of the Finance Act, 1994.

15. The appeal filed by the appellant is thereby disposed off in above terms.



(UMA SHANKER)
COMMISSIONER (APPEALS-II)
CENTRAL EXCISE, AHMEDABAD

ATTESTED


(R.R. PATEL)
SUPERINTENDENT (APPEALS-II),
CENTRAL EXCISE, AHMEDABAD.



By R.P.A.D.:

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Copy To:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Deputy Commissioner, Service Tax, Division-II, Ahmedabad.
- 4) The Assistant Commissioner (Systems), Service Tax(HQ), Ahmedabad.
- 5) The P.A. to Commissioner (Appeals-IV), Central Excise, Ahmedabad.
- 6) Guard File.

