



आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क :
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan.

रेस कोर्स रिंग रोड, / Race Course Ring Road.

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

| | | | |
|---|---|---------------------------|------------------|
| क | अपील / फाइल संख्या Appeal / File No. | मूल आदेश सं / O.O. No. | दिनांक / Date |
| | V2/56/GDM/2016 | 11/JC/2016 | 22.08.2016 |

ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-139-2017-18

आदेश का दिनांक /
Date of Order: **18.12.2017** जारी करने की तारीख /
Date of issue: **21.12.2017**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

गें अपर आयुक्त आयुक्त आयुक्त उप-आयुक्त सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जयनगर / गान्धीधाम द्वारा उपरलिखित जारी मूल आदेश से नूजित /

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-**

M/s. Katira Construction Ltd Grinding Unit, "KCL HOUSE", 1st Floor, C- Wing, Katira Shoppers City,, RTO Relocation Site,,Bhuj, Kutch.

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपरोक्त अधिकारी / अधिकारण के समक्ष अपील दाखल कर सकता है। /
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) सर्वोच्च न्यायालय से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, बेंगलूरु : लोक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपील के अलावा शेष सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठ, दिल्ली तल, बहामनी भवन असावी अहमदाबाद- 380016 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील दर्ज कराने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये धारा EA-3 की धारा पंक्तियों में दर्ज किया जाना चाहिए। इसमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा, व्याज की सीमा और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का प्रगतन संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का प्रगतन, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

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.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994 के नियम 9(1) के तहत निर्धारित धारा S.T.5 में धारा पंक्तियों में की जा सकती है एवं उसके साथ निम्न आदेश के विरुद्ध अपील की जा सकती है, उसकी प्रति साथ में संलग्न की जायेंगे से एक प्रति प्रस्तुत होनी चाहिए और इसमें से कम से कम एक प्रति के साथ, जहां सेवाकर की सीमा, व्याज की सीमा और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का प्रगतन, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का प्रगतन, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

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 fee 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. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) विल अपीलियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत टॉर की सभी अपील, सेवाकर विधायक, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T.-7 में की जा सकती एवं उसके साथ अप्रुक्त, केन्द्रीय उत्पाद शुल्क अध्याय अध्याय (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ सहित को (जन्मे में एक प्रति प्रमाणीत होनी चाहिए) और अप्रुक्त द्वारा सहायक अप्रुक्त अध्याय अध्याय, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलियम न्यायाधिकरण को आवेदन टॉर करने का निर्देश देने वाले आदेश की प्रति भी साथ में प्रेषित करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 of the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलियम प्रविष्टि (सेनटेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अपीलियम 1944 की धारा 35एक के अंतर्गत, जो की विलियम अपीलियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलियम प्रविष्टि में अपील करते समय उत्पाद शुल्क/सेवा कर मात्र के 10 प्रतिशत (10%), जब मात्र एवं दुर्लभा विवादित है, या दुर्लभा, जब केवल दुर्लभा विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपीलियम देय राशि दस करोड़ रुपए से अधिक न हो।

- केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'मात्र किए गए शुल्क' में निम्न शामिल है
 - (i) धारा 11 डी के अंतर्गत रकम
 - (ii) सेनटेट जमा की गई राशि
 - (iii) सेनटेट जमा विधायक के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान विलियम (स. 2) अपीलियम 2014 के अंतर्गत में पूर्व किसी अपीलियम प्रविष्टि के तहत विचारणीय प्रश्न नहीं एवं अपील को लागू नहीं होगी।

For an appeal to be filed before the CESTAT, 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, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

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

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

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षण प्रविष्टि निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अपीलियम, 1994 की धारा 35EE के अध्याय पाठक के अंतर्गत आता है। भारत सरकार, पुनरीक्षण आवेदन इकाई, विलियम मंत्रालय, राज्य विभाग, लोक भवन, जीवन टॉप अवन, बस स्टेशन, नई दिल्ली-110001, को किया जाता चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid.

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने में भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के परसकरण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के संबंध में। / In case of any loss of goods, where the loss occurs 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

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भारी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / 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.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) अनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इमुटी क्रेडिट इस अपीलियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो अप्रुक्त (अपील) के द्वारा विलियम अपीलियम (स. 2), 1998 की धारा 109 के द्वारा नियत की गई तात्कालिक समायोजि पर या बाद में पारित किए गए हैं। / 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 such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec 109 of the Finance (No.2) Act, 1998.

(v) अप्रुक्त आवेदन की दो प्रतियाँ फॉर्म सचय EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) विधायक, 2001 के नियम 9 के अंतर्गत विधिद्विष्ट है, इस आदेश के लक्ष्य के 3 माह के अंतर्गत की जानी चाहिए। अप्रुक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ भरन की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अपीलियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साथ के तौर पर TR-6 की प्रति भरन की जानी 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 O.I.O and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Chalan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहां संलग्न रकम एक लाख रुपये या उससे कम है तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा है तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त हो में किया जाना चाहिए। इस समय के होने हुए भी की विषय पढी करे में बदले के लिए न्यायप्रति अपीलियम न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers 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 filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) न्यायसंबंधित न्यायालय शुल्क अपीलियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं उपाय आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट जमा होना चाहिए। / One copy of application or O.I.O, as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलियम न्यायाधिकरण (कार्य विधि) विधायक, 1982 में वर्णित एवं अन्य संबंधित मामलों को अपीलियम करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / 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.

(G) उच्च अपीलियम प्रविष्टि को अपील दाखिल करने में संबंधित न्याय, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलियम विभाग वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s. Katira Construction Ltd., KCL House, 1st Floor, C-wing, Katira Shoppers City, RTO Relocation Site, Bhuj, Kutch (hereinafter referred to as 'the appellant') has filed the present appeal against the Order-In-Original No. 11/JC/2016 dated 22.08.2016 (hereinafter referred to as 'the impugned order'), passed by the Joint Commissioner, Central Excise & Service Tax, Gandhidham (hereinafter referred to as "the lower adjudicating authority").

2. The brief facts of the case are that the appellant having Service Tax Registration No. AACCK5024DST001 was providing services chargeable to Service Tax under the categories of Construction Services in respect of Commercial or Industrial Buildings and Civil Structures classifiable under Section 65(105)(zzq), transport of goods by Road falling under Section 65(105)(zzp), Site Preparation and Clearance falling under Section 65(105)(zzza) and Works Contract Service falling under Section 65(105)(zzzza) of Finance Act, 1994 (hereinafter referred to as "the Act").

2.1 Show Cause Notice No. V.ST/AR-GDM/79/2014-15 dated 08.07.2014 was issued proposing demand of Services Tax of Rs. 39,83,768/- alongwith Education Cess of Rs. 79,675/- and Secondary & Higher Secondary Education Cess of Rs. 39,839/-, total Rs. 41,03,281/-, under Section 73(1) of the Act read with Section 68 of the Act; to appropriate Rs. 27,58,018/- paid/deposited by them during investigation; to charge and recover interest at the applicable rate under Section 75 of the Act and an amount of Rs. 2,23,976/- paid towards interest was proposed to be appropriated against interest liability; to impose penalties under Section 76, 77 and 78 of the Act.

2.2 The Show Cause Notice alleged that the appellant though provided taxable service of "Commercial or Industrial Construction Service" to various clients, however, they had not paid Service Tax for the period from April, 2013 to June, 2013. The director of the appellant in his statement stated that they carried out Civil Construction work for the Government as well as private entities like M/s. Balkrishna Industries Ltd., M/s. Gujarat Adani Institute of Medical Sciences, Bhuj and had not charged Service Tax as no Service Tax was payable on the said project, the same being exempted from Service Tax; that they had not paid Service Tax of Rs. 13,13,581/- from April, 2013 to June, 2013 payable on the taxable service having value of Rs. 1,58,83,767/- (Rs. 71,23,624/- abated value). However, scrutiny of records revealed that the

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appellant had rendered taxable output service valued at Rs. 1,92,32,774/- and as such they were required to pay Service Tax of Rs. 14,79,156/-.

2.3 The Show Cause Notice also alleged that the appellant rendered services for construction of boy's hostel for M/s. Gujarat Adani Institute of Medical Science, Bhuj, which was managed and controlled by the Adani Group. The appellant was requested to provide copy of the agreement entered with the state government but they did not provide. The above institute was run by Adani group was charging fees from medical students as per the highest ceiling permitted by the state Government. The fee structure of this private medical institute was very high compared to the fee charged by the Government colleges and hence the hostel building of such a private institute is a building used for earnings and was required to be treated as liable to Service Tax.

3. The lower adjudicating authority vide impugned order confirmed demand of Services Tax of Rs. 41,03,281/- including Education Cess and Secondary & Higher Secondary Education Cess, under Section 73(1), read with Section 68 of the Act and Rs. 27,58,018/- deposited by the appellant was appropriated; ordered to recover interest at the applicable rate under Section 75 of the Act on Service tax confirmed and to appropriate interest of Rs. 2,23,976/- paid by appellant towards interest liability. The proposal for imposition of penalty under Section 76 and Section 77 of the Act was dropped but penalty of Rs. 41,03,281/- under Section 78 of the Act was imposed giving option to pay reduced penalty as available under Section 78 of the Act.

4. Being aggrieved by the impugned order, appellant preferred the present appeal, *inter-alia* on the following grounds:

- A. The adjudicating authority erred in fastening Service Tax liability for construction work carried out for institutions established solely for educational purposes even though the category of "Commercial or Industrial Construction Services" exclude new building or civil structure which were not primarily for the purposes of commerce or industry from Service Tax. CBEC Circular No. B-2/8/2004-TRU dated 10.09.2004, clarified that construction for use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purpose of profit were not taxable, being non-commercial in nature. They rely on the

judgment in the case of Anand Construction Company reported as 2013 (32) STR 451 and B. Ramarao & Co. reported as 2014 (35) STR 781.

- B. It is not a case that Service Tax was charged by the appellant. Merely, because contract indicated value excluding service tax would not automatically meant that the activities undertaken were taxable services. The contractual agreement between the parties regarding taxability of service had never been the basis for deciding legal issue whether the activities in question were taxable service or not.
- C. The lower adjudicating authority erred that payment of certain amount during investigation along with interest means that they couldn't contested levability of Service Tax by relying on the decision in the case of Parle International reported as 2001 127 ELT 329.
- D. The lower adjudicating authority noted that the service recipient charges heavy of fee and high hostel charges and this shows that the said activity was not carried out for educational institution. The quantum of fee and high hostel charges collected by an educational institution was not relevant to the issue whether the institution was involved in 'commercial of industrial' business as clarified in CBEC Circular No. B2/8/2004-TRU.
- E. The invocation of extended period is absolutely unauthorized and illegal as the activities carried out by the appellant were well within the knowledge of the authorities and relied on judgment in the cases of Padmini Products and Chemphar Drugs & Liniments reported as 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively. Continental Foundation Jt. Venture reported as 2007 (216) ELT 177 (SC), Jaiprakash Industries Ltd. reported as 2002 (146) ELT 481 (SC).
- F. Penalty cannot be imposed in the facts of the present case as per judgment in case of Hindustan Steel Limited reported as 1978 ELT (J159). They also contested that interest under Section 75 is not attracted in the instant case.

4.1 A personal hearing in the matter was held wherein S/Shri Amal Pares Dave and Aditya Tripathi, both Advocates reiterated grounds of appeal; that the appellant has constructed hostels for Medical College and hence construction activity is not liable to Service Tax as per CBEC Circular dated 17.09.2004 and CESTAT's decision in case of Anand Construction Co. reported as 2013 (32) STR 451 (Tri.-Mumbai).

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FINDINGS:

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and submissions made during personal hearing. The issue to be decided in the present appeal is as to whether the appellant is liable to pay Service Tax under Commercial and Industrial Construction Service for construction of hostel and Works Contract service alongwith interest or not.

6. The show cause notice alleges that appellant has undertaken services of construction of Commercial or Industrial Buildings but not discharged service tax on services provided under various contracts during the period from 2010-11 to 2012-13 whereas the appellant has submitted that the activities of construction carried out by them under various contracts referred in the show cause notice were for M/s. Balkrishna Industries Ltd. (BIL) and for M/s. Gujarat Adani Institute of Medical Science, Bhuj (GAIMS) and the said constructions were not meant for any commercial or Industrial use by the service recipients and therefore, they are not liable to service tax in view of CBEC circular No.80/10/04-ST dated 17.09.2004. They submitted contract entered by them with GAIMS in support of their claim but did not submit any document in respect of BIL. They submitted that there was no element of suppression of facts on their part, and as such, demand of service tax is hit by limitation under section 73(1) of the Finance Act, 1994.

6.1 I find that the matter is required to be examined in light of CBEC circular No.80/10/04-ST dated 17.09.2004, relevant portion of which is as under.

13. *Construction services (commercial and industrial buildings or civil structures):*

13.1 *Services provided by a commercial concern in relation to construction, repairs, alteration or restoration of such buildings, civil structures or parts thereof which are used, occupied or engaged for the purposes of commerce and industry are covered under this new levy. In this case the service is essentially provided to a person who gets such constructions etc. done, by a building or civil contractor. Estate builders who construct buildings/civil structures for themselves (for their own use, renting it out or for selling it subsequently) are not taxable service providers. However, if such real estate owners hire contractor/contractors, the payment made to such contractor would be subjected to service tax under this head. The tax is limited only in case the service is provided by a commercial concern. Thus service provided by a labourer engaged*

directly by the property owner or a contractor who does not have a business establishment would not be subject to service tax.

13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.

(Emphasis supplied)

6.2 Thus, for taxability of service tax for the "commercial or Industrial construction service", the real test as explained in para 13.1 of the said letter is to verify the usage of such construction by the service recipients on whose behalf such construction carried out by the said service provider. In other words if such constructions are to be used for commercial or Industrial purpose, by the service recipients then such construction activities are liable to service tax.

6.3 Thus, the constructions carried out for use by organization or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purpose, it should not be for the purposes of profit and should be non-commercial in nature. It has also been clarified that Government building or civil construction are used for residential, office purpose or for providing civic amenities are not liable to service tax, however, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builder would be subjected to service tax.

7. I also find that the appellant has not submitted anything in respect of demand of Service Tax of Rs. 27,58,019/- for Commercial or Industrial Construction service as well as Works Contract service carried out by them on behalf of M/s. Balkrishna Industries, Bhuj, Inlibnet Centre, Ahmedabad. There is, thus, no dispute on this part of demand as has been held in the impugned

order and hence, I hold that this demand of Service Tax is rightly confirmed by the lower adjudicating authority alongwith interest for delayed payment. To this extent, appeal fails and impugned order is upheld.

8. With regard to demand of service tax at serial No.1, 2 and 3 of the Annexure to the show cause notice, the appellant has submitted that, service-tax demand is made for Boys hostels made by them for GAIMS. The appellant submitted a copy of Memorandum of Understanding between Government of Gujarat and Adani Education and Research Foundation for Management of GK General Hospital, Bhuj and Establishment of Medical College and Allied Institutions in the premises of GK General Hospital Bhuj. The excerpt of the said MOU is as under:

"Whereas the Government of Gujarat and AERF (Adani Education and Research Foundation) have agreed to form a Special Purpose Vehicle (SPV) to upgrade and administer the GK General Hospital at Bhuj. The conditions of Memorandum and Bylaws of the said SPV shall be as mutually agreed by both parties to this MoU and the AERF has taken the responsibility of further increasing the number of patient beds to 750 at this hospital at its own cost and

Whereas the Government of Gujarat and AERF are desirous of setting up a self financed (SFI) medical college with an initial admission of 150 students per year from the academic year 2009 on the premises of the aforesaid GK General Hospital (26.79 Acres), this MoU is hereby entered into."

8.1 It is alleged in the Show Cause Notice and the impugned order that the medical college is a self financed college set up by the GAIMS, located on GK General Hospital Compound, Bhuj and the contract has been entered into by GAIMS and the appellant for construction of Boys hostel building at GAIMS, Bhuj. The contract nowhere mentions that the Government of Gujarat is constructing the Boys Hostel Building. In fact, no government/ semi-government or government undertaking institutions is involved in construction of this Boys hostel.

8.2 It has been held that the courses are conducted by GAIMS, which neither a trust nor a society. The AERF is registered as Trust and a Society under the Bombay Public Trust Act, 1950 and Societies Registration Act, 1860 whereas GAIMS is a self financed medical college. The appellant has provided services to GAIMS and orders for construction and/or 'works contract' have been given to the appellant by GAIMS and not by Government and also not by society or trust.

The appellant has failed to submit any documents/ information about the approved plan of the building or civil construction, which would have clearly established the use and purpose of the building constructed by them. In absence of documents, it can't be said to be non-commercial buildings more so when they charge very high fee. The appellant has submitted a list of colleges under "Admission Committee 2014-15 - LIST OF MEDICAL COLLEGES / INSTITUTES", wherein GAIMS has been mentioned at Sr. No. 6 of the Self Financed Medical College. The fees agreed at by the Admission Committee for the year 2014-15, to be charged by GAIMS, is Rs. 3,25,000/- per annum. Thus, GAIMS has charged hefty fee from the students enrolled for study. Under the circumstances, I have no option but to hold that the construction carried out by the appellant is used for commercial purpose.

8.3 As per facts available in this case and in absence of documents like Building plan as approved by local authorities, I hold that the activities of construction on behalf of GAIMS by the appellant is classifiable under the category of "Commercial Construction Service"/ "Works Contract Service" and the appellant is liable to service tax. Therefore, the confirmation of demand of Service tax of Rs. 13,45,262/- is also held to be correct and appeal fails.

9. The next argument of the appellant is that demand is time barred. I find that the appellant being limited company and having Service Tax registration for long time are well aware of the Service Tax law. The Service Tax law casts obligation on the assessee to act honestly since the legislation has put faith on the assesseees by way of introduction of self assessment. Since no physical control is exercised, whatever is stated by the appellant has been construed as true and correct. When the violation of the provisions of the Act is made with intent to evade payment of duty and this wrong doing by them could be detected during investigation by the Department and that's how Department came to know about it. Therefore, the provisions of extended period have rightly been invoked in this case. I am of the considered view that the extended period has rightly been invoked against them and the case-laws relied upon by them are not applicable in view of the facts of the case on hand. For the above reasons, equal mandatory penalty as imposed under Section 78 of the Act is also imposable on the appellant.

10. In view of above, I hold that the appellant is liable to pay Service Tax of Rs. 41,03,281. Since the service tax is payable, the interest is also required to

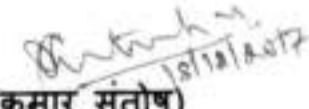


be paid by them. I also uphold equal mandatory penalty under Section 78 of the Act as imposed in the impugned order.

11. In view of above, I uphold the impugned order and reject the appeal.

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

11.1 The appeal filed by the appellant is disposed of in above terms.


(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Katira Construction Ltd., KCL
House, 1st Floor, C-wing, Katira
Shoppers City, RTO Relocation Site,
Bhuj, Kutch

मे. कतीरा कंस्ट्रक्शन लिमिटेड, केसीएल
हाउस, पहेला तल्ला, सी-विंग, कतीरा
शॉपर्स सिटी, आरटीओ रेलोकेशन साइट,
भुज, कच्छ.

Copy for information and necessary action to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Kutch, Gandhidham.
- 3) The Assistant Commissioner, GST & Central Excise, Division, Bhuj.
- 4) The Superintendent, GST & Central Excise, Range, Bhuj.
- 5) Guard File.