



उद्योग वास्तु (अपील) वा वास्तुवापन चर्चा एवं सेवा वा सेवा प्रदाता उद्योग वास्तु
INDUSTRIAL DEVELOPMENT CORPORATION, INDIA & IT PARK, KUCHI



द्वितीय उद्योग वास्तु केंद्र, 22nd Floor, 29, Oldcourt
वादी रोड, मुंबई - 400026, महाराष्ट्र

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संलग्नता क्रमांक वा दिनांक

न	संलग्नता क्रमांक/दिनांक Application No./Date	उद्योग वास्तु INDIA	दिनांक Date
	92142109157013 15	16/09/2019	27.09.2019

वर्षा नं. वर्षा नं. (Year no./Year no.)

REPLY ENCLUGN-DDE-APP-077-2019

सदेश वा निवास : 31.01.2019
Date of Issue : 31.01.2019
नाम वा नाम नं. वा मीठा :
Name of Issue : 11.03.2019

कुमार, संदीप प्रदीप वास्तु (अपील), वास्तुवापन उद्योग वास्तु
Kumar, Sandeep Pradip Vastu (Appeal), Industrial Development Corporation (Appeals), Rajkot

उद्योग वास्तु (अपील) वास्तुवापन उद्योग वास्तु केंद्र, 22nd Floor, 29, Oldcourt
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Industrial Development Corporation, 22nd Floor, 29, Oldcourt
Road, Mumbai - 400026, Maharashtra

उपस्थितता व उद्योग वास्तुवापन (Name & Address of the Applicants & Respondent):

M/s Gujarat Industrial Development Corporation, Housing Plot No. 1213, Near Shopping Centre,
Phase-III, Wadiwan Circle, Surendranagar-387005

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IN ORDER-IN-APPEAL :

M/s. Gujarat Industrial Development Corporation, Surendranagar (hereinafter referred to as "Appellant") filed appeal No. VZ/1/2/SVR/2018-19 against Order-in-Original No. 18/Demand/2018-19 dated 27.7.2018 (hereinafter referred to as "impugned order") passed by the Asst. Commissioner, CGST & Central Excise Division, Surendranagar (hereinafter referred to as "lower adjudicating authority").

2. The brief facts of the case are that the Appellant, a Government of Gujarat undertaking, was established under the Gujarat Industrial Development Act, 1962. The Appellant was registered with Service Tax having registration No. AAB0080230SD014 for 'Renting of Immovable Property Service'.

2.1 The Audit of the records of the Appellant revealed that they were generating incomes from various operations and booking these incomes under different Heads like Non Agriculture Conversion Charge, Transfer fee, Infrastructure Upgradation Charge and Premium Receipts, which were allegedly taxable and hence, liable to pay Service Tax. The Audit also found that the Appellant was receiving consideration in the form of Non utilization penalty and Misc. Receipts/ Recovery and hence, liable to service tax under the category of 'Business Auxiliary Service'. However, the Appellant was not paying Service Tax on these incomes.

2.2 Show Cause Notice No. VI/Sig/ 115/EA 2020/Audit-III/V(2)/15-16 dated 25.11.2016 was issued for the period from 2011-12 to 2014-15, calling the Appellant to show cause as to why Service Tax of Rs. 8,69,485/- under 'Business Auxiliary Service' and Rs. 38,75,011/- in respect of 'Renting of Immovable Property Service' should not be demanded and recovered from them under Section 73(1) of the Finance Act, 1994, along with interest under Section 75 of the Act and why penalty under Sections 76.77 and 78 of the Act should not be imposed on them.

2.3 The above Show Cause Notice was adjudicated by the Asst. Commissioner, CGST & Central Excise, Surendranagar Division vice the impugned order which held that 'Premium Receipts Income' is not liable to Service Tax in view of Section 104 of the Finance Act, 1994 and dropped the demand of Rs. 2,69,022/- dropped service tax demand of Rs. 29,159/- under the category of 'Business Auxiliary Service' holding that no service was involved. The impugned order confirmed Service Tax demand of Rs. 8,40,326/- under 'Business Auxiliary Service' and Rs. 36,05,990/- in respect of 'Renting of Immovable Property

Services' and ordered for its cancellation. The order of 2011 of the AIT along with interest under Section 73 of the Act and the interest penalty of Rs. 4,50,466/- under Section 78 of the Act were also cancelled under Section 77 of the Act.

2. Being aggrieved with the aforesaid order, the appellants have preferred appeal on various grounds, inter alia, as under:-

(i) That the appellants have established under the Gujarat Industrial Development Act, 1952 by the Government of Gujarat for the purpose of securing orderly establishment and expansion of industries in industrial areas and industrial estates in Gujarat and for establishing commercial centres in connection with the establishment and expansion of such industries. Various areas in Gujarat where industries were clustered were declared as GIDC zones and new industrial zones were also created and plots of land were allotted to willing industries. An economic centre to cater overall industrial development could take place in a structured and planned manner.

(ii) That Section 13 of GID Act, describes various functions to be performed by the Appellant which includes provision and assistance in rapid and orderly establishment, growth and development of industries; development of land on its own account or for the State Government for the purpose of facilitating the location of industries and commercial centres; financial assistance by way of loans to industries to move their factories into industrial estates or areas and undertaking schemes for providing units and commercial establishments with such structures as may be necessary for their orderly establishment, growth and development. The Appellant also maintains the structure like roads, sustained water supply, drainage etc. within the industrial areas or estates. Further, maintenance and up gradation of the existing infrastructure is also a primary responsibility of the Appellant. In view of Section 37(c) of the GID Act, the Appellant incurs expenditure to maintain these facilities and collects maintenance charges from plot holders.

(iii) The Appellant has collected 'transfer fee' for the purpose of transfer of title in land / plot from one allottee to another allottee. Amount collected as 'Transfer fee' is not falling under the service category of 'Renting of Immovable Property Services' and no service tax is payable. The 'Renting of immovable property' includes renting, leasing, letting, licensing or similar arrangements of immovable property for use in the course of furtherance of business or commerce. The transfer fee cannot be said to be collected for renting / leasing / letting or any other similar arrangement. The service tax demand has been confirmed under the category of 'renting of immovable property services'

without giving logical reasoning as to how the amount collected as transfer fees satisfies the conditions as stated under the definition of the said category. Further, as per definition of 'services' contained in section (50(44)) of the Act, transfer of title in immovable property by way of sale, gift or in any other manner is excluded from the levy of service tax. Hence, they are not liable to pay Service Tax on 'Transfer Fee' collected by them during the period 2011-12 to 2014-15.

(vi) The Appellant develops infrastructure like roads, sustained water supply, drainage etc. within the industrial areas or estates which is their primary responsibility in view of section 47(1) of CID Act. For any estate developed under CID Act, 50% of the contribution is made by the State Government and balance 50% contribution is made in the ratio of 60:40 i.e. 50% is contributed by the Appellant and 40% is contributed by Industrial association. The contribution towards development of the estate as collected by the appellant is termed as 'Infrastructure Upgradation Fund'. Post development of the estate, the Appellant recovers total fund contributed by them and industrial association from the plot allottees and transfers 40% of the fund to respective industrial association. The Appellant is discharging service tax on their 60% contribution w.e.f. 01.07.2010 under service category of 'Renting of Immovable Property service'. However, they are not liable to pay service tax on 40% of contribution, since the same is not retained by them but passed on to respective industrial association and also shown as liability in their financial statement. Since there is no provision of service, service tax demand under the service category of 'renting of immovable property service' is not sustainable.

(v) The Appellant acquires land from the state government and converts agricultural land into non agricultural purpose in order to develop industrial estate and makes payment of Non Agricultural charges to the State Revenue department and recovers the same from the plot allottee. The Appellant is discharging service tax w.e.f. 01.07.2012 i.e. after introduction of negative list. As there was no specific entry prior to introduction of negative list, the Appellant has not discharged service tax on the same. The impugned order has confirmed service tax demand under the category of 'Renting of Immovable Property service' without giving logical reasoning as to how the amount collected as 'NA Charges' satisfies the conditions as stated under the definition of the said category.

(vi) The Appellant is charging penalty to plot holders in case of non utilization of plot for business activity within stipulated period which is termed as 'non-

authority' as the tax is levied on the nature of goods/ services and not service transaction as per the Tax Exemption under 'Business Auxiliary Services'.

(vii) Notwithstanding arguments to the contrary, above said, the Appellant being a governmental authority is eligible for exemption vide 39 of entry No. 39 of Mega Exemption Notification No. 25/2012-ST dated 20.06.2012, which reads as under:

"39. Services by a governmental authority in the way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution."

As per the said exemption entry, any services provided by government authority in relation to any functions entrusted to municipality under article 243W of the Constitution are exempted from the levy of service tax. The term 'governmental authority' is defined in under clause 3(i) of the notification supra. The Appellant has been established by the Legislature of state of Gujarat under the Gujarat Industrial Development Act, 1962 and performs its functions in accordance with the provisions contained in the Act and the Rules made thereunder. The Appellant qualifies as a governmental authority and performs various functions which are entrusted to a municipality under Article 240W of the Constitution and Schedule VI of the Constitution. Thus, it can be said that any activity performed by appellant in relation to the purpose for which appellant has been established, would qualify for exemption from service tax under entry 39 of the Mega Exemption Notification No. 25/2012-ST dated 20.06.2012 and hence service tax shall not be levied for the period from 01.07.2012 on the amount of GST collected by appellant from its allottees and settled upon judgement of Bombay High Court passed in case of M.M. reported as 2018 (9) G.S.T.L. 373 (Over).

(viii) Since the Appellant is not liable to pay Service Tax confirmed in the impugned order, no interest is payable by them under Section 70 of the Act.

(ix) The impugned order has confirmed demand involving extended period of limitation under section 78. Larger period of limitation can be invoked only in case where there is fraud, collusion, wilful misstatement, suppression of facts or contravention of provision of any Excise law with an intent to evade payment of duty'. The onus to prove that there was an intent to evade payment of duty is upon the department, which has not been discharged. The Appellant was established under the provisions of Gujarat Industrial Act, 1962 for performing statutory functions. The Appellant being a government body could not have a

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malafide intention for non-payment of service tax, reliance is placed on the following judgments:

- (a) CCE v. Bharat Petroleum Corporation Ltd. (2016) 344 E.T. 657
- (b) Karnataka State Tourism Dev. Laron. Ltd. v. CST (2011) 21 STR 51
- (c) Maharashtra State Seed Certification Agency v. CCE/CE (2015) 37 STR 655 (Trib. Mumbai)
- (d) Gujarat Karmada Valley Fertilizers & Chem. Ltd. v. CCE (2015) 37 STR 796 (Trib. Ah. Td.)

4. Personal Hearing in the matter was attended by Sarit Devang Gajjar, Chartered Accountant and Shri Sagar Makadia, Assistant of the Appellant who reiterated the grounds of appeal and submitted that GIDC has been created by an Act passed by Gujarat State Legislature; that GIDC is a 'Government authority' and hence mega exemption notification applies to it; that the issue has already been decided by the Hon'ble High Court of Mumbai in the case of CCE, Nasik Vs MIDC and this case law is applicable; On query as to how MIDC is similar to GIDC in various aspects as decided by the Hon'ble High Court, he submitted that he will make additional submissions within a fortnight.

4.1 The Appellant vide letter dated 17.11.2018 submitted additional submissions as under:

(i) The Appellant reproduced various provisions of Gujarat Industrial Development Act, 1962 and Maharashtra Industrial Development Act, 1961 and submitted that object and functions of the Gujarat Industrial Development Corporation are same as that of Maharashtra Industrial Development Corporation and furnished copies of GID Act, 1962 and MID Act, 1961.

(ii) That the Appellant is performing statutory functions as per G. I. D. Act, 1962 and G.I.D. Rules, 1963 and various charges collected by G.I.D.C. from plant holders are compulsory levy which are collected to discharge statutory functions in terms of Section 13 of the G.I.D. Act, 1962 and relied upon decision of the Hon'ble Bombay High Court passed in the case of CCE Nasik Vs M/s M.I.D.C.- 2018 (5) G.S.T.L. 372 (Bom.) and hence that appellant is not liable to pay service tax on charges collected by them.

(iii) Relied upon Order-in-Original no. A-14 EXCUS CGM-011-18-19 dated 28.09.2018 passed by the Commissioner, CGST & Central Excise, Ahmedabad South in their own name who dropped the service tax demand for the period post 1/7/2012 by relying upon entry no. 39 of the Mega Exemption notification No. 25/2012 dated 25.06.2012. Considering G.I.D.C. as a governmental authority. Also relied upon Order-in-Original no. RA-1 EXCUS GUM I.S.W. 04 17 18 dated

29.10.2018 passed by the Appellant on 29.10.2018 in their own case.

4.7 The Appellant vide entry No. 1 of 12/11/2018 submitted copy of Order No. A/124/9/2018 dated 10.9.2018 issued by the Hon'ble C&AG, Ahmedabad in their own case. The Appellant vide entry No. 2 of 12/11/2018 submitted bifurcation of income booked under various heads under 'Income Recovery' along with description of each income.

Findings:

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and written as well as oral submissions made by the Appellant. The issue to be decided is whether the Appellant is liable to pay service tax on various charges levied collected by them, under the categories of 'Renting of Immovable Property, services and Business Auxiliary Service' or not.

6. I find that the Appellant was established under the Gujarat Industrial Development Act, 1962 for the purpose of securing orderly establishment and organisation of industries in urban, suburban and industrial estates in Gujarat and for establishing commercial centres in connection with the establishment and organisation of such industries. Section 13 of the Gujarat Industrial Development Act, 1962 prescribes functions to be performed by the Appellant which reads as under:

- (1) The functions of the Corporation shall be -
- (i) especially to secure, secure, develop and orderly establishment, growth and development of industries in the State of Gujarat, and
- (ii) to establish and manage industrial estates at places selected by the State Government:
 - (a) establish and manage industrial estates at places selected by the State Government;
 - (b) develop industrial areas selected by the State Government for the purpose and make in a well-planned way arrangements to establish industries;
 - (c) develop land on its own account or for the State Government for the purpose of facilitating the location of industries and commercial centres;
 - (d) assist financially by such advances to those who establish or lease industrial estates or areas;
 - (e) undertake schemes for providing industrial units and commercial establishments with such structures and facilities as may be necessary for their orderly establishment, growth and development;
 - (f) promote, organise, sponsor or undertake to finance or work on either jointly with other corporate bodies or institutions, or on the Government or local authorities, or on an agency basis, in furtherance of the purposes in which the Corporation is established and of business conducted thereat.

(Signature)

7. I find that the lower adjudicating authority has confirmed Service Tax demand on the incomes booked by the Appellant under the Heads of Non Agriculture Conversion Charge, Transfer Fee and Infrastructure Upgradation Charge during the period 2011-12 to 2014-15 under the category of 'Renting of Immovable Property Service'. I find that Section 6a(90a) of the Act defines 'Renting of Immovable Property' as under:

"(90a) "Renting of immovable property" includes earning, letting, leasing, licensing or other similar arrangements of immovable property for use in the course of furtherance of business or commerce but does not include—

- (A) renting of immovable property by a religious body or a religious trustee;
- (B) renting of immovable property to an educational body imparting skill or knowledge in business, any other art or field, other than a commercial training or coaching centre."

7.1 I find from the records available that detail descriptions of above mentioned income heads are as under:

(i) Non Agriculture Conversion charges:

The Appellant acquires agricultural land from the State Government and converts into non agricultural purpose in order to develop industrial estate and makes payment of Non Agricultural Conversion charge to the State Revenue department and recovers the same from the plot allottees.

(ii) Transfer fee: The Appellant has collected 'Transfer Fee' for the purpose of transfer of title in land / plot from one allottee to another allottee.

(iii) Infrastructure Upgradation Charge:

The Appellant develops infrastructure like roads, water supply, drainage etc. within the industrial areas or estates in view of Section 37(1) of CID Act. For any estate developed under CID Act, 50% of the contribution is made by the State Government and balance 50% contribution is made in the ratio of 60:40 i.e. 60% is contributed by the Appellant and 40% is contributed by industrial association which is termed as 'Infrastructure Upgradation Fund'. Post development of the estate, the Appellant recovers total fund contributed by them and Industrial association from the plot allottees and transfers 40% of the fund to respective industrial association. The Appellant has been paying service tax on their 60% contribution w.e.f. 01.07.2015 under category of 'Renting of Immovable Property service' but contested service tax demand on 40% of the contribution transferred to respective industrial associations.

7.2 I find that the Appellant is entitled to a reduction of demand under the category of 'renting of immovable property' for want of the grounds that the appellant, being a governmental authority, is eligible for exemption vide F. 01/7-2012 dated 20.06.2012, which reads as follows: "services provided by government authority in relation to the rendering of services to municipality under Article 243W of the Constitution are exempted from the levy of service tax; that the Appellant is covered by the term 'governmental authority' defined under clause 3(a) of the notification signed by the Appellant was established by the Legislature of State of Gujarat under the Gujarat Municipal Development Act, 1967 and performs functions in accordance with the provisions contained in the Act and the Rules made thereunder; such functions performed by them are same as entrusted to a municipality under clause 39 of the Constitution and Schedule XII of the Constitution that they would qualify for exemption from service tax under entry 39 of the State Exemption Notification No. 25/2012-11 dated 20.6.2012 and relied upon Judgement of Bombay High Court passed in case of MDC (reported as 2018 (9) G.S.T.L. 371 (Bom.)).

7.3 I find that Notification no.25/2012 ST dated 20-06-2012, inter alia, exempts certain services from payment of Service Tax vide clause 19 of the said notification as under:

"39. Services by a governmental authority by way of any function entrusted to a municipality under article 243 W of the Constitution."

7.4 I find that the term 'governmental authority' has been defined under Notification No. 25/2012-ST dated 20-06-2012 as under:

"(a) 'governmental authority' means a board or an authority or any other body established with either or more powers, by way of equity or control by Government, and set up by an Act of Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution."

7.5 The definition of "governmental authority" has been amended vide L. 32-21-2014, vide Notification No. 02/2014-ST dated 30-01-2014, which reads as under:

"(a) 'governmental authority' means an authority or a board or any other body:
 (i) Set up by an Act of Parliament or a State Legislature or
 (ii) Established by Government
 and 50% or more establishment by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution"

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7.6 I find that the Appellant is a corporation set up by an Act of State Legislature of Government of Gujarat. As per various provisions of the Gujarat Industrial Development Act, 1962, the Government of Gujarat has full control over it. Therefore, there cannot be any doubt that the Appellant is a governmental authority. However, I find that exemption under Sl.No.39, Under Notification No. 25/2012-ST dated 20-06-2012, is available only to the services provided by a governmental authority in relation to any function entrusted to a Municipality under Article 243W of the Constitution. The functions entrusted to a Municipality have been prescribed under Twelfth Schedule under Article 243W of the Constitution, which reads as under:

- (TWELFTH SCHEDULE to Article 243W)
1. Urban planning including town planning.
 2. Regulation of land-use and construction of buildings.
 3. Planning for extensions and social development.
 4. Roads and bridges.
 5. Water supply for domestic, industrial and commercial purposes.
 6. Public health, sanitation, conservancy and solid waste management.
 7. Fire services.
 8. Urban forestry, protection of the urban environment and aesthetic aspects.
 9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
 10. Street lighting and upgradation.
 11. Urban poverty alleviation.
 12. Provision of municipal services and facilities such as parks, gardens, playgrounds.
 13. Promotion of cultural, educational and aesthetic aspects.
 14. Burials and funeral grounds, crematoriums, cemeteries and electric crematoriums.
 15. Control over a provision relating to animals.
 16. Vital statistics including registration of Births and Deaths.
 17. Public amenities like drinking water, lighting, parking lots, bus stops and public conveniences.
 18. Regulation of slaughter houses and tanneries."

7.7 I find from the above list of functions entrusted to a Municipality, that the services of 'Renting of immovables Property Service' is not covered under Twelfth Schedule under Article 243W of the Constitution whereas conversion of agriculture land into non-agriculture and transfer of land from one allottee to another allottee is being done by the Appellant on behalf of State while performing statutory function as at Sl. No. 2 of 12th Schedule. I also find that Infrastructure Upgradation Charge, being collected for development of infrastructure within industrial areas/estate, is a statutory function in terms of Section 15 of the Gujarat Industrial Development Act, 1962 and is covered by Sl. No. 3 of 12th Schedule and hence, the Appellant is eligible for exemption from payment of Service Tax on Non-Agriculture Conversion Charges, Transfer Fees and Infrastructure Upgradation Charges w.e.f. 1.7.2012. The Appellant is

31/08/2012

wholly liable for the Tax on the total amount of self-construction made by them under Section 10(23A) and not merely on the Tax demand only on 40% of contribution transferred to members of the Local Associations. They can get benefit what has been claimed by them in the proceedings, therefore, set aside demand contained vide order dated 10.6.2012 and the above charges for the period from 1.7.2012 to March 2013 and consequent penalties imposed on the Appellant in this regard.

8. Regarding service tax under Section 66 for the period from April, 2011 to 30.6.2012, the Appellant has contended that in performing statutory functions as per G.I.D. Act, 1962 and G.I.D. Rules, 1962 and various charges collected by the Appellant from plot holders are compulsory levy which are collected by them to discharge statutory functions in terms of Section 14 of the G.I.D. Act, 1962 and relied upon decision of the Hon'ble Bombay High Court, passed in the case of *CCF Nashik Vs. M/s. M&S Ltd.* (2011) 336 I.T.R. 272 (Bom.) and claims that appellant is not liable to any service tax on maintenance charges collected by them.

8.9. The Appellant has relied upon the judgment of the Hon'ble Bombay High Court in the case of *Commissioner of Central Excise, Nashik Vs. Maharashtra Industrial Development Corporation* reported as 2018 (9) E.S.T.L. 372 (Bom.) wherein the Hon'ble High Court has held that:

¶12. We have already referred to Section 14 of the MIDC Act which provides that the function of the MIDC is "to develop and manage industrial estates for to establish and manage industrial estates. The role of MIDC is not limited only to establishing industrial estates and sheltering tax reliefs on building or setting up of industrial undertakings. The function and obligation of the MIDC is also to manage and maintain the said physical estates as per Section 14. In doing so, the statutory obligation of the MIDC to provide amenities as defined in clause (a) of Section 2 of the MID Act to the industrial estates established by it, which is the primary obligation of MIDC to provide and maintain amenities in its industrial estates such as roads, water supply, street lighting, drainage, etc. Thus, we find that the activities for which the demand was made are part of the statutory functions of the MIDC under MID Act. As stated earlier, the demand is an explicit levy to be collected from plot holders for services such as roads, water supply, street lighting, drainage, management and repairs, as provided in the order dated 08th December, 2015, for providing amenities to the plot holders, the service tax or service charges collected by MIDC are levied in the nature of compulsory levy which is used by MIDC in discharging statutory obligations under Section 14. We find that, according to the facts and circumstances, the demand for service rendered for which Service Tax was sought to be levied was not in the nature of statutory obligation.

12. There are no grounds for view taken by the Appellate Tribunal. No substantial question of law arises."

(Sd/-)

(Impressis supplied)

8.2 The Hon'ble CESTAT, Ahmedabad vide Final Order No. A/12479/2018 dated 30.03.2018 passed in GIDC case only has held that:

"We have carefully considered the submissions made by both the sides and perused the records, we find that the same are not inconsistent with the right of the judgment of Hon'ble Bombay High Court in the case of Maharashtra Industrial Development Corporation (SIgned), as well as Tribunal order reported at 2008 (1) TMI 1403 and 2018 (1) TMI 2894 (CESTAT Ahmedabad) respectively and in the case of Chhatrisgarh State Industrial Development Corporation Ltd 2019 (1) TMI 357 (CESTAT New Delhi). In view of the above judgments, Service tax liability on Maintenance Charges collected by State Industrial Development Corporation from its Industrial plot owners Accordingly, the impugned order is set aside. Appeal is allowed."

(Emphasis supplied)

8.3 In view of above judgement of the Hon'ble High Court and Order of the CESTAT, I hold that the Appellant is not liable to pay Service Tax on Non Agriculture Conversion Charges and Transfer Fees during the period from April, 2011 to 30.6.2012 also. The demand confirmed for payment of Service Tax on 40% of Infrastructure Upgradation Charge is also not correct. I therefore, set aside Service Tax demand confirmed on these charges for the period from April, 2011 to 30.6.2012, which have been challenged by the Appellant. This Appellate Authority cannot decide on any issue which has not been challenged by the Appellant in these appeal proceedings, including on the issue of service tax paid by the Appellant on 60% of Infrastructure Upgradation Charge.

9. I find that the lower adjudicating authority has confirmed Service Tax demand under 'Business Auxiliary Service' on income booked under the Head's 'Non Utilisation Penalty' and 'Misc. Receipts/Recovery'. I find it is pertinent to examine the definition of 'Business Auxiliary Service' under Section 65(19) of the Act during the period, which was as under:

"(19) "Business auxiliary service" means any service in relation to-

- (i) production or processing or sale of goods produced or provided by or to a client, in that order;
- (ii) retention or warehousing of service provided by the client; or
- (iii) any customer care service provided on behalf of the client; or
- (iv) procurement of goods or services, which are inputs for the client; or
- (v) modification or processing of goods for or on behalf of the client;
- (vi) provision of service on behalf of the client; or
- (vii) service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and reconciling, inventory management, execution or development of prospective customer or vendor, public relation services, management or supervision.

and includes services as a commission agent, but does not include any activity that amounts to manufacture of goods or sale of goods.

30/03/2019

9.1 I find from the evidence that the 'Non-Utilisation Penalty' has been recovered by the respondent on the work done by the assessee. If work had not been started by the assessee on the stipulated time, then it would have been in form of penalty for not utilising the land allotted by the assessee as per the terms and condition of the allotment of the plots but shown as recovery of fine from contractor and in this case, respondent is not for any statutory functions being performed as to be performed by the appellant as per 12th Schedule under Article 243W of the Constitution, as gets clear from the order and hence, this charge is not covered by the judgement of the Hon'ble High Court. The transactions involved herein are also covered under 'declared service' which include "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" in terms of Section 66(1c) of the Finance Act, 1994, and hence demand on this charge is correct, legal and proper. I, therefore, hold that the appellant is liable to pay Service Tax of Rs. 5,09,508/- demanded on income booked under Head 'Non-Utilisation Penalty' w.e.f. 1.7.2012 to 25.12-13 to 25.14-15.

9.2 Regarding service tax demanded on the income booked under the Head 'Misc. Receipt/Recovery', the Appellant has furnished bifurcation of income booked under the said head along with description of each income. I find that the Appellant booked income relating to suo motu property, capital receipts relating to withdrawal of concession given at the time of plot allotment, interest on late payment of lease premium etc. under this Head. I, therefore, find that these incomes were generated on account of the services rendered by the Appellant, which are not in the nature of statutory functions but covered within the definition of 'Business auxiliary services'. I, therefore, hold that the appellant is liable to pay Service Tax of Rs. 3,30,877/- on the income booked under Head 'Misc. Receipt/Recovery' as this function is not covered under 12th Schedule of Article 243W of the Constitution and/or the above said judgement of the Hon'ble High Court.

9.3 In view of Para 9.1 and 9.2, confirmation of Service Tax demand of Rs. 5,09,508/- in respect of 'Non-Utilisation Penalty' and Rs. 3,30,877/- in respect of 'Misc. Receipt/Recovery' is upheld. Since demand is payable, the Appellant is required to pay this demand along with interest at the applicable rates during the period, under Section 75 of the Act.

10. I find that the issues involved in this case are interpretation of law and hence, no penalty is imposable on the Appellant under section 78 of the Act as

10/12/15

per the judgment of the Hon'ble Supreme Court in the case of Shree Rajasthan Syntex Ltd. reported as 2015 (2) E.L.T. 626 (SC), wherein it has been held that,

"3. Insofar as the question of a six year period of limitation is concerned, we have gone through the order of the Commissioner and are of the opinion that he has rightly held that the extended period of limitation in part 10 proviso of Section 11A(1) of the Central Excise Act, 1944 would be applicable in the given circumstances.

6. Moreover, we say of the regulation that in so far as the present one, where the legal effect had been that of an amended Section 4 and the judicial effect is amendment in the good provision with effect from 1-7-2009 was in a fluid state, it would not be appropriate to levy the penalty.

7. In the absence of any ground the original appeals are allowed in part by setting aside the Commissioner's Order in Original passed on 10-1-2003 insofar as it relates to the period from 1-7-2009 to July 2009 and the penalty is set aside. However, there shall be no order as to costs."

(Emphasis supplied)

10. I also rely on Final Order Passed by the Hon'ble CESTAT, New Delhi in the case of Tata Consultancy Services Ltd reported as 2018(18) GSTL 178 (Tri. Del.) sub affirmed by the Hon'ble Supreme Court as reported at 2018(18) GSTL 127(S), which held that penalty is not imposable when dispute relates to interpretation of statute.

10.2 In view of above, I set aside the penalties imposed, for Service Tax payable under these two heads, vide the impugned order.

11. अपीलवाली दस्तावेज दर्ज की गई तथ्यावली का विषयगत उपरोक्त तरीके से किया जाता है।

11. The appeal filed by Appellant is disposed off as above.

सुनवाई,

1/11/2014

नया दिल्ली

विभागाध्यक्ष, अपील

श्री. अशोक कुमार शर्मा
(सुनवाई संतोष)

प्रधान सहायक (अपील)

By R.P.A.D.

To,
Gujarat Industrial Development Corporation,
Wadhvani,
Bhambhaniagar.

पति,

शु. वत हजारीपुर इंफ्लामेंट कंपनी लि.,
नयापन,
सुवेन्द्रनगर।

प्रतिक्रिया:-

- 1) प्रयोग सूक्ष्म संयुक्तों की विलेयता की जांच के लिए सूक्ष्म संयुक्तों को तैल, एथेनॉल, पानी में घोलकर देखें।
- 2) आयुक्त, कस्तूरी जैसे पदार्थों को प्रयोग के लिए सूक्ष्म संयुक्तों में घोलकर देखें।
- 3) चलायक आयुक्त को तैल, पानी, एथेनॉल, पानी, सूक्ष्म संयुक्तों में घोलकर देखें।
- 4) गार्डे टैब्लेट

