



अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क
 THE COMMISSIONER APPEAL, NATIONAL GST & EXCISE,



इंडियन न्याय, श्री गंगा रोड, एन. टी. एन. GST भवन,
 एन. सी. रोड, चंडीगढ़ कालोनी, चंडीगढ़

फ़ोन नं./ टेलीफ़ोन : 260190

फ़ैक्स नं./ फ़ैक्स : 2627957/24-1113

ईमेल: ocaap@natga.gov.in, natga-n

संबंधित याचिका नं. श्री. इत्यादि :-

क. न्यायिक क्रमांक/ टैक्स आर. डी. क्र. /	क. आदेश दिनांक/	दिनांक/
क्रमांक: / File No.	दिनांक/	दिनांक/
227/28/2017/2017	09/08/2018	07/08/2017

न. अपील प्रारंभिक क्रमांक: Border In Appeal - 141

BH-V-EXCISE-006-APP-085-2018-19

आदेश का दिनांक: 08.08.2018 - श्री. सुब्रह्मण्यम नारायण - 14.05.2018
 Date of Order - 08.08.2018 - Mr. Subrahmanyam Narayanan - 14.05.2018

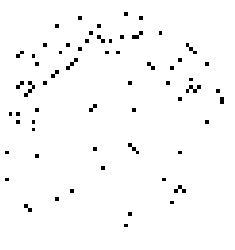
Passed by: Shri Gopi Nath, Additional Director General (Appeals), Scheduled Zone Unit, Ahmedabad.

आदेशानुसार एकल न्यायिक आदेशों (सदस्यीय न्यायिक आदेशों के रूप में) की अपीलें आदेश का
 अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क आदेशों, आदेशों,
 आदेशों आदि के खिलाफ आदेशों को चुनौती देने के लिए दाखल की जाती हैं। आदेशों के अतिरिक्त (अपील) या अपारंपरिक,
 वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क आदेशों के खिलाफ आदेशों को चुनौती देने के लिए दाखल
 की जाती हैं। आदेशों के अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क
 आदेशों के खिलाफ आदेशों को चुनौती देने के लिए दाखल की जाती हैं।

The present appeal is filed with the Director General (Appeals) No. 227/28/2017/2017 dated 17.10.2017 and
 with Board Order No. 6550/2017 dated 14.05.2018. Shri Gopi Nath, Additional Director
 General (Appeals) Ahmedabad Zonal Unit is authorized to hear appeal and to pass orders
 thereon for the purpose of pending orders to be reported accordingly filed under section 35 of
 Central Excise Act, 1944 and Section 105 of the Finance Act, 1994.

- क. आदेशों के अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क आदेशों, आदेशों,
 आदेशों आदि के खिलाफ आदेशों को चुनौती देने के लिए दाखल की जाती हैं।
 Appeal can be above Section 2 of the Act, 1944 and Section 105 of the Finance Act, 1994.
- ख. आदेशों के अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क आदेशों, आदेशों,
 आदेशों आदि के खिलाफ आदेशों को चुनौती देने के लिए दाखल की जाती हैं।
 Appeal can be above Section 2 of the Act, 1944 and Section 105 of the Finance Act, 1994.
- ग. आदेशों के अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क आदेशों, आदेशों,
 आदेशों आदि के खिलाफ आदेशों को चुनौती देने के लिए दाखल की जाती हैं।
 Appeal can be above Section 2 of the Act, 1944 and Section 105 of the Finance Act, 1994.
- घ. आदेशों के अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क आदेशों, आदेशों,
 आदेशों आदि के खिलाफ आदेशों को चुनौती देने के लिए दाखल की जाती हैं।
 Appeal can be above Section 2 of the Act, 1944 and Section 105 of the Finance Act, 1994.
- ङ. आदेशों के अतिरिक्त (अपील) या अपारंपरिक, वस्तुगत कर, एन. टी. एन. और उत्पाद शुल्क आदेशों, आदेशों,
 आदेशों आदि के खिलाफ आदेशों को चुनौती देने के लिए दाखल की जाती हैं।
 Appeal can be above Section 2 of the Act, 1944 and Section 105 of the Finance Act, 1994.

For further information contact the Director General (Appeals) and the Director General (Appeals) Ahmedabad Zonal Unit.
 The Director General (Appeals) Ahmedabad Zonal Unit is authorized to hear appeal and to pass orders
 thereon for the purpose of pending orders to be reported accordingly filed under section 35 of
 Central Excise Act, 1944 and Section 105 of the Finance Act, 1994.



STATE IN APPEAL

The Assistant Commissioner, Service Tax Division, Bangalore Directorate referred to as "The Appellant", authorized by the Principal Commissioner, Central Excise & Service Tax, Bangalore vide Revenue Order of F. No. 223-730/BJ-BRA/2016-17 dated 20/05/2017 has filed an appeal against the Order-in-Original No. R/92/2015 dated 22/09/2015 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Service Tax Division, Bangalore Directorate referred to as the "Refund Sanctioning Authority".

3. Briefly stated facts of the case are as under:

- (i) M/s. Sukral Construction Co. Mr. Jvin Temple, Kalthugola, Kollur, Bangalore District also referred to as the respondent, State of Karnataka Registration No. ADRP94825QSD001, filed refund claim of Rs. 1,40,100/- on 11.11.2016 under the provisions of Section 102 of Finance Act, 2016 under section 114B of the Central Excise Act, 1944 as made applicable to Service Tax under vide Section 80 of the Finance Act, 1994, on account of retrospective exemptions granted to the services provided to the Government Departments on a non-commercial basis. The provision of Section 102 of the Finance Act, 2016. The aforesaid claim was filed on 11.11.2016 along with documents as detailed at Para-03 of the impugned order. However, on scrutiny of the said claim, Query Memo dated 22.01.2016 was issued to the respondent asking them to submit the requisite information as detailed at Para 5 of the impugned order.
- (ii) After following the direction of Karnataka High Court, the Appellant has filed refund claim of Rs. 1,40,100/- under the provisions of Section 11D of the Central Excise Act, 1944 as made applicable to service tax under vide Section 88 of the Finance Act, 1994 as well as section 102 of the Finance Act, 2016.

3. Being aggrieved by the impugned order, the appellant duly authorized by the Principal Commissioner, Central Excise & Service Tax, Directorate vide Revenue Order of F.No. 27/08/2017 issued under F. No. 273-730/BJ-BRA/2016-17 has filed an appeal against the impugned order wherein it is inter alia contended that:



(i) The respondent did not submit the copy of any certified invoice sent by them with the Governmental Account by the Government for providing the Services as well. They had paid Service Tax and for which no audit objection was raised. In absence of copy of contract, it cannot be verified and ascertained also. The respondent had provided the said construction services to the Government Departments under contract, which had been entered into before 01.05.2015 and on which stamp duty had been paid by them on or before 01.05.2015. This is a plain requirement under section 41 of Section 106 of the Finance Act, 1994.

(ii) without scrutiny of the contracts, the adjudicating Authority has erred by holding that the burden of service tax had not been passed on to any other person by the respondent. These facts would only be settled by the Hon'ble High Court and Hon'ble Justice H. L. Datta, Supreme Court of India, in the case of *N. J. V. Mohan Reddy & Co. vs. Union of India*, reported in 1997 (89) ELT 417 (SC), wherein a majority is granted only when it is established that burden of tax/duty has not been passed on to others. The doctrine of unjust enrichment is a just and salutary doctrine, no person can seek to collect the tax from both the parties.

(iii) The respondent vide letter dated 16.03.2017 filed in the above Objection on the grounds wherein they submitted that;

(i) They had been sub-contracted by the Main contractor for the work of the design, construction of classrooms of primary school at various places in District of Pimpri Chinchwad. Charges for construction of Classrooms in the primary school had been levied between the Main contractor and the Government.

(ii) Scrutiny of the copy of work order Ref. SEA/GVDR/2014-14/21978 dated 27.07.2014 in respect to package No. 318/AOR/K/999 entered into between the Main contractor and also contract entered into by the respondent with the Main contractor relating to package No. 318/AOR/K/999/1 dated 14.7.2014 and also the work order issued by their Main Contractor to them for executing work under aforesaid work order and so on.

(iii) They have not passed an amount as service tax on the main Contractor and also furnished the certificate issued by the Main Contractor, certifying that respondent had not collected any service tax from them under package No. 318/AOR/K/999.

- (iii) A statement in a copy of certificate of their Main contractor certifying that no such tax had not been claimed by them except the amount paid by them.
- (iv) As they had not passed an order in favor of the Main Contractor, said certificate was unjustly certified by them as per Section 100 as per under provision of section 100 of Finance Act, 1993. Accordingly, the decision in the case of *M/s. Maruti Industries Ltd. vs. ITO* (1997) 231 ITR 247 (SC) was not applicable.
- (v) Requested to dismiss the appeal filed by the Appellant.

5. Hearing in the matter was held on 15.2.2016 wherein Sri Pravin Shah, Counsel, appeared for respondent and they reiterated their cross objection already filed by them and further submitted their submission dated 10.5.2015 and requested that the case may be closed in their favor. Further, vide submission dated, 10.2.2018, respondent orally reiterated their arguments which was submitted in their cross objection filed on dated 10.5.2015.

6. I have carefully gone through the facts of the case on records, contents of the appeal memorandum filed by the appellant and also the Cross Objection filed and oral as well as written submission made at the time of hearing by the respondent. I take up the case as follows:-

7. I will summarize the relevant legal provisions as under.

1. Notification No. 25/2012-ST dated 20.6.2012 Exemption from Service Tax - Mega Retailers - Mega Retailers - Notification No. 17/2012-ST, as amended

(1) Goods supplied to the Government or any authority or governmental institution by way of contract, order, procurement, purchase, contract, financial supply, maintenance, provision, or distribution of

(2) Goods supplied to any authority or governmental institution or any other governmental authority, agency or institution providing,

(3) Any service rendered in foreign or international or inter-territorial, cross-border or export or supply certified under the Special Economic Zones Act, 2005 (34 of 2005)

(4) Any service rendered in pursuance of the use of any special or preferential rate of duty or other facilities,

(5) Any other service or facility;

(6) Any goods or services supplied to any person or authority or governmental institution, department, or

(7) Any service rendered predominantly used for defence or the use of the land forces or other services specified in the Schedule to the said Act (Section 65B of Finance Act, 1993)

2. Vide Notification No.06/2016 ST Dated 1.3.2016. E.No. 13, item(a),(c) and (f) were omitted.(Relevant part is extracted below)

5(c) in clause 1a, item (a), item (b) shall be omitted"

3. Via. Notification No. 9/2016 ST Dated 1.7.2016 E.No. 12A was inserted in 25/2012 ST Dated 20.6.2011 relevant part is extracted below)

and after sub-section (1) of section 201A the following shall be inserted, namely:-

(1)A. Materials provided in the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, maintenance, fitting out, repair, maintenance, renovation or alteration of

(a) a building structure or any other original work more predominantly for use other than for commerce, industry, or any other business or profession;

(b) a structure more predominantly for use as (i) an educational institution or (ii) an office building or establishment; or

(c) a residential complex predominantly used for habitation or the use of their dependents or other persons specified in the Explanation 1 to clause (1) of section 201B of the said Act

where a contract work has been entered into prior to the 1st April, 2012 and the work is complete or close to completion, and has not yet been handed over

and that the building required to be exempted is completed on or after the 1st April, 2012."

4. Sd/- PHE 102. Special provision for exemption in certain cases relating to construction of Government buildings.

(1) Whereby, anything contained in section 201A, so far as it may be varied or modified during the period commencing from the 1st day of April, 2012 and ending with the 31st day of March, 2013, shall apply in respect of building erected provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, fitting out, repair, maintenance, renovation or alteration of

(a) a building structure or any other original work more predominantly for use other than for commerce, industry or any other business or profession;

(b) a structure more predominantly for use as

(i) an educational institution;

(ii) an office establishment; or

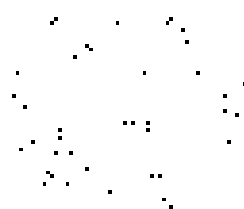
(iii) an area or complex of buildings;

(c) a residential complex predominantly used for habitation or for the use of their dependents or other persons specified in the Explanation 1 to clause (1) of section 201B of the said Act.

where a contract entered into before the 1st day of April, 2012 and the work is incomplete and has not yet been handed over, and has not yet been handed over

(2) Whereby, the value of all such goods or works has been collected but such amount has not been collected and sub-section (1) does not apply in all the above cases

(3) For the meaning ascribed to the said clause, an application for the issue of a final bill shall be made public a period of six months from the date on which the building and work ceases the work of the President



5. Notification No. 25/2012-ST dated 20.6.2012 Exemptions from Service tax Meg. Notification - Notification No. 29/2012-ST, superseded.

12) Service tax, including cesses and surcharges, in respect of supplies -

13) Sub-contracting or providing services by way of work contracts to another contractor providing main contract services (both are exempt)."

5.2 Find that the respondent is a sub-contractor, entered into agreements/contracts with main contractor Mrs Dharti Prasad Pvt. Ltd. to execute work/service as detailed in Para 12 of the impugned order. The Main Contractor Mrs Dharti Prasad Pvt. Ltd entered into agreement with the Gujarat Government. Further in 2011, the service given by the respondent were exempted by virtue of the exemption granted vide Entry No. 29 of the Mega Notification No. 25/2012-ST dated 20.6.2012. However, during the period from 1.4.2015 to 31.3.2016 the service provided by the Main Contractor to the Government were become taxable in view of the Notification No. 29/2012-ST dated 01.03.2015 and in turn service provided to the Main Contractor were also taxable in view of E. No. 2014 of Not. No. 25/2012-ST dated 20.6.2012. Hence, from 1st of April, 2015 the respondent as well as the respondent both were required to discharge their liability as tax liability. Accordingly, the respondent paid service tax on bills raised from 01.4-2015 for the service provided to main Main Contractor under the contracts entered into by them. The amount paid by them prior to 31st March, 2016 which service tax was aggregating to Rs. 3,70,705/- on bills raised during the period from 01.04.2015 to 31.03.2016. However, the respondent in Notification No. 9/2016-ST dated 20.01.2016 the service given by the respondent again become non taxable by virtue of E. No. 29 of Not. No. 25/2012-ST dated 20.6.2012. Accordingly, the respondent claimed refund of Rs. 3,70,705/- paid by them.

Keeping the above mentioned legal provisions and fact of the case in mind, I proceed further to decide the appeal.

5.3 I find that the respondent's contention that the refund is a matter to be decided by the appellate authority under the impugned order is legally unsustainable or otherwise in reference with the appellants plea.

6- The Tax authorities of the appellant, that the respondents did not submit the copy of any contract entered into by them with the service provider and contract for test of students if copy of contract, if any, sent has verified and ascertain that the respondent had provided the said construction service to the Government Departments under contract which has been entered into before 01.03.2015 and on which stamp duty had been paid by them on or before 01.03.2015, which is a prime condition under sub section (1) of Section 103 of the Finance Act, 1994.

6.5 I find that Refund Sanctioning authority was bound to verify that the respondents had provided the said construction services to the Government Departments under contract which had been entered into before 01.03.2015 and on which stamp duty had been paid by them on or before 01.03.2015, which is a prime condition under sub section (1) of Section 103 of the Finance Act, 1994. Further the respondents, in their own admission had furnished the copy of the contract entered into with their main contractor, as well as copy of contract entered into by main contractor with the Government in these proceedings before me. As an appellate authority, the law does not require me to discharge duties and functions of a Central Excise officer. However, I am not persuaded from saying that the burden to prove that the sum of the expenditure was prior to payment of service tax was on the respondents making such a claim. Be that as it may, I find that the respondent has failed to produce the copy of the Contract entered into by the Respondent with the Government. With the result, in the absence of the copy of Contract entered into with Government made available to the assessing officer at the time of issue of the impugned order, the Refund Sanctioning Authority being bound to me, I am hereby consider the submission of the contract as a plea and has to assess the eligibility of the refund claim in question under Section 103 of the Finance Act, 1994. Moreover in a case, if the respondent is a sub contractor to the main contractor and has not entered into contract with the government to provide service to the main contractor but not to the Government as envisaged under the provision of Section 103 of the Finance Act, 1994, the sub contractor will not be eligible to claim refund under Section 103 of the Finance Act, 1994 as the prime condition i.e. in respect of taxable services



exercised by the Commissioner, a local authority or a Government authority, with the same result in that case. Accordingly, the impugned order passed by the Refund Sanctioning Authority issued without verifying the relevant materials essential in the present case, is legally not sustainable and hence not sustainable in view of the above, I find that the impugned order is not sustainable as devoid of merits. Further when the question of admissibility of refund filed by the respondent is in dispute in view of the provision of section 100 of the Finance Act, 1994, I do not find any reason to go to the merits in any of the grounds passed on the grounds as stated above raised by the appellant.

5.6. In view of the above it is hereby keeping other issues open on either side, I am to set aside the impugned order and remand the matter back to the Refund Sanctioning Authority to decide the matter afresh by keeping in mind the observation given in the preceding para and also following the principle of natural justice. The respondent is also directed to provide the documents, if any, referred to by the Refund Sanctioning Authority. The decision concerning matters back to the refund sanctioning authority is supported by the decision of the Hon'ble High Court of Gujarat in the Tax Appeal No 376/2014 in the case of Commissioner, Service Tax, Ahmedabad vs Associated Hotels Ltd, reported at 3015377, 311 493 (SC); and also by the decision of the Hon'ble CESTAT, Kolkata in case of Commissioner of Central Excise, Para - Va. Bai Advaitilal Ltd and reported in 2012 (2) 313 66 (M. Tribunal).

अनुचित खर्चा की वृद्धि अपील का निष्कार कार्यवाही नतीज है कि अनाधिक

The Appeal filed by the appellant stands disposed off in above manner




आपका यह अधिकार अधिकार प्रमाणित किया जाता है

By Refd. No. V2/10/EA2/DVR/2017
F.No. V2/10/EA2/DVR/2017

Date: 11/11/2017

To,

1. The Assistant Commissioner, Excise and Customs, Udaipur, Gujarat,
Gandhinagar,
Rajasthan Service Tax Division, Udaipur-315 001
2. M/s. Sukum Concrete, Plot No.
B-1, Sector-1, Gurgaon,
Gurgaon, Haryana
Gurgaon-122002

Copy to:-

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad.
 - 2) The Commissioner (Appeals), Central Excise, Rajkot.
 - 3) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
 - 4) The Assistant Commissioner (Appeals), GST & Central Excise, Division, Ahmedabad Commissionerate, Bhavnagar.
 - 5) The Regional Chief, Maharashtra, GST & Central Excise, Division, Ahmedabad Commissionerate.
- Copy to:-
- 1) Guard File for Copy to the Additional Director, Central Goods, Ahmedabad Zone, Unit, Ahmedabad.