आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
सत्यमेव जयते
☎ 07926305065- टेलेफैक्स07926305136

NATION TAX MARKET

आयुक्त का कार्यालय
केन्द्रीय वस्तु एवं सेवा कर, अहमदाबाद उत्तर.
सीआरयू/CRU
26 OCT 2022
आवक रजिस्टर क्रमांक 1552

DIN: 20220964SW0000318293

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2511/2022-APPEAL /3462

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-38/2022-23**
दिनाँक Date : **23-09-2022** जारी करने की तारीख Date of Issue 26.09.2022

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **11/AC/Dem/2021-22** दिनाँक: **30.07.2021**, issued by Assistant Commissioner, CGST, Division-V, Ahmedabad-North

घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Maruti Construction Co.
2, Adinath Complex,
Nr. Kalikund, Maflipur, Dholka
Ahmedabad-387810

2. Respondent
The The Assistant Commissioner, CGST, Division-V, Ahmedabad North
2nd Floor, Shahjanand Arcade, Memnagar, Ahmedabad - 380052

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur 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.

आयुक्तालय केन्द्रीय वस्तु एवं सेवाकर (अपील) अहमदाबाद OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी 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 OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order. covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है.**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shali not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

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।

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."

आयुक्तालय, केन्द्रीय कर एवं सेवाकर (अपील) OFFICE OF THE COMMISSIONER CENTRAL GST(APPEAL) VADODARA

ORDER IN APPEAL

The present appeal has been filed by M/s. Maruti Construction Co., 2, Adinath Complex, Nr. Kalikund, Maflipur, Dholka, Ahmedabad-387810 (hereinafter referred to as "the appellant") against Order–in–Original No. 11/AC/Dem/2021-2022 dated 30.07.2021 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST and Central Excise, Division-V, Ahmedabad North (hereinafter referred to as the "adjudicating authority").

2. The facts of the case, in brief, are that based on the CERA Audit Inspection report, an inquiry was initiated by the department against the appellant. On scrutiny of financial records and the documents provided by the appellant, it was noticed that the appellant were engaged in construction of road, compound wall work etc, covered under Work Contract Service and were also incurring transport expenses. However, during the F.Y. 2011-12 to F.Y. 2014-15, they had not discharged their service tax liability on works contract service rendered and on GTA service, as recipient of service. As they were not registered with the department, they took service tax registration on 29.06.2015 after initiation of the investigation.

2.1 A Show Cause Notice (SCN) No.SD-04/SCN-17/Maruti/2016-17 dated 06.10.2016 was, therefore, issued proposing service tax demand of Rs.20,60,898/- under Works Contract Service and demand of Rs.6,18,808/- under GTA service, u/s 73(1) of the F.A.,1994 alongwith interest u/s 75. Penalties u/s 77(1)(a) for failure to obtain registration, penalty u/s 77(1)(c)(ii) for failure to produce documents called by Superintendent, Service Tax; Penalty u/s 77(1)(c)(iii) for failure to honour the summons; penalty u/s 77(2) for non-filing of returns and failure to self assess the taxable value and tax liability and Penalty u/s 78 for non-payment of service tax were also proposed.

2.2 The said SCN was adjudicated vide the OIO No. SD-04/29/AC/2016-17 dated 27.03.2017, wherein the service tax demand alongwith interest was confirmed. Penalties proposed in the SCN were also imposed. Aggrieved by the said OIO, the appellant went in appeal and the Commissioner (Appeal), Central GST, Ahmedabad vide OIA No.AHM-EXCUS-002-APP-235-17-18 dated 22.12.2017, remanded the matter to the adjudicating authority to examine the case afresh and pass a speaking order.

2.3 In the remand proceedings, the adjudicating authority vide impugned order confirmed the recovery of service tax demand alongwith interest. He also imposed penalty of Rs.10,000/- u/s 77 and penalty of Rs.26,79,706/- u/s 78 of the F.A, 1994.

2.4 Aggrieved by the impugned order, the appellant preferred the present appeal contesting the demand, principally on following grounds:-

- At para-12 of the OIA, the then Commissioner (A) had already held that trading of goods is exempted. Hence, goods supplied to M/s. Akshar Arcade are not taxable but the adjudicating authority travelled beyond the remand order by re-adjudicating the issue and passing a fresh order.
- Impugned order passed without giving personal hearing either through virtual or physical mode hence passed in violation of natural justice. They relied on catena of decisions in support of their claim.

- M/s. Natraj Construction Co. (Govt. registered contractor Class AA) was entrusted road work by Panchayat R&B Division, Ahmedabad, of which certain portion of road work was entrusted to appellant as a sub-contractor. Hence, the services are exempted vide Entry at Sr. No. 13 of Notification No.25/2012-ST dated 20.06.2012. Further for Works Contract service, if held taxable then, only 40% of the gross receipt is taxable as the activity carried out falls under the purview of original work defined in Explanation 1 of Rule 2A of the Service Tax (Determination of Value) Rules, 2006.
- The construction of compound wall and drainage work for individual bungalows was carried out by the appellant are exempted vide entry at Sr. No. 14(b) of Notification No.25/2012-ST dated 20.06.2012.
- They are not liable to pay tax under RCM on GTA service as they have not received any consignment note from GTA as the expenses were less than Rs.1500/-. These expenses also include transport of goods by Tractor and Rickshaw and cost of material purchased. Thus, they are exempted vide entry at Sr. No. 21(b) of Notification No.25/2012-ST dated 20.06.2012. They relied on following decisions:-
  - OIA No. AHM-SVTAX-000-APP-352-1-14 dated 19.02.2014 passed by Commissioner(Appeals-IV) in the case of Surya Construction;
  - South Eastern Coalfields Ltd-2016-TIOL-2773-CESTAT-Del
  - Lakshminarayana Mining Co.-2019(7) TMI 917
- The entire issue is revenue neutral as the service tax liability held to be payable would be claimed as Cenvat credit.
- As the taxable turnover is below Rs.50 Lakhs hence, tax liability does not arise hence computation of tax adopted by the adjudicating authority is incorrect. They claim they are also eligible for adhoc exemption available under Notification No.06/2005-ST dated 01.03.2005, Notification No.04/2007-ST dated 01.03.2007 & No.08/2008-ST dated 01.03.2008, granting value based exemption. Further, they also claimed cum tax benefit.
- SCN is time barred as no malafide intention established to invoke provisions of Section 73(1).
- Penalty u/s 77 not imposable as they were not required to take registration or file the return. As there is no suppression of fact, penalty u/s 78 is also not imposable. By invoking Section 80, no such penalty is imposable.

3. Personal hearing in the matter was held on 01.09.2022 in virtual mode. Shri Bishan R. Shah, Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in appeal memorandum. He contended that the impugned order was passed in violation of the principles of natural justice as they were not heard during the COVID times. He further stated that he would be providing a copy of CESTAT decision passed in the case of Ganesh Traders wherein it was held that exemption is available for society roads. He also stated that they were not liable to make payment under RCM in respect of GTA service as the vehicle owners were not Goods Transport Agency and had not issued any consignment notes. He further stated that he would be submitting additional written submissions.

3.1 In the additional written submission, the appellant reiterated their contentions made in the appeal memorandum and relied on following case laws:-

- Shree Ganesh Traders Vs CCE, Udaipur-2022(5) TMI 749-CESTAT New Delhi
- Jet Airways (I) Ltd. Versus Commissioner of Service Tax Mumbai- 2016 (8) TMI 989 - CESTAT Mumbai
- Ludhiana Builders Versus Commissioner of C. Ex. And S.T., Ludhiana-2019 (10) TMI 1327 - CESTAT CHANDIGARH
- Rathi Steel & Power Ltd. Versus Commissioner of CGST & Excise, Bhubaneswar and Rourkela - 2022 (7) TMI 824 - CESTAT Kolkata

4. I have carefully gone through the case records, the impugned order, written submissions made in the appeal memorandum, the additional submissions made via e-mail dated 03.09.2022 as well as the submissions made during personal hearing by the appellant and also the OIA No.AHM-EXCUS-002-APP-235-17-18 dated 22.12.2017 passed by the Commissioner(Appeal), Central GST, Ahmedabad. The issue to be decided in the present appeal is as to whether the impugned order passed by the adjudicating authority was in consonance with the directions issued by the Commissioner(A) vide OIA No.AHM-EXCUS-002-APP-235-17-18 dated 22.12.2017? The demand pertains to the period F.Y. 2011-12 to F.Y. 2014-15.

5. Before going into the merits of the case, I will first examine whether the impugned order was passed in violation of the principles of natural justice. On going through the impugned order, it is observed that the adjudicating authority had granted personal hearing on 24.11.2020, 04.03.2021, 22.07.2021 & 23.07.2021. I find that the remand order was passed by the Commissioner (A), Ahmedabad on 22.12.2017, wherein the appellant was directed to provide relevant documents in support of their contention to the adjudicating authority within 30 days of receipt of the OIA. However, they failed to submit any written submission or documents before the adjudicating authority. Though sufficient P.H. dates were granted to the appellant, they did not attend the same nor did they submit any letter for adjournment. I find that repeated failure on the part of the appellant to avail the opportunity for hearing forfeits their entire claim to plead violation of natural justice. Natural justice is a maxim meant to facilitate the smooth conduct of justice. The flexibility inbuilt in the doctrine is not meant to be twisted and subverted to sabotage the judicial process itself. I find that the appellant was directed to produce relevant documents, before adjudicating authority. They did not submit any written submission. Hence, I find that the above circumstances do not warrant to be qualified as a denial of natural justice. On the contrary, the appellant appears to have successfully derailed the judicial process by their tacit non-cooperation and would like to use the cloak of denial of natural justice to cover up their wilful defaults. Natural justice is not a cloak to conceal self inflicted injuries. It is a noble doctrine meant to illuminate the path of justice. Hence, I hold that there has been absolutely no violation of natural justice. I am supported by the judgment of the Hon'ble Tribunal in *R.K. Mill Board (P) Ltd.* v. *Commissioner* - 2001 (135) E.L.T. 1296 (Tri - Del.) .

5.1 Coming to the issues on merits, it is observed that the then Commissioner (A), Ahmedabad vide OIA No.AHM-EXCUS-002-APP-235-17-18 dated 22.12.2017, remanded the matter pertaining to demand under Works Contract and GTA services to the original adjudicating authority to re-examine the case afresh and pass a speaking order, after recording specific findings as to why:-

a) The demand under Works Contract Service would classify under 'Maintenance or Repair or Reconditioning or Restoration or Servicing of any goods' and not under 'Original Works' and why the benefit of exemption granted under Notification No.25/2012-ST dated 20.06.2012, was not available to the appellant? It was also directed to grant cum tax benefit to the appellant while deciding the actual tax liability.

b) In respect of demand under GTA service, the Commissioner (A) held that the plea of the appellant regarding non-receipt of consignment note is not acceptable in terms of Board's letter F.No.:166/02/2005-CX-4 dated 30.01.2006, wherein it is clarified that in terms of Rule 4B of the Service Tax Rules, any GTA who provide service in relation to transport of goods by road in a goods carriage has been mandated to issue consignment note. The appellant was, therefore, directed to produce evidence to prove that they are not specified person in terms of Notification No.30/2012-ST.

c) On the third issue of trading of goods, it was held that in some cases the appellant is engaged in trading of goods as they have charged VAT from their customers. As 'trading of goods' is enlisted in negative list, value of such goods needs to be deducted and only service element shall be taxed. This aspect needs to be verified by the adjudicating authority and to decide the tax liability accordingly.

6. To examine whether these directions were followed in the remand proceedings, I will take up the issue-wise findings recorded by the adjudicating authority.

6.1 On the demand under Works Contract service, the adjudicating authority held that the appellant could not produce any documents to substantiate that the construction service provided by them were specified in Board's Circular No.110/4/2009-ST dated 23.02.2009 or the service related to road building was provided for use of general public specified under Sr.No.13 of Notification No.25/2012-ST dated 20.06.2012. He has denied exemption granted under Sr. No. 14(b) of said notification on the argument that the construction of compound wall was for a residential complex project of a developer and not for a single residential unit. Cum tax benefit was also denied to the appellant on the grounds that there is no dispute on the taxability of the service and the appellant were neither registered nor were paying service tax.

6.2 It is noticed that the appellant before the original adjudicating authority were claiming exemption provided under Sr.no.13 & 14 of Notification No.25/2012-ST dated 20.06.2012. Relevant text of said notification is reproduced below:-

13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;

(b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;

(c) a building owned by an entity registered under section 12AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;

(d) a pollution control or effluent treatment plant, except located as a part of a factory; or a structure meant for funeral, burial or cremation of deceased;

14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-

(a) an airport, port or railways, including monorail or metro;

(b) a single residential unit otherwise than as a part of a residential complex;

(c) low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

(d) post-harvest storage infrastructure for agricultural produce including a cold storages for such purposes; or

(e) mechanised food-grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages;

6.3 It is observed that the original adjudicating authority at para 16.1 of the OIO dated 27.03.2017 had listed the nature of construction work carried out by the appellant, wherein, the work carried out for the main contractor M/s Natraj Construction Co. was classified as government work. It is for this reason that the Commissioner (A) held that such activity would fall under the aforesaid notification, as the work was entrusted by Panchayat R & B, Division, Ahmedabad. However, the present adjudicating authority in the impugned order failed to examine this aspect and brushed aside the issue merely on the grounds of non-submission of the documents. Moreover, sub-contractor providing services by way of works contract to another contractor, providing works contract services are exempted in terms of Sr. no.29 of said notification. The adjudicating authority while deciding the remand matter ignored these facts. He also failed to record any finding as to why the activities carried out by the appellant would not fall under 'Original Works' and instead were covered under 'maintenance or repair or reconditioning or restoration or servicing of any goods'. Thus, I find that the specific directions issued by the Commissioner (A) were not examined while deciding the issue in the remand proceedings.

6.4 Further, I find that the adjudicating authority also denied cum tax benefit to the appellant on flimsy grounds. It is observed that Hon'ble Tribunal in the case of ***Commissioner v. Advantage Media Consultant [2008 (10) S.T.R. 449 (Tri.-Kol.)]*** upheld the remand order of Commissioner (Appeals) where cum-tax benefit was directed to be given wherein the party was rendering Advertising Agency service and Service tax was not collected for services rendered to government agencies. It was held that service tax being an indirect tax, was borne by consumer of goods/services and the same was collected by assessee and remitted to government and total receipts for rendering services should be treated as inclusive of Service tax due to be paid by ultimate customer unless Service tax was paid separately by customer. The Tribunal had noted that cum-tax value has been incorporated in Section 67 of Finance Act, 1994 vide amendments made subsequently. This decision has been maintained by the Apex Court as reported in **2009 (14) S.T.R. J49 (S.C.).** Further, the issue was also settled by the Apex Court in the case of ***Maruti Udyog Ltd.*** - **2002 (141) E.L.T. 3 (S.C.)** wherein it was held that the sale price

which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which are included in the wholesale price are to be excluded in arriving at the assessable value. That means, that the cum-duty price when charged, then in arriving at the excisable value, the element of duty which is payable has to be excluded. Since there is nothing on record to show that after the demand was raised by the Department, the appellant has collected the service tax from their customers, therefore the amount which they have collected need to be taken as cum-tax value and correspondingly the amount of service tax needs to be re-computed. There are endless quasi judicial and judicial decisions on this issue and hence, I find that this benefit is required to be extended to the appellants and service tax demand needs to be re-worked out accordingly.

7. In respect of demand under GTA service, the Commissioner (A) has directed the appellant to produce documentary evidence to prove that they are not specified person in terms of Notification No.30/2012-ST. The appellant nevertheless failed to produce any documents in support of their above claim and therefore the adjudicating authority confirmed the demand. The benefit of exemption claimed under Notification No.25/2012-ST dated 20.06.2012, in terms of Sr.No. 21(b) also was not extended to the appellant as no documentary evidence was produced. Relevant text of Notification No. 25/2012-ST dated 20.06.2012 is reproduced below:

> ***21. Services provided by a goods transport agency by way of transportation of -***
>
> *(a) fruits, vegetables, eggs, milk, food grains or pulses in a goods carriage;*
>
> *(b) goods where gross amount charged for the transportation of goods on a consignment transported in a single goods carriage does not exceed one thousand five hundred rupees; or*
>
> *(c) goods, where gross amount charged for transportation of all such goods for a single consignee in the goods carriage does not exceed rupees seven hundred fifty;*

7.1 The appellant contended that they have not received any consignment notes in respect of the GTA service availed. However, such plea I find, was not entertained by the Commissioner (A), Ahmedabad and the appellant was directed to submit relevant documents/consignments notes to substantiate their claim seeking exemption under above notification. The appellant however failed to produce the same before the adjudicating authority, hence, the exemption was denied. As the directions of the Commissioner (A) were not followed, I, therefore, find no reasons to interfere with the findings of the adjudicating authority.

7.2 The appellant have relied on the decision of Hon'ble Tribunal passed in the case of **South Eastern Coalfields Ltd-2016-TIOL-2773-CESTAT-Del**, wherein it was held that *"where admittedly no consignment notes were issued by the 24 transporters for transportation of the appellant's coal, the Goods Transport Agency service cannot be held to have been rendered. That being the position the appellant is not liable to tax".* I find that this decision was set aside and the matter was remanded to the Tribunal for a fresh decision in accordance with law. Similarly, the decision passed in the case of **Lakshminarayana Mining Co- 2019 (27) G.S.T.L. 745 (Tri. - Bang.)** and relied by the appellant is also not applicable to the present case where the facts are distinguishable. In

the case Lakshminarayana Mining there was no agency function involved, the goods were loaded on vehicles hired by assessee hence no third party involvement was there hence, it was held that the activity performed for the appellant by transporters falls outside the ambit of Section 65(105)(zzp) of Finance Act, 1994 and not taxable. However, in the present appeal, it is contended that no consignment note was issued to them and some of the goods transported were by tractor or rickshaw, on which no service tax liability arises. I find that any Goods Transport Agency who provide service in relation to transport of goods by road in a goods carriage is mandated to issue consignment note as stipulated under Rule 4B of the Service Tax Rules, 1994, therefore the argument that no consignment note was issued is a vague argument. Further, the argument that some goods were not transported in carriage other than goods carriage is also not supported by any documentary evidence.

7.2.1 Further, the appellant also placed reliance on the decision passed in the case of **Jet Airways (I) Ltd. - 2016 (8) TMI 989 - CESTAT Mumbai**. I find that in the said case, the appellant had not contested the leviability of service tax on GTA. In fact they had challenged the orders of the Commissioner (Appeals) demanding tax for the extended period. As both sides agreed that the Appellant was otherwise liable to pay tax under RCM, therefore, Hon'ble CESTAT did not indulge into this aspect while disposing the appeals and upheld both the appeals on the ground of limitation. Similar view was taken in the case of **Rathi Steel & Power Ltd. - 2022 (7) TMI 824 - CESTAT Kolkata** also. Hence, the above decision cannot be applied to the present case as the appellant is contesting the leviability of service tax on GTA. Moreover, there are various decisions of Tribunal [***Commissioner* v. *Reliance Industries Ltd. - 2017 (51) S.T.R. J187 (S.C.) ; Max Tech Oil Gas Service Pvt. Ltd. v. Commissioner - 2017 (52) S.T.R. J258 (S.C.)***] wherein it was held that where a credit of Service Tax paid is available to assessee, intention to evade duty cannot be attributed because entire exercise is revenue neutral and hence extended period of limitation not invocable. But, I find that these decisions were challenged by the department and are pending before Apex Court. Matter being sub-judice, ratio of these decisions cannot be made applicable.

7.2.2 Further, Hon'ble CESTAT Principal Bench New Delhi, in the case of Dharampal Prem Chand Ltd- 2011 (265) E.L.T. 81 (Tri. - Del.), held that *"**7.5 In none of the above judgments, Hon'ble Supreme Court has laid down a general principle that in a revenue neutral situation an assessee is not required to pay the duty.** Dismissing Department's SLP on the ground that charging duty on an intermediate product whose Cenvat credit is available to the assessee, is revenue neutral, does not amount to laying down a general principle in this regard. There is no such provision in the Central Excise Act that in respect of goods cleared for captive consumption when the Cenvat credit of duty paid on such goods is available, no duty is required to be paid in such cases. .....**We also find that since in this case, the NCCD had not been paid at the time of clearance of goods for captive consumption and on account of non-payment of NCCD, in addition to the NCCD, the interest on the same under Section 11AB is also chargeable and in the event of payment of NCCD, the Cenvat credit would be available only of the NCCD paid, not of the interest on the NCCD under Section 11AB, this cannot be said to be a revenue neutral situation."* If the argument of revenue neutrality is accepted as permissible defense in the present case, entire scheme of payment of taxes on reverse charge basis will become meaningless and no asseesee liable to pay service tax would be required to pay service tax in respect of services received by them, for the reason that the tax so paid will be available as credit to them. I, therefore, find that the contention of

revenue neutrality is not tenable merely because the credit is subsequently admissible to the appellant. Therefore, I find that the demand confirmed by the adjudicating authority sustains on merits.

7.3 When the demand sustains there is no escape from interest, the same is therefore recoverable with applicable rate of interest.

7.4 I find that in the instant case, the appellant have not obtained registration under GTA as per provisions of Section 69; have not paid applicable service tax and have not filed due returns for the period F.Y. 2011-12 to F.Y. 2014-15. They also failed to produce documents as called by Superintendent. I, therefore, find that penalty u/s 77(1)(a), (c) and 77(2) imposed upon the appellant is legally sustainable.

7.5 Further, the contention of the appellant that penalty under Section 78 is not imposable as mala fide intention not established, is also not tenable. I find that Section 78 of the Finance Act, 1994, provides penalty for suppressing the value of taxable services. The crucial words in Section 78(1) of the Finance Act, 1994 are *'by reason of fraud or collusion'* or *'willful misstatement'* or *'suppression of facts'* should be read in conjunction with '*the intent to evade payment of service tax'*. I find that the demand was raised on inquiry conducted based on the CERA Audit noticed during scrutiny of records by audit. It is the responsibility of the appellant to correctly assess their tax liability and pay the taxes. The appellant by taking a plea that such expenses are purchase expenses and include cost of materials and expenses of shifting the material from one place to another, tried to avail ineligible exclusion as recipient of GTA service on which they were liable to discharge their tax liability, which they failed to discharge. Therefore, it is apparent that though being aware, they choose not to discharge their tax liability properly which undoubtedly brings out the willful intent to evade payment of service tax, hence I find that the penalty imposed under Section 78, sustains.

8. On the third issue regarding trading of goods, the original adjudicating authority held that as per the relevant documents and ledgers relied in the SCN and as per the written submissions dated 10.01.2017 & 23.02.2017 and the invoices submitted, it is not just supply of materials but includes supply of services in respect of Works Contract service rendered by the appellant. The Commissioner (A), however, observed that in some cases, the appellant supplying material to their customer is charging VAT thereon, as in the case of *Akshar Arcade,* where only material was supplied, hence such activity shall remain outside the purview of service tax. He observed that value of such goods needs to be deducted and only service element shall be taxed. The adjudicating authority was, therefore, directed to verify this aspect and decide the tax liability accordingly.

8.1 The adjudicating authority in the impugned order denied the exemption of trading activity on the ground that appellant have not submitted documents to establish that the materials used was in the execution of the work contract. The appellant in the present appeal have stated that as per Work Order dated 05.03.2013, they have supplied material to Akshar Arcade which is trading, hence the amount of Rs.22,81,543/- should be excluded. But, the appellant failed to submit the abovementioned contract either before the adjudicating authority or with the appeal memorandum so as to substantiate their claim of trading. It, therefore, appears that the appellant are making claims without

producing any concrete evidences. However, considering the fact that there was a specific direction by the Commissioner (A), I, remand the demand on this issue and grant the appellant a last opportunity to produce all relevant documents in support of their claim before the adjudicating authority so that the matter can be decided considering the directives issued by the Commissioner(A) in his regard.

9. In the interests of justice and fair play, one more chance is given to the appellant. I, accordingly, remand issue no. (a) and (c) listed at Para no.5.1 of this order, back to the adjudicating authority for fresh consideration, who shall, afford an opportunity of personal hearing to the appellant and after considering appellant's contention pass fresh orders on merits and in accordance with law. The appellant is also directed to submit all relevant documents to the adjudicating authority and cooperate in concluding the adjudication proceedings at the earliest.

10. In view of the above discussion, I uphold the demand of Rs.6,18,808/- under GTA service alongwith interest and penalty. Further, I allow the appeal with respect to the demand of Rs.20,60,898/- by way of remand.

अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stand disposed off in above terms.

23rd September 2022.

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 9.2022

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Maruti Construction Co., - **Appellant**
2, Adinath Complex, Nr. Kalikund,
Maflipur, Dholka,
Ahmedabad-387810

The Assistant Commissioner - **Respondent**
CGST, Division-V,
Ahmedabad North
Ahmedabad

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. Guard File.