

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : V2(BAS)43/STC-III/2016/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-268-16-17
दिनांक Date 23.03.2017 जारी करने की तारीख Date of Issue 31/3/17

श्री उमाशंकर आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Uma Shankar** Commissioner (Appeals-I) Central Excise
Ahmedabad

ग आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं
दिनांक : से सृजित

Arising out of Order-in-Original No **GNR-STX-DEM-DC-07/2016** dated **13.06.2016** Issued by:
Assistant Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

ध अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The **Appellants/Respondents**

M/s. Airoil Flaregas Pvt. Ltd.

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the
following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

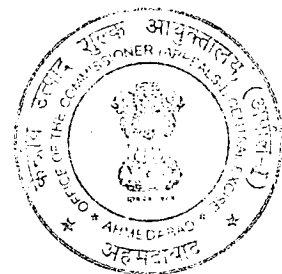
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैनटल हास्पिटल
कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20,
Meghani Nagar, New Mental Hospital Compound, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील
सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा
सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए
(उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित
सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की
मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी
होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए
5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या
उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal
Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994
and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy)
and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest
demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest
demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/-
where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in
the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public
Sector Bank of the place where the bench of Tribunal is situated.



(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 & (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

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

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

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(4)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

This appeal has been filed by M/s Airoil Flaregas Pvt Ltd., S.No.788 & 793, Opp.Torrent Laboratories, Kalol-Mehsana Highway, Indrad, Kadi, Mehsana (Gujarat) [hereinafter referred to "as the appellant"] against Order-in-Original No.GNR-STX-DEM-DC-07/2016 dated 13.06.2016 [impugned order] passed by the Assistant Commissioner of Service Tax Division, Gandhinagar Division [adjudicating authority].

2. Briefly stated, the facts of the case is that during the course of audit of the records, it was observed that the appellant had received various services located outside India and paying service tax as a recipient of service under Reverse Charge Mechanism. On comparison of financial records of the appellant and ST-3 returns filed by them, it was observed that during 2012-13 and 2013-14 they had short paid service tax amounting to Rs.88,735/- in respect of service viz. Consulting Engineering Services and Technical Consultancy Services. On pointed out the same by the audit officer, the appellant had paid the said amount with interest on 12.12.2015. However, a show cause notice dated 02.03.2016 was issued to them for demand of said amount and appropriation of amount which they have already paid. The show cause notice also proposes for imposition of penalty under Section 78 of Finance Act, 1994 (FA). Vide impugned order, the adjudicating authority confirmed the demand and imposed penalty equal to the tax amount.

3. Being aggrieved, the appellant has filed this present appeal on the grounds that when the tax and interest have already been paid before issuance of show cause notice, notice should not have been issued as the case covers within the purview of the provisions of Section 73(3) of FA; that they were regularly paying service tax on such import of services and during the relevant period they had paid about 12 lacs as service tax as recipient of such service; that the amount of Rs.88,735/- short paid is purely a clerical error/mistake and on pointed out the same they immediately paid with interest. They have recorded complete transaction in their books and accounts; therefore, there is no intention to evade the tax. The appellant has relied on various case laws in support of their argument.

4. A personal hearing in the matter was held on 17.02.2017. Shri N.R.Parmar, Consultant appeared for the same and reiterated the grounds of appeal.

5. I have carefully gone through the facts of the case and submissions made by the appellant. At the outset, I observe that the appellant has not disputed the short payment of tax but only disputes regarding imposition of penalty under Section 78 of FA. Therefore, I limit the issue for discussion with regard to applicability of imposition of penalty. They argued that their case covers well within the purview of Section 73(3) of FA which stipulates that where any service tax has been short-paid, the person chargeable with the service tax, may pay the amount of such service tax, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer



before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid; that since they have paid the amount so short-paid with interest on pointed out the same by the officer, no further action by imposing penalty is required to be taken.

6. The adjudicating authority contended that in view of Section 73(4) the FA which clarifies that section 73(3) shall not apply to a case where the tax has been short paid by reason of fraud, collusion, willful misstatement or suppression of facts with intent to evade payment of service tax; that in the instant case the appellant has suppressed the fact of such short payment with an intention to evade payment.

7. In the instant case, I observe that the appellant was paying their tax liability as a recipient of service tax in respect of various services received from abroad under Reverse Charge Mechanism during 2012-13 and 2013-14. However, while comparing the financial records with ST-3 returns of the said period by the officers, a short payment of Rs. 88,735/- in respect of service was noticed in respect of Consulting Engineering Services and Technical Consultancy Services. It is the contention of the appellant that as they have paid about Rs.12 lacs as service tax under Reverse Charge Mechanism during the relevant period towards various other services received, the said amount short paid was a bonafide mistake /clerical error and there was no intention for evasion of tax as the said amount was brought in the financial records.

8. On consideration of the facts and submissions made by the appellant, I further observe that the appellant has admitted to short payment of the service tax liability and has paid the tax amount on being pointed out by the audit officers before issuance of show cause notice. Undisputed facts reveal that the appellant has been declared the transaction in books of account. It is also a fact that during the relevant period under dispute they have paid about service tax amounting to Rs.12 lacs for different services. In the circumstances, there could be a *bona fide* error on the appellant's part of not declaring/paying the negligible amount of Rs.88,735/- towards Consulting Engineering Services and Technical Consultancy Services. Therefore, the plea of the appellant that there was a *bona fide* error/ inadvertent mistake committed by the appellant in not recording the amount in the ST-3 return and payment thereof. In the facts and circumstances, by invoking the provisions of Section 80 of Finance Act, 1994, I am of the considered view that the penalty imposed under Section 78 of the FA is required to be set aside and accordingly I do so. In this regard, I rely on the decision of Hon'ble Tribunal, Mumbai in the case of M/s Gupta Matallc & Power Ltd [2016 (44) STR 681] and M/s Rohit Steels [2016(43)STR 403], wherein the Tribunal has set aside the penalty under Section 78 of FA in a similar situation.



9. In view of above discussion, I set aside the impugned order and allow the appeal.
The appeal stands disposed of in above terms.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - I)

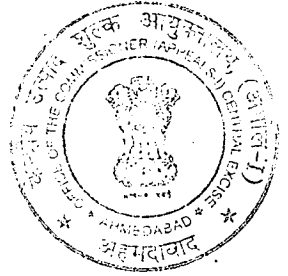
Date: 23/03/2017

Attested

20/3/17
(Mohan V.V)
Superintendent (Appeals-I)
Central Excise, Ahmedabad

By R.P.A.D.

To
M/s Airoil Flaregas Pvt Ltd.,
S.No.788 & 793, Opp.Torrent Laboratories,
Kalol-Mehsana Highway, Indrad, Kadi, Mehsana (Gujarat)



Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-III
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-III
4. The Dy. / Asstt. Commissioner, ST Division- Gandhinagar, Ahmedabad-III
5. Guard file.
6. P.A file.

