
 केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX वस्तु एवं सेवा कर भवन सातवीं मंजिल पॉलिटेक्निक के पास आम्बावाडी अहमदाबाद-380015 079-26305065		 GST Building 7 th Floor, Near Polytechnic Ambavadi, Ahmedabad-380015 टेलीफोन 079-26305136
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क फाइल संख्या : File No : V2(GTA)76/AHD-III/2016-17

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-081-17-18**

दिनांक Date : **28.08.2017** जारी करने की तारीख Date of Issue: **20/9/17**

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **GNR-STX-DEM-DC-02/2017** दिनांक : **17.01.2017** से सृजित

Arising out of Order-in-Original: **GNR-STX-DEM-DC-02/2017**, Date: **17.01.2017** Issued by: Assistant Commissioner, Central Excise, Div: Gandhinagar, Ahmedabad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Bilfinger Water Technologies Pvt. Ltd.

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 अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

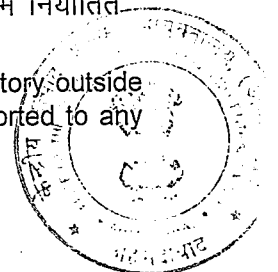
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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

(ख) 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 मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.



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

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

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट 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।

(d) 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 दिनांक 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 रुपये या उससे कम हो तो रुपये 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 अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- ञबी/35-इ के अंतर्गत:-

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

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 ओ-20, न्यू मेटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 5 लाख या उससे कम है वहाँ रुपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 5 लाख या 50 लाख तक हो तो रुपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 50 लाख या उससे ज्यादा है वहाँ रुपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रुप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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. Registrar 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 आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्ट से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.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 bear 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 43 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 अर्जी एवं अपील को लागू नहीं होंगे।

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,

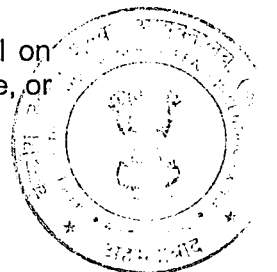
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

(6)(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।

(6)(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."



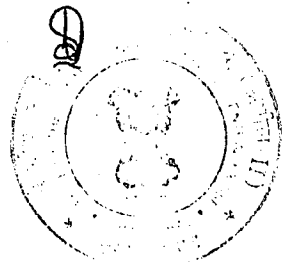
ORDER-IN-APPEAL

This appeal has been filed by M/s. Bilfinger Water Technologies Pvt. Ltd., Block No.: 53/P, Khatraj Chokdi, Khatraj, Kalol (hereinafter referred to "as the appellants") against the Order-in-Original number GNR-STX-DEM-DC-02/2017 dated 17.01.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Central Excise, Gandhinagar (hereinafter referred to as "the adjudicating authority").

2. Brief facts of the case are that the appellants are engaged in providing taxable services of GTA, BAS, Rent-a-cab and manpower Recruitment service and are holding Service Tax registration number AABCJ4330LST001. During the course of audit, for the period of January 2013 to March 2014, it was observed that they had failed to pay Service Tax, under reverse charge mechanism. On being pointed out, the appellants paid the amount of ₹ 6,72,568/- (₹4,29,215/- + ₹2,43,353/-) along with interest of ₹1,75,478/- (₹1,25,347/- + ₹50,131/-) on 17.02.2015. However, it was noticed that the appellants did not calculate the interest amount correctly and short paid the interest. On being pointed out, they paid the difference amount of interest ₹27,175/-.

3. A show cause notice dated 19.04.2016 was issued to the appellants which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority confirmed the demand of Service Tax amounting to ₹6,72,568/- under Section 73 of the Finance Act, 1994 and ordered to appropriate the said amount already paid by the appellants. The adjudicating authority further confirmed the demand of interest of ₹2,02,653/- under Section 75 of the Finance Act, 1994 and ordered to appropriate the said amount already paid by the appellants. He further imposed equal penalty of ₹6,72,568/- under Section 78 of the Finance Act, 1994.

3. Being aggrieved, the appellants have filed the present appeal on the grounds that they have willingly paid the Service Tax along with interest as and when pointed by the officers of audit. The provisions of Section 78 of the Finance Act, 1994 could be invoked only if the intentions of the appellants were mala fide i.e. the intention to evade payment of Service Tax. In the instant case, there was no intention to evade duty payment as all the transactions were reflected in their books of account. Further, the appellants quoted that whatever Service Tax was payable to them under reverse charge mechanism, was admissible to them as Cenvat credit of input service. Thus, the matter is absolutely revenue neutral as whatever tax was paid through challan is admissible as Cenvat credit to them which can be utilized for payment of their further duty liability.



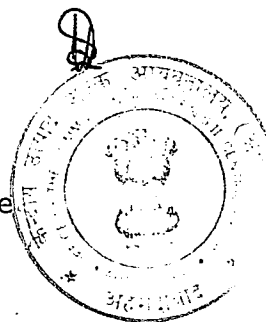
4. A personal hearing in the matter was held on 17.08.2017 and Shri Archit Kotwal, Consultant, appeared for the same. He reiterated the grounds of appeal and argued that as the issue is revenue neutral, 100% penalty cannot be imposed.

5. I have carefully gone through the facts of the case on records, appeal memorandum and submissions made by the appellants at the time of personal hearing. I find that the appellants had failed to pay Service Tax under reverse charge mechanism amounting to ₹6,72,568/- and on being pointed out by the audit officers of the department, they paid the said amount along with applicable interest arising out of the late payment. The adjudicating authority, vide the impugned order, confirmed the short paid Service Tax and interest (and ordered for appropriation of the same) under Section 73 and 75 of the Finance Act, 1994 and imposed equivalent penalty under Section 78 of the Finance Act, 1994. The appellants argued that their intentions were not malafide as all the transactions were reflected in their books of account. They further claimed that the issue is revenue neutral as whatever Service Tax was payable to them was admissible as Cenvat credit. Thus, they are not supposed to be penalized; and in paragraph 6 of their grounds of appeal, they claimed that under the proviso to Section 78 of the Finance Act, 1994, penalty shall be limited to 50% if transactions are recorded in the books of account.

5.1. In this regard, I would, first of all, like to quote the contents of Rule 8(3), Central Excise Rules, 2002, where it is stated that if the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest in terms of rate fixed under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount. Thus, it is quite clear that the appellants are liable to pay interest on the Service Tax amount late paid by them. Service Tax provisions provide for the imposition of interest and penalty when an assessee avoids or delays the payment of Service Tax he is liable to pay. However, charging of interest and penalty are two separate provisions under the law. The Hon'ble Supreme Court in the case of Pratibha Processors v. Union of India observed as follows:

"In fiscal statutes, the import of the words tax, interest, penalty, etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute".

Further, for more ease, I quote the concerned lines of section 76(1) of the



Finance Act, 1994 as below;

"Section 76. (1) *Where Service Tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the Service Tax and interest specified in the notice, be also liable to pay a penalty...*".

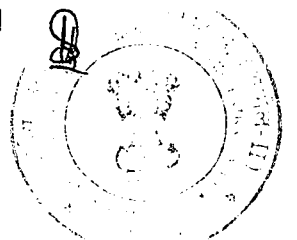
Here, in the instant case, the appellants did not pay the Service Tax amount of ₹6,72,568/- and therefore, I conclude that the adjudicating authority has very rightly confirmed, demanded and appropriated the amount of Service Tax along with interest (under Section 73 and 75 respectively of the Finance Act, 1994) and imposed penalty under Section 78 of the Finance Act, 1994. Section 78 of the Finance Act, 1994, is used to levy penalty when Service Tax has been not levied or not paid or short levied or short paid or erroneously refunded with the intention of evading payment of Service Tax due to following reasons (hereinafter referred as Service Tax evasion with **malafide intention**):

- fraud; or
- collusion; or
- willful mis-statement; or
- suppression of facts; or
- contravention of any provisions or rules.

Therefore, if the Service Tax is evaded with any malafide intention then section 78 is applicable. Now looking to the structure of the case, I come to the conclusion that the intentions of the appellants were bonafide as they did not try to conceal anything from the officers of the audit and on being pointed out; they willingly paid the Service tax along with interest. Further, I find that the appellants have quoted the contents of the proviso to Section 78 of the Finance Act, 1994 and claimed that the penalty imposed on them ought to be 50% of the Service Tax instead of 100%. I agree to the argument of the appellants and find that they are liable to pay penalty to the tune of 50% of Service Tax instead of 100% as imposed under Section 78 of the Finance Act, 1994 by the adjudicating authority vide the impugned order.

6. In view of above discussions, I allow the appeal, filed by the appellants, to the extent that they are liable for imposition of penalty, under Section 78 of the Finance Act, 1994, upto 50% of the Service Tax confirmed by the adjudicating authority.

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



7. The appeals filed by the appellant stand disposed off in above terms.

31/12/17

(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED

20/09/17
(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.

BY R.P.A.D

To,

M/s. Bilfinger Water Technologies Pvt. Ltd.,

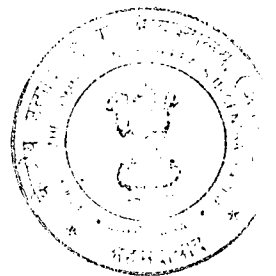
Block No.: 53/P,

Khatraj Chokdi, Khatraj,

Kalol- 382 721.

Copy to:-

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



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