

	केन्द्रीय कर आयुक्त (अपील)	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), GENERAL TAX, केन्द्रीय कर शुल्क भवन सातवीं मजिल पॉलिटेक्निक के पास आम्बावाडी अहमदाबाद-380015	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
079-26305065		टेलिफैक्स : 079-26305136

क फाइल संख्या : File No : **V2/25/RA/GNR/2017-18** / 3638-42

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-003-APP-6-18-19**

दिनांक Date : **21/05/2018** जारी करने की तारीख Date of Issue **15/06/17**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

C. file

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **92/Ref/S Tax/JUU/2017** Dated **27-09-2017**

Issued by **Assistant Commissioner**, Service Tax, Div-**Gandhinagar**,
Ahmedabad

ध अपीलकर्ता का नाम एवं पता
Name & Address of The Respondent

M/s. Hitendra Nath Sarkar
Ahmedabad

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 :-

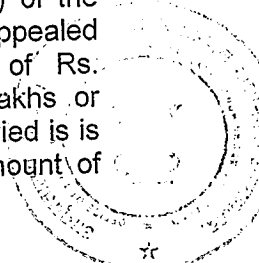
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, 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 accompany ed 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 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-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फॉर्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर

आयुक्त, सहायक / उप आयुक्त अथवा अधीक्षक केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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 (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) 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 adjudication 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 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त 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 बशर्त 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 होंगे।

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,

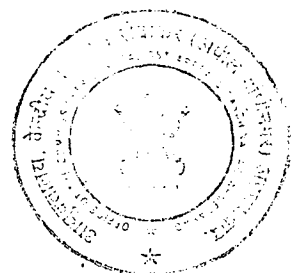
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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(1) इस संदर्भ में, 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(1) 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.



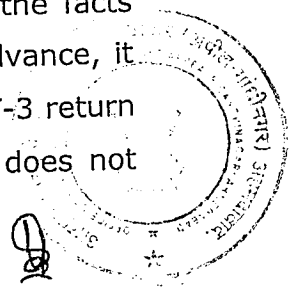
ORDER-IN-APPEAL

This appeal has been filed by the Assistant Commissioner of CGST, Gandhinagar Division [hereinafter referred to "department"] as per Review Order No.30/2017-18 dated 15.01.2018 of Commissioner of CGST, Gandhinagar, against Order-in-Original No.92/Ref/S.Tax/JUJ/2017 dated 28.09.2017 [hereinafter referred to "impugned order"] passed by the Assistant of Commissioner of CGST, Gandhinagar Division [adjudicating authority] in respect of M/s Hitendranath Sarkar, 11, Chandramauli Society, Mansa Bazar, Dist Gandhinagar (hereinafter referred to as "the respondent").

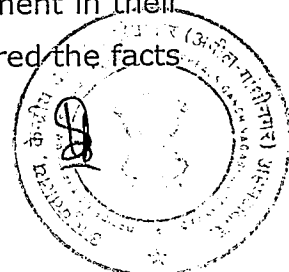
2. Briefly stated, the respondent had filed a refund claim of service tax amounting to Rs.1,25,313/- on 06.08.2013 before the jurisdictional Deputy Commissioner on the grounds that they had paid both 25% and 75% of service tax payment pertaining to the period from July 2012 to September 2012 under partial Reverse Charge Mechanism; that as per RCM under notification No.30/2012-ST, they were liable to pay 25% of service tax amount and by mistake, they made payment of both 25% and 75% of service tax payment. Vide Order-in-Original dated 13.05.2016, the refund claim was rejected by the jurisdictional Deputy Commission on the ground of non submission of documents viz income ledger, Form 26 AS etc. Vide Order-in-Appeal No.AHM-EXCUS-003-APP-269-16-17 dated 22.03.2017, the case was remanded to re-examine with regard to admissibility of the refund on merit on the basis of documents furnished by the respondent. Vide the impugned order, the adjudicating authority has sanctioned the claim.

3. Being aggrieved, the department has filed the instant appeal and requested that the impugned order may be remanded back for considering following aspects and ascertained the admissibility of refund claim accordingly:

- The respondent have made excess payment of 75% of service tax on different dates viz. 11.04.2014, 22.08.2012, 4.10.2012, 08.07.2012, 09.06.2012 and 10.11.2012; that the RCM was introduced vide Notification No.30/2012 dated 20.06.2012 w.e.f 01.07.2012. Therefore, the liability of the service provider only upto the extent of 25% under RCM accrues w.e.f 01.07.2012 and not before that. However, the adjudicating authority has erred by not looking into these facts.
- The adjudicating authority has also erred in not appraising the facts that if the payment had been made by the respondent in advance, it should be reflected in ST-3 returns filed by them; that the ST-3 return for the period of July-September 2012 available on record does not have any reference of such advance payment.



- The respondent has shown gross value on Manpower Recruitment Supply service to the tune of Rs.16,09,898/- in their ST-3 return for the period July-September 2012-13, however, on going through the Form .26AS, the total value of service for the said period by the receiver of service viz.M/s Century tiles Ltd, M/s Cengress Tiles Ltd and M/s Sonata Ceramics Pvt. Ltd comes to Rs.18,26,806/-. The respondent has not explained the difference.
 - The respondent has already availed the abatement of 75% of the value of service in ST-3 and declared the Service Tax payable accordingly. In such circumstances, they should have explained why only in respect of M/s Cengress Tiles Ltd, they had paid full service tax. The adjudicating authority has not looked into these facts.
 - The original claim refund claim was filed on 06.08.2013; that as per provisions, limitation of one year come into play. In such cases the payment of service tax made on 09.06.2012 and 08.07.2012 automatically becomes time barred and no refund could have been granted. The adjudicating authority has erred in not looking at this fact.
 - The respondent has not provided any documents before the adjudicating authority to prove that the aspect of unjust enrichment is satisfied.
 - In the instant case, the service recipient is manufacturer and as per provisions of Cenvat Credit Rules, the manufacturer of the excisable goods is entitled for Cenvat Credit. Therefore, the adjudicating authority ought to have satisfied himself that no Cenvat credit of excess payment of service tax has been availed by the recipient of service.
4. Personal hearings of instant appeal were granted to the respondent on 20.02.2018, 14.03.2018, 28.03.2018 and 26.04.2018. However, the respondent neither appeared for the same nor sought any adjournment. Since sufficient opportunities of personal hearing as prescribed under Section 35 of Central Excise Act, 1944 have been given and the respondent has failed to avail the opportunities, I take up the matter for decision ex-parte.
5. I have carefully gone through the facts of the case available on records and submissions made by the department.
6. At the outset, I observe that the adjudicating authority has sanctioned the refund claim of excess amount of service tax paid by the respondent under RCM against their liability; that the respondent has paid service tax amounting to Rs.1,75,059/- against their liability of Rs.49,746/- under RCM which in excess payment of Rs.1,25,313/-. However, the department in their appeal contended that the adjudicating authority has not considered the facts



mentioned at para 3 above, while deciding the refund claim. Therefore, the department has requested to remand the case to the adjudicating authority to consider all the facts mentioned in their grounds of appeal and decide the refund claim accordingly. Since the respondent has not filed any cross-objection to the appeal filed by the department and also not made any further submission on the department appeal, I have left no option but to remand the case to the adjudicating authority as requested by the department on the grounds mentioned at para 3 above. Accordingly, I do so.

7. The department appeal is allowed accordingly.

अशिम

(उमा शंकर)

आयुक्त (अपील्स)

Date : .05.2018

Attested

26/05/18
(Mohan V.V)
Superintendent (Appeals)
CGST, Ahmedabad

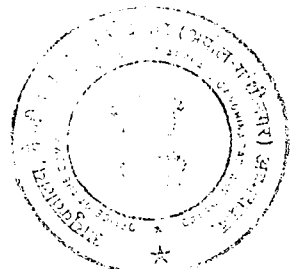
By R.P.A.D

To

M/s Hitendranath Sarkar,
11, Chandramauli Society, Mansa Bazar,
Dist Gandhinagar (Gujarat)

Copy to:-

1. The Chief Commissioner, CGST, Ahmedabad Zone .
2. The Commissioner, CGST, Gandhinagar
3. The Deputy/Assistant Commissioner, CGST Dn, Gandhinagar.
4. The Assistant Commissioner, System-Gandhinagar.
5. Guard File.
6. P.A. File.



11/11/11

