
	<b>केन्द्रीयकर आयुक्त (अपील)</b>	
सत्यमेव जयते	<b>O/O THE COMMISSIONER (APPEALS) - GENERAL TAX,</b>	
वस्तु एवं सेवा	GST Building, 7 <sup>th</sup> Floor,	
कर भवन	Near Polytechnic,	
सातवांमंजिल, पलिटैकनिक के पास,	Ambavadi, Ahmedabad,	
आम्बावाडी-अहमदाबाद-380015	380015	
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क फाइल संख्या : File No : **V2/41/RA/GNR/2018-19**

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-156-18-19**

दिनांक Date : **27-12-2018** जारी करने की तारीख Date of Issue:

2/1/2019 *Cr file*

**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 : **02/Ref/ST/AC/2018-19**  
दिनांक : **18-07-2018** से सृजित

Arising out of Order-in-Original: **02/Ref/ST/AC/2018-19**, Date: **18-07-2018** Issued by:  
Assistant Commissioner, CGST, Div: Kalol, Gandhinagar Commissionerate, Ahmedabad.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

**M/s. Yogi Consultancy**

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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।

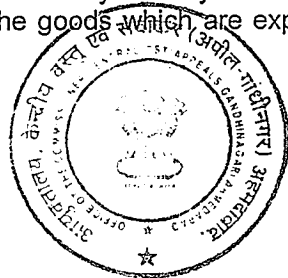
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case,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

(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 सवूत 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- णबी/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 दूसरा मंजिल, बहुमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

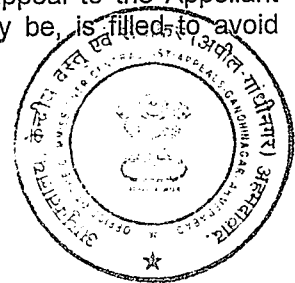
To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-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 रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप 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 पढी कार्य 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 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 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 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।

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:

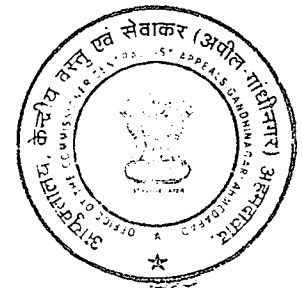
- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ 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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/ Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.



ORDER IN APPEAL

This appeal has been filed by the Assistant Commissioner, CGST Kalol Division, Gandhinagar Commissionerate [for short – ‘appellant’] in terms of review order no. 30/2018-19 dated 16.10.2018, issued by the Commissioner, CGST, Gandhinagar Commissionerate, against OIO No. 2/Ref/ST/AC/18-19 dated 18.7.2018 [for short – ‘impugned OIO’] passed by the Assistant Commissioner, CGST Kalol Division, Gandhinagar [for short –adjudicating authority’].The respondent in the said appeal is M/s. Yogi Consultancy, Proprietor Shri Rasikbhai B Parekh, F-14, 1<sup>st</sup> floor, Ambika Shopping Centre, Nr. Ambika Bus Stop, Highway, Kalol, Gandhinagar District – 382721.

2. Briefly, the facts of the case are that the respondent filed a refund claim on 30.5.2017, under the provisions of Section 11B of the Central Excise Act, 1944, made applicable to service tax vide Section 83 of the Finance Act, 1994. The respondent ,is engaged in providing *Legal Consultancy services* and *Manpower supply Agency services*. An inquiry was conducted against the respondent and a show cause notice was thereafter issued demanding service tax under the said two services. This notice was adjudicated vide OIO No. AHM-CEX-003-AC-002-2018 dated 27.4.2018 passed by the adjudicating authority, wherein he confirmed the demand, along with interest and further imposed penalty. The respondent in the meantime filed a refund claiming that he had paid excess duty.

3. Vide the impugned OIO dated 18.7.2018, the adjudicating authority sanctioned the refund. Department feeling aggrieved, has filed the appeal raising two contentions:

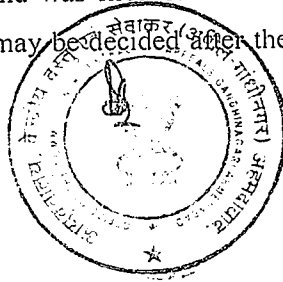
- that the adjudicating authority erred in not considering the relevant date for filing refund claim and ascertaining whether the refund claim was filed within the prescribed time in terms of Section 11B of the Central Excise Act, 1944;
- the adjudicating authority erred in concluding that the payment was from their own pocket and had not been collected from the recipient without any documentary evidence.

4. The respondent filed cross objections dated 5.11.2018, received on 12.11.2018, highlighting the fact that they had filed the refund claim on 30.5.2017, seeking refund of excess amount of Rs. 9,27,306/- which in fact was paid on 2.2.2017.

5. The personal hearing in the matter was held on 12.12.2018, wherein Shri Rasik Parekh, Proprietor of the respondent, explained the matter and reiterated the submissions made in their cross objection/written submissions.

6. I have gone through the facts of the case, the grounds of appeal and the oral submissions made during the course of personal hearing. The matter to be decided is whether the departmental appeal is correct in contending that the refund is barred by limitation and that unjust enrichment was not examined by the adjudicating authority.

7. I find that the refund was filed on 30.5.2017 and a letter was submitted by the respondent that the refund claim may be decided after their main matter was decided, which on



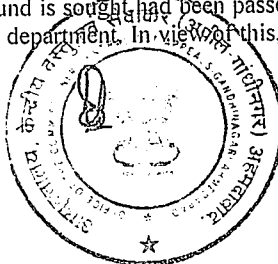
that day was pending. The main matter was decided vide OIO dated 27.4.2018. Thereafter, the respondent vide his letter dated 16.5.2018, informed that as their main matter was decided and since they had paid the penalty imposed vide the impugned OIO, they may be granted the refund of excess payment of tax which stood filed on 30.5.2017. The adjudicating authority in para 5 of his impugned OIO has given a finding that "*the claim is treated as fresh/acknowledged on 16.5.2018*". **This is not tenable at all.** The refund claim was filed on 30.5.2017, which is very emphatically mentioned in para 1 of the impugned OIO, which stands not disputed. There is nothing on record that any deficiency memo was issued. So the refund claim was final. It was the plea of the respondent that the claim be decided after his main matter was finalized. Therefore, it is an undisputed fact that the refund claim was filed on 30.5.2017. Moving to the second issue, I find that the adjudicating authority has in paras 2.3 and 2.4, clearly mentioned the payment particulars along with the dates. The respondent is correct when he states that he was seeking refund of an amount paid on 2.2.2017, for which refund was filed on 30.5.2017. Hence, I find that the refund was filed well within the time limit specified under Section 11B of the Central Excise Act, 1944 made applicable in terms of Section 83 of the Finance Act, 1994.

8. The second ground raised in the review order is that the claim was not examined with reference to unjust enrichment. Para 5.5 of the said review order states as follows:

*"5.5 Further, the adjudicating authority has come to the conclusion that the payment of ST was made from their own pocket and had not been collected from their recipient of service without basis of any documentary evidence. The adjudicating authority ought to have ascertained from the records to satisfy himself that the incidence of service tax has not been passed on to any other person to examine the doctrine of unjust enrichment."*

On going through the impugned OIO para 6.8, I find that the adjudicating authority while examining the claim in terms of the principle of unjust enrichment, held that the respondent had paid the service tax from his own pocket; that in terms of judgement in the case of M/s. Krishna Homes [2014(34) STR 881], when any amount towards service tax is not charged, it cannot be said that the service provider had passed the incidence of service tax. The relevant paras of the judgement relied upon by the adjudicating authority, is reproduced below:

11. The third point of dispute is as to whether these refund claims are hit by unjust enrichment. In terms of Section 12A of Central Excise Act, 1944, notwithstanding anything contained in this Act or any other law for the time being enforce, every person who is liable to pay duty of excise on any goods shall at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoices and other like document, the amount of such duty which will form part of the price at which such goods are to be sold. Under Section 12B of the Central Excise Act, 1944 every person who has paid excise duty on any goods under this Act, shall, unless the contrary is proved, be deemed to have passed on full incidences of such duty to the buyers of such goods. By virtue of Section 83 of the Finance Act, 1994, Sections 12A and 12B of the Central Excise Act, 1994 are applicable to Service Tax matters. Department's plea is that in view of the provisions of Section 12B as made applicable to Service Tax matters as Section 83 of the Finance Act, 1994, the burden is on the assessee to prove that the incidence of the Service Tax whose refund is claimed had not passed on by them to their customers. However, the finding of the Commissioner (Appeals) in the case of M/s. Raj Homes is that he has seen sample invoices and in none of the invoices, any amount towards Service Tax has been charged. In view of this, this finding of the Commissioner (Appeals), it cannot be said that M/s. Raj Homes had passed on the incidence of the Service Tax whose refund is claimed by them to their customers. Similarly, in the case of M/s. Krishna Homes also, there is no evidence that they had charged any amount towards Service Tax from their customers. The presumption under Section 12B of the Central Excise Act, 1944 is a rebuttable presumption and when an assessee shows invoices issued by him in support of his claim that no amount representing Service Tax had been charged by him from his customers, the burden would shift to the department to produce evidence that the incidence of the tax, paid whose refund is sought, had been passed on to the customers. In this case, no such evidence has been produced by the department. In view of this, we hold that the refund claims are not hit by unjust enrichment



There is nothing in the findings which shows that the invoices, documents etc. were examined by the adjudicating authority. Therefore, it is not understood as to how the adjudicating authority concluded that the respondent had paid the service tax from his own pocket. Hence, it is not understood as to how the rationale of the aforementioned judgment would be applicable to the present dispute. The adjudicating authority has not mentioned what documents were examined to arrive at the conclusion, if at all any documents were examined. Further, the respondent in his cross objections dated 5.11.2018, is silent on this ground raised in the review order.

9. In the interest of justice, it would therefore, be prudent that the impugned OIO be set aside on the grounds that the claim was not examined in terms of the principle of unjust enrichment. However, as far as the grounds of limitation raised by the department is concerned, I have already held that the refund claim was filed within the time limit prescribed. The matter is remanded back to the original adjudicating authority to examine the claim in terms of unjust enrichment and thereafter pass an order after following the principles of natural justice.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।  
10. The appeal filed by the appellants stands disposed of in above terms.

*उमा शंकर*

(उमा शंकर)

आयुक्त (अपील्स)



Date 27.12.2018

Attested

*Vinod Lukose*

(Vinod Lukose)  
Superintendent (Appeal),  
Central Tax,  
Ahmedabad.

By RPAD.

To,

M/s. Yogi Consultancy,  
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Kalol,  
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Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Gandhinagar Commissionerate.
3. The Assistant Commissioner, Central Tax Division- Kalol, Gandhinagar Commissionerate.
4. The Assistant Commissioner, System, Central Tax, Gandhinagar Commissionerate.
5. Guard File.
6. P.A.

