
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, वस्तु एवं सेवा कर भवन सप्तवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015 टेलीफोन : 079-26305065	 GST Building, 7 th Floor, Near Polytechnic, Ambavadi, Ahmedabad-380015 टेलीफोन : 079-26305136
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क फाइल संख्या : File No : V2/165/GNR/2018-19 / 10674 to 10675

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-02-19-20

दिनांक Date : 25-04-2019 जारी करने की तारीख Date of Issue: 22/05/2019

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 : 15/D/GNR/NK/2018-19
दिनांक : 12-11-2018 से सृजित

Arising out of Order-in-Original: 15/D/GNR/NK/2018-19, Date: 12-11-2018 Issued by:
Assistant Commissioner, CGST, Div: Gandhinagar, Gandhinagar Commissionerate,
Ahmedabad.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Gujarat Power Corporation

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, 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 दिनोंक 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- 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 2nd 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 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 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 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 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 (सीस्टेट) 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, 1998 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 रुपए 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 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."

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 M/s Gujarat Power Corporation Ltd, 6th Floor, Block No.8, Udyog Bhavan, Sector-11, Gandhinagar [hereinafter referred to as "the appellant"] against Order-in-Original No.15/D/GNR/NK/2018-19 dated 12.11.2018 [hereinafter referred to as "the impugned order"] passed by the Assistant Commissioner of CGST, Gandhinagar Division [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the fact of the case is that during the course of audit of the records of appellant, it was noticed that they had not discharged service tax amounting to [i] Rs.3,42,990/- towards application fees of Rs.27,75,00/- for development of solar park received for the period from January 2013 to March 2016 and [ii] Rs.10,958/- on Manpower supply service under reverse charge mechanism for the period of 2013-14. Accordingly, a show cause notice dated 29.08.2017 was issued to the appellant for the above said non-payment of service tax which was later on confirmed with interest by the adjudicating authority, vide impugned order. The adjudicating authority has also imposed penalty equal to service tax amount not paid under Section 78 of the Finance Act, 1994 (FA) and Rs.10,000/- under Section 72(2) of the FA.

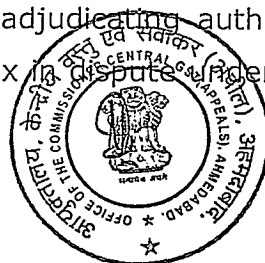
3. Being aggrieved, the appellant has filed the instant appeal on the grounds that:

- They have received the amount of Rs.27,75,500/- in respect of application fee for development of solar park; that they were not providing any separate service in consideration of the said application fees as it is part and parcel of charges towards one time lease premium; that they collect the said amount for development charges and rent for the service provided by it on which it they were paying service tax. The application fees received were as per the instruction and policy of the company along with one time lease premium just to ensure that no one applied just for the sake of application and the fees received has nothing to do with the provision of taxable service.
- As regards non-payment of service tax in respect of Manpower supply service, even if they paid service tax under reverse charge mechanism, they were eligible for cenvat credit as per Cenvat Credit Rules.
- The adjudicating authority has ignored case law cited by the appellant.

4. A personal hearing in the matter was held on 05.04.2019. Shri Sandip Gupta, Chartered Accountant 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 case is relating to non-payment of service of [i] Rs.3,42,990/- towards application fees of Rs.27,75,00/- received by the appellant for development of solar park received for the period from January 2013 to March 2016 and [ii] Rs.10,958/ in respect of Manpower supply service under reverse charge mechanism for the period of 2013-14.

6. As regards [i] above, I find that the adjudicating authority has contended that the appellant had not paid the service tax in dispute under "Business Auxiliary



service" during the relevant period as the activities carried out by them covers under the definition of "service" as defined under clause (44) of Section 65 B of Finance Act, 1994. The definition of "service" under the Section ibid reads as under:

"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

- (a) *an activity which constitutes merely,—*
 - (i) *a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
 - (ii) *such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or*
 - (iii) *a transaction in money or actionable claim;*
- (b) *a provision of service by an employee to the employer in the course of or in relation to his employment;*
- (c) *fees taken in any Court or tribunal established under any law for the time being in force.*

7. In view of above definition, the principal requirement that are embedded in the provisions clearly appears to be (a) there should be a activity; (b) that the activity should be carried out by a person for another; and (b) that such activity should be for a consideration. Now the question arises in the instant case is as to whether selling of application carried out by the appellant by accepting required fees is a service or not. The appellant has contended that they were not providing any separate service in consideration of the said application fees as it is part and parcel of charges towards one time lease premium; that they collects the said amount for development charges and rent for the service provided by it on which it they were paying service tax. However, I find that the adjudicating authority has not given any conclusion as to how the process i.e selling of application in consideration is an 'activity' which falls under the definition of "service" as per provisions of section supra. The sale of application form in consideration in relation to development of solar park would clearly not fall within the meaning of 'service' as provided under Clause (44) of Section 65B ibid as the above referred three essential elements are unmistakably lacking. Therefore, the amount received against such application fee is not within the purview of taxable amount. The CBEC Circular No. 354/59/2006-TRU, dated 10-11-2006 it has been clarified that the Service Tax can be levied only when a consideration is received for taxable services provided. In view of above discussion, I do not find any merit in the impugned order in this regard and uphold that service tax is not liable on the amount received towards application fees.

7.1 Further, I find that Notification 41/2016-ST dated 22.09.2016 exempts taxable service provided by State Government Industrial Development Corporations/Undertakings to industrial units by way of granting long term (thirty years, or more) lease of industrial plots from so much of service tax leviable thereon under section 66B of the said Act, as is leviable on the one time upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for such lease. In the budget 2017, the above notification has




applicable retrospectively w.e.f 01.06.2007. This notification is squarely applicable to the appellant's case as the application fees are nothing but part and parcel of the same only, hence the question of liability of service tax does not arise.

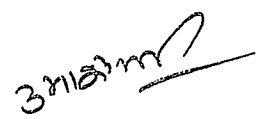
8. As regards non-payment of service tax in relation to "Manpower supply service" mentioned at [ii] above, I find that the appellant had failed to pay service tax amounting to Rs. 10,958/- in respect of service of Police availed in relation to a meeting mandatorily required by a Government Body. I find that as per notification No.30/2012-ST dated 20.06.2012, service provided by or agreed to be provided by non-body corporate by way of supply of man power service is required to be paid service under Reverse Charge Mechanism at the rate prescribed. Therefore, the transaction carried out by the appellant is taxable and liable for service tax. The appellant has argued that if even if they paid the service tax in question under RCM, they were eligible to Cenvat credit and hence situation is in neutral. Such argument is not tenable. As per law prevails, the person who is liable to pay tax shall pay the tax first. The statutory provisions which are directly relevant to the payment of tax and there could have been no *bona fide* belief about non-liability to tax. If the situation as argued by the appellant prevails, no one pay the tax. The appellant has relied on the decision of M/s Matrix Telecom Pvt Ltd [2013 (32) S.T.R. 423 (Tri. - Ahmd.)] with respect to the issue of revenue neutrality. In the said decision, I also observe that the Hon'ble Tribunal has further observed that "the Revenue neutrality would depend upon the facts and circumstances of each case. In the case in hand as already recorded by me there was a confusion regarding Service Tax liability on an assessee under reverse charge mechanism". In the instant the appellant ^{has} failed to pay the service tax under Reverse Charge Mechanism and there was no confusion on their part. Accordingly, I find that the adjudicating authority has correctly confirmed the demand of non-payment of service tax in question with interest. The penalty imposed under Section 78 of FA in this regard is also justifiable looking into the facts of the case.

9. In view of above discussion, I partly allow the appeal filed by the appellant. I set aside the demand of Rs.3,42,990/- and upheld the demand of Rs. 10,958/- with interest and penalty imposed thereon.

10. The appeal stands disposed of in above terms.

Attested


(Mohanan V.V.)
Superintendent (Appeal),
Central Tax, Ahmedabad.


(उमा शंकर)
प्रधान आयुक्त (अपील्स)
Date : .04.2019



By RPAD.

To,
M/s Gujarat Power Corporation Ltd,
6th Floor, Block No.8, Udyog Bhavan,
Sector-11, Gandhinagar

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central GST, Gandhinagar.
3. The Assistant Commissioner, System, CGST, Gandhinagar
4. The Assistant Commissioner, CGST, Dn.Gandhinagar
5. Guard File.



