



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

वस्तु एवं सेवा

कर भवन,

सातवीं मंजिल, पॉलिटेक्निक के पास,

आम्बावाडी, अहमदाबाद-380015

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Ambavadi, Ahmedabad-

380015



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- क फाइल संख्या : File No : **V2/78/GNR/2019-20/13841 7013845**
- ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-57-19-20** *G. file*
दिनांक Date : **22/01/2020** जारी करने की तारीख Date of Issue: **11/02/2020**
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals) Ahmedabad
- ग आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **04/ST-Ref/AC/2019-20**
दिनांक : **26/09/2019** से सृजित

Arising out of Order-in-Original: **04/ST-Ref/AC/2019-20**, Date: **26/09/2019** 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. Aneesh Engineers

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 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- षोबी/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, बहमाली

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 न्यायाधिकरण 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 वहां 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 वहां 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 पढ़ी 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, 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 रुपये से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल हैं

- (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 Aneesh Engineers, 3, Aman Park, Opp.Aradhana Society, P.O. Kalol (Gujarat) [hereinafter referred to as "appellant"] against Order-in-Original No.04/ST-Ref/AC/2009-20 dated 26.09.2019 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner, CGST, Kalol Division, Gandhinagar Commissionerate [hereinafter referred to as "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant has filed a refund claim amounting to Rs.21,32,557/- on 21.05.2019 before the adjudicating authority, in respect of Service Tax Paid under the service category of "Erection, Commissioning or Installation" and Cenvat credit reversed. The background for filing the said refund claim by the appellant is that:

- [i] A Show Cause Notice dated 04.08.2010 was issued to them for [a] re-classification of service provided under "Erection, Commissioning or Installation" service to "Commercial or Industrial Construction Service; [b] the Service Tax amounting to Rs.20,22,971/- paid by the appellant should not be confirmed under the category of "Commercial or Industrial Construction Service; [c] demanding differential Service Tax amounting to Rs.31,74,721/- with interest and imposition of penalty, on account of irregular availment of benefit of Notification No.15/2004-ST dated 10.09.2004, as amended and Notification No.01/2006-ST dated 01.03.2006; and [d] imposition of penalty. The said Show Cause Notice has also proposed for appropriation of amount of Rs.1,09,586/- paid against the demand of Rs.31,74,721/-.
- [ii] Vide Order-in-Original No.3/ADC(SC)/2011 dated 06.01.2011, jurisdictional Additional Commissioner of Central Excise has confirmed the demand under "Commercial or Industrial Construction service and dropped the demand amounting to Rs.31,74,721/- on limitation.
- [iii] The department has filed an appeal against the Order-in-Original dated 01.01.2011 before the Commissioner (Appeals), challenging non-payment of Service Tax on the differential value not declared in the periodical returns and irregular abatement under notification supra and also challenged the demand dropped on limitation. The Commissioner (Appeals), vide OIA No.129/2011/Ahd-III/D.Singh/Commr(A)/Ahd dated 17.08.2011, has set aside the Order-in-Original dated 01.01.2011, dropping the demand on limitation. The Commisisioner (Appeals) had further confirmed the demand of differential Service Tax of Rs.31,74,721/- alongwith interest under Section 75 of the Finance Act, 1994 as well as imposed penalty under Sectin 76, 77 and 78 of the Act ibid.



- [iv] The OIA was challenged by the appellant before the CESTAT, Ahmedabad and the CESTAT, Ahmedabad, vide Order No.A/10812/2019 dated 24.04.2019, has set aside the demand of Rs.31,74,72/-confirmed by the Commissioner (Appeals) and allowed the benefit of Notification supra.

2.1 In view of Tribunal's Order dated 24.04.2019, the appellant has filed the refund claim in question before the adjudicating authority, who, vide impugned order dated 26.09.2019 has sanctioned only Rs.1,09,1586/- and rejected Rs.20,22,971/- on the grounds that the CESTAT, vide order dated 24.04.2019, has dropped the demand of differential Service Tax amounting to Rs.31,74,721/- confirmed by the Commissioner (Appeals) and allowed the abatement under supra; thus, the question of refund of Service Tax amounting to Rs.20,22,1971/-which was already paid by them on the abated value does not arise. The adjudicating authority has also taken a ground that the refund claim in question is time barred under the provisions of Section 11B of Central Excise Act, 1944, as they have not filed the refund claim within one year from date of Order in Original dated 06.01.2011.

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

- The Additional Commissioner, vide order dated 06.01.2011 has dropped the proceedings initiated under the Show Cause Notice dated 04.08.2010 on limitation which was set aside by the Commissioner (Appeals); that before initiating inquiry against them they had paid Rs.20,22,971/- and the said paid by them was considered by the CESTAT as a pre-deposit while passing Stay Order No.S/1016/WZB/AHD/2012 dated 12.06.2012. Therefore, the refund claimed by the appellant is pertaining to pre-deposit made during investigation.
- The Service Tax paid by the appellant was not payable at the material time; that when there was no tax, the amount paid is a pre-deposit amount which is required to be refunded to them. Such refund claim would not fall under the provisions of Section 11 B of CEA.
- The appellant has relied on various case Laws.

4. Personal Hearing in the matter was held on 09.01.2020. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of the appellant and reiterated the submissions made in Appeal Memorandum. He also produced a copy of CESTAT's Stay Order dated 12/19.06.2012.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the Appeal Memorandum as well at the time of Personal Hearing. The limited issue to be decided in the instant case is regarding eligibility of refund of Service Tax paid by the appellant as per the order dated 24.04.2019 of Hon'ble CESTAT, Ahmedabad passed in favour of the appellant.



6. From the chronological events of the case as mentioned at para 2 above, it is observed that before initiating inquiry against the appellant regarding wrong classification of service viz. Erection, Commissioning or Installation Service instead of Commercial or Industrial Construction Service, they had paid Rs.20,22,971/- against their Service Tax liability and Rs.1,09,586/- at the time of inquiry against wrong availment of benefit under Notification supra. From the Show Cause Notice dated 04.08.2010 issued to the appellant, it is apparent that the department has raised allegation in three counts i.e; [i] the appellant had wrongly classified the service under "Erection, Commissioning or Installation Service" instead of heading "Commercial or Industrial Construction Service" and the Service Tax amounting to Rs.20,22,971/- paid should be confirmed against Commercial or Industrial Construction Service; [ii] benefit of Notification supra should be denied; and [iii] the differential amount of Rs.31,74,721/- arisen on account of irregular availment of notification supra dated 10.09.2004 should be confirmed and recovered. From the above, it is apparent that the appellant's total Service Tax liability is amounting to Rs.51,97,692/-, out of which Rs.20,22,971/- was paid by them after availing abatement under Notification supra and the demand of Rs.31,74,721/- raised by the department is towards differential amount in respect of abatement availed irregularly under Notification supra.

7. Further, it is observed that the classification of service has been upheld as "Commercial or Industrial Construction Service" from the initial stage by adjudicating authority, the Commissioner (Appeals) and finally by the Tribunal. However, the appellant at any point of time, has not disputed the classification of service before any authority but only challenged availment of benefit of Notification supra. In the circumstances, it is apparent that the Service Tax amounting to Rs.20,22,971/- paid by the appellant is their due payment towards the Service Tax liability under "Commercial or Industrial Construction Service" after availment of benefit of Notification supra. Therefore, the question of refund of such payment does not arise. Seeking refund of due Service Tax paid on account of service rendered is absolutely wrong.

7. Further, it is apparent that the appellant has filed the refund claim on the basis of decision of Tribunal's order dated 24.04.2019, passed against the OIA dated 30.12.2018 supra. On perusal of the said Tribunal's order, it is observed that the appellant has challenged the order of Commissioner (Appeals) who confirmed the demand of Rs.31,74,721/-, which arisen as differential amount due to wrong availment of benefit under Notification supra. The Tribunal's order is as under:

"...We find that the demand was confirmed on the grounds that the appellant has not included the value of goods supplied by service recipient M/s ONGC on the gross value of Commercial or Industrial Construction service. This issue has been settled in the case of Bhayana Builders (supra) wherein it was held that even though the value of free supplied material is not included in the gross value, the abatement provided under notification 15/2004-ST and 01/2006 is available. Accordingly, the demand confirmed by the Commissioner (A) is not sustainable. The impugned order is modified to the above extent. The appeal is allowed."



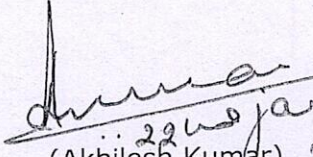
The above order also clarifies that the dispute between the appellant and the department is only relating to abatement availed under Notification 15/2004-ST and 01/2006-ST in respect of Commercial or Industrial Construction service and differential tax demanded thereof. The Service Tax paid already on abated value by the appellant is not at all under dispute. Therefore, the adjudicating authority has rightly rejected the said claim of refund.

8. The appellant has argued that as per Stay Order No.S/1016/WZB/AHD/2012 dated 12.06.2012, the amount of Rs.20,12,971/- was considered as pre-deposit by the Tribunal, hence it become refundable on final decision. The said argument is baseless and not legally correct. It is observed that the Stay Petition was filed for the waiver of pre-deposit of Service Tax amount of Rs.31,74,72/- and penalty imposed thereof. Since the appellant had paid the said amount, out of total liability of Service Tax, the Tribunal has waived further pre-deposit and stayed the further recovery proceedings.

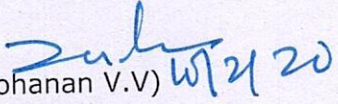
9. In view of above discussion, I find that the appellant has wrongly filed the refund of Service Tax amounting to Rs.20,12,971/- which was paid by them towards their Service Tax liability under "Commercial or Industrial Construction service". Therefore, the adjudicating authority has rightly rejected the said claim on merit. Further, I find that the adjudicating authority has rejected the claim on limitation also. Since the claim in question is not at all eligible on merit, I do not find necessary to discuss the issue on limitation.

10. The appellant has relied on various case laws in the grounds of appeal which is not applicable to the facts relating to the eligibility of refund claim in question in the instant case.

11. In view of above discussion, I reject the appeal filed by the appellant. The appeal stands disposed of in above terms.


(Akhilesh Kumar)
Commissioner (Appeals)
/01/2020

ATTESTED


(Mohanan V.V)
Superintendent
CGST (Appeals) Ahmedabad

By R.P.A.D/Speed Post.

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- 2) The Commissioner, CGST, Gandhinagar.
- 3) The Asst. Commissioner (System), CGST, Gandhinagar Commissionerate
- 4) The Assistant Commissioner, CGST, Kalol Division.
- 5) P.A File
- 6) Guard File.

