



आहुत का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद, आहुतनालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
GST Bhavan, Ambawadi, Ahmedabad-380015
Phone: 079-26305065 - Fax: 079-26305136
E-Mail : comrapp1-cexamd@nic.in
Website : www.cgstappealshmedabad.gov.in

भारतीय
अभूत प्रतिसूचक

By Regd. Post

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(क)	प्रारण संख्या / File No.	GAPPLCOM/STP/1094/2022-APPEAL / 7822-26
(ख)	अपील आदेश संख्या और तिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-103/2022-23 and 30.01.2023
(ग)	पारित किया गया / Passed By	श्री अशिशेक कुमार, आहुत (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	बारी करने की तिनांक / Date of issue	30.01.2023
(ङ)	Arising out of Order-In-Original No. PLN-AC-STX-19/2022-23 dated 21.04.2022 passed by the Assistant Commissioner, CGST, Division-Palanpur, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Vanihara Construction (Prop. Nikita Rakeshkumar Joshi), 22/2, Shiv Mahal Society, Part-7, Opp. Biheri Baug, Abu Highway, Palanpur, Gujarat

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति प्रयासिति नीचे बताए गए सखत अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 अखत नीचे बताए गए मामलों के बारे में पूरुको धारा को उप-धारा के प्रथम परलुक के अंतर्गत पुनरीक्षण आवेदन अधीन अधिनियम, भारत सरकार, िस संघालन, राजस्व विभाग, चौबी संघल, सीधन वीध घवन, संघव मार्ग, नई दिल्ली: 110001 को की जानी चाहिए :-

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 :-

(क) यदि माल की हानि के मामले में जब ऐसी हानिखर जाने से किसी भण्डारवार वा अन्य कारखाने में वा किसी भण्डारवार से दूसरे भण्डारवार में माल ले जाते हुए मार्ग में, वा किसी भण्डारवार वा भण्डार में जाते वह किसी कारखाने में वा किसी भण्डारवार में हो माल की प्रक्रिया के दौरान हुई हो।

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.



(ब) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्धारित मान पर वा मान के विनिर्माण में उपयोग शुल्क कच्चे मान पर उत्पादन शुल्क के रिजेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्धारित है।

In case of rebate of duty of excise on goods exported to any country or territory outside India of an 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 वा भूटान को) निर्यात किया गया मान हो।

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

(घ) अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो बड़दी केरिड मान्य की गई है और ऐसे आदेश को इस आरा एवं विषय के मुआविक अधुक्त, अपील के द्वारा पारित को समय पर वा बाद में विच अधिनियम (नं 2) 1998 आरा 109 द्वारा निवृक्त किए गए हो।

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.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रथम संख्या एए-8 में जो प्रतियों में, रेविज आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर पूर्व-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन भिजा जाना चाहिए। उसके साथ आरा इ नर मुक्त शीर्ष के अंतर्गत आरा 35-द में निर्धारित की के भुगतान के सकूल के साथ टीआर-6 बालान 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 O&O 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न एक लाख रुपये वा उसके कम होतो रुपये 200/- की एक भुगतान की जाए और जहाँ संलग्न 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की आरा 35-बी/35-द के अंतर्गत-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(2) उक्तविधित परिच्छेद में बताए अधुआर के अलावा की अपील, अपील के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (मिस्टेट) की परिधिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बड़मानी भवन, अमरवा, विरधरनागर, अहमदाबाद-380004।

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad: 380004. In case of appeals other than as mentioned above para.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-8 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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / interest is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed draft in favour of Assat. 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 अपीलों का समावेश होता है तो प्रत्येक मूल अपील के लिए फीस पर भुगतान उपर्युक्त ढंग से किया जाता चाहिए। इस तथ्य के होते हुए भी कि लिखा पत्री वर्षों से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आदेशन 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 तथा संशोधित की अनुसूची -1 के अंतर्गत निर्धारित किन्तु अनुसार उक्त आदेशन या मूलआदेशन यथास्थिति निर्गमन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिरुप रु 6.50 पैसे का न्यायालय शुल्क टिकट लगा होगा चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall 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 और संबंधित मामलों को निबंधन करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यागिति) 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिन्डेट) एक प्रति अपीलीय के मामले में फॉर्मलिंग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की राशि (Duty Demanded)।

- (1) कंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिखा गया सेल्वेट क्रेडिट की राशि;
- (3) सेल्वेट क्रेडिट नियमों के नियम 6 के तहत देन राशि।

यह पूर्व जमा 'सेल्वेट अपील' में पहले पूर्व जमा की तुलना में अपील दाखिल करने के लिए पूर्व जमा बना दिया गया है।

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994).

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.

(6)(ii) इस आदेश के प्रति अपील प्राधिकरण के समक्ष नहीं शुल्क अथवा शुल्क या दंड विवादित हो तो नॉग किए गए शुल्क के 10% भुगतान पर और नहीं केवल दंड विवादित हो तब दंड के 10% भुगतान पर की जा सकती है।

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.*



अपीलिय आदेश / ORDER-IN-APPEAL

The present appeal has been filed by M/s. Vanihara Construction, 6 - Bhagyoday Society, Mansarovar Road, Palanpur, Banaskantha, Gujarat, [alternate address - 22/2, Shiv Mahal Society, Part-7, Abu Highway, Opp. Bihari Bag, Palanpur, Banaskantha, Gujarat] (hereinafter referred to as the appellant) against Order in Original No. PLN-AC-STX-19/2022-23 dated 21.04.2022 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner, CGST, Division : Palanpur, Commissionerate : Gandhinagar [hereinafter referred to as "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant were holding Service Tax Registration No. AHAPI4758PSD001 for providing taxable services. As per the information received from the Income Tax department, discrepancies were observed in the total income declared in Income Tax Returns/26AS and Service Tax returns of the appellant for the period F.Y. 2014-15. In order to verify the said discrepancies as well as to ascertain the fact whether the appellant had discharged their Service Tax liabilities during the period F.Y. 2014-15, a letter was issued to them vide email dated 19.06.2020. The appellants failed to file any reply to the query. It was also observed by the Service Tax authorities that the appellants had not declared actual taxable value in their Service Tax Returns for the relevant period. It was also observed that the nature of service provided by the appellant were covered under the definition of 'Service' as per Section 65 B(44) of the Finance Act, 1994 (FA,1994), and their services were not covered under the 'Negative List' as per Section 66D of the FA,1994. Further, their services were not exempted vide the Mega Exemption Notification No.25/2012-S.T dated 20.06.2012 (as amended), hence, the services provided by the appellant during the relevant period were considered taxable.

3. In the absence of any other available data for cross-verification, the Service Tax liability of the appellant for the F.Y.-2014-15 was determined on the basis of value of difference between 'Sales of Services under Sales/Gross Receipts from Services (Value from ITR)' or 'Total amount paid/credited under Section 194C, 194H, 194J of the Income Tax Act, 1962' as provided by the Income Tax department and the 'Taxable Value' shown in the ST-3 returns for the relevant period as per details below :

Table

Sr. No	Details	F.Y. - 2014-15 (Amount in Rs.)
1	Taxable Value as per Income Tax Data i.e Total amount paid / credited under Section 194C, 194I, 194H, 194J OR Sales/Gross Receipts from Services (from ITR)	20,028 /-
2	Taxable Value declared in ST-3 Return	0 /-
3	Difference of Value (sr.no.1-2)	20,028 /-
4	Amount of Service Tax alongwith Cess not paid /short paid (12% Basic + 2% E.Cess+1% H.E.Cess)	2,475/-

3. The appellant was issued a Show Cause Notice vide F.No. IV/16-11/TPI/PI/Batch-3B/2018-19/Gr.V/3272 dated 25.06.2020 wherein it was proposed to:

- Demand and recover service tax amounting to Rs.2,475/- under the proviso to Section 73 (1) of the Finance Act, 1994 alongwith Interest under Section 75 of the Finance Act,1994 ;
- Impose penalty under Section 77(2), 77C and 78 of the Finance Act, 1994;

4. The said Show Cause Notice was adjudicated vide the impugned order wherein :

- the demand for Rs. 2,475/- was confirmed under Section 73(1) of the Finance Act, 1994 and as the said amount have been paid, the same was appropriated.
- Interest was imposed to be recovered under section 75 of the Finance Act,1994.
- Penalty amounting to Rs.2,475/- was imposed under Section 78 of the Finance Act, 1994;
- Penalty of Rs.10,000/- was imposed under Section 77 (2) of the Finance Act, 1994 ;
- Penalty of Rs.10,000/- was imposed under the provisions of Section 77 C of the Finance Act, 1994.
- Option was given for reduced penalty vide clause (ii) of the second proviso to Section 78(1) of the Finance Act,1994.

5. Being aggrieved with the impugned order, the appellant have filed the present appeal on following grounds :

- They had carried out 'Garden Work' at only 'Parks and Garden' Gandhinagar and after the year - 2016 they have stopped providing the said



services. As their house was closed after 2017, hence the letters issued to them may not have been received on time. Also they have not hired any lawyer or tax professional for the Service Tax work.

- They have paid an amount of Rs. 2,475/- towards Service Tax for the F.Y.2014-15 on 10.07.2020.
- They have paid an amount of Rs.2,700/- towards Interest after the impugned order.
- They have also paid an amount of Rs.620/- on 16.05.2022 (as 25% of the penalty amount of Rs. 2,475/- imposed under Section 78 of the Finance Act,1994) within 30 days of receipt of the impugned order.
- Although they have paid the demand of Service Tax alongwith interest and availed the facility of reduced penalty in terms of second proviso to clause (ii) of Section 78 (1) of the Finance Act,1994, they have contested the imposition of penalty of Rs.20,000/- as imposed under Section - 77 (2) and 77C of the Finance Act,1994.

6. It is observed that the appellant is contesting the imposition of penalty amount of Rs. 10,000/- each imposed under Section 77 (2) and Section 77 C of the Finance Act, 1994 respectively. Upon scrutiny of the appeal papers filed by the appellant on 17.05.2022, it was noticed that they had made all the payments in Form GST-PMT-06, i.e neither they paid vide DRC-03 or vide Challan specified as per Board's Instruction dated 28.10.2022. They had not submitted any evidence towards payment of pre-deposit in terms of Section 35F of the Central Excise Act, 1944. The relevant Section for filing appeal stipulates that :

"SECTION 35F: Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. — The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal ...

As they are contesting the amount of penalty imposed upon them, therefore, they were required to deposit an amount equivalent to @7.5% of the amount of interest confirmed against them.

The CBIC had consequent to the rollout of the Integrated CBIC-GST Portal, Circular No.1070/3/2019-CX dated 24.06.2019, directed that from 1st July,



2019 onwards, a new revised procedure has to be followed by the taxpayers for making arrears of Central Excise & Service Tax payments through portal "CBIC (ICEGATE) E-payment". Subsequently, the CBIC issued Instruction dated 28.10.2022 from F.No.CBIC-240137/14/2022-Service Tax Section-CBEC wherein it was instructed that the payments made through DRC-03 under CGST regime is not a valid mode of payment for making pre-deposits under Section 35F of the CEA 1944 and Section 83 of the Finance Act, 1994.

9. In terms of Section 35F of the Central Excise Act, 1944, an appeal shall not be entertained unless the appellant deposits 7.5% of the duty in case where duty and penalty are in dispute or 7.5% of penalty where such penalty is in dispute.

Relevant legal provisions are reproduced below:-

"SECTION 35F: Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. — The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal —

(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];"

10. The appellant was, therefore, called upon vide letter F.No. GAPPL/COM/STP/1094/2022-APPEAL dated 24.11.2022 to make the pre-deposit in terms of Board's Circular No.1070/3/2019-CX dated 24.06.2019 read with CBIC Instruction dated 28.10.2022 and submit the document evidencing payment within 10 days of the receipt of this letter. They were also informed that failure to submit proof of pre-deposit would result in dismissal of the appeal for non-compliance in terms of Section 35F of the Central Excise Act, 1944.

11. However, no communication was received from the appellant, nor did they submit evidence of pre-deposit in terms of Board's Circular No.1070/3/2019-CX dated 24.06.2019. It is observed that though sufficient time was granted to the appellant to make the payment of pre-deposit in terms of Circular No.1070/3/2019-CX dated 24.06.2019, they have failed to furnish proof of revised payment of pre-deposit of 7.5% of the duty made in terms of CBIC Instruction dated 28.10.2022 issued from F.No.CBIC-240137/14/2022-Service Tax Section - CBEC.



12. I find it relevant to mention that the Instruction dated 28.10.2022 was issued by the CBIC consequent to the directions of the Hon'ble Bombay High Court in the case of Sodexo India Services Pvt. Ltd. Vs. UOI and Ors. in Writ Petition No. 6220 of 2022, which is reproduced below :

"8 Therefore, it does appear that the confusion seems to be due to there being no proper legal provision to accept payment of pre-deposit under Section 35F of the Central Excise Act, 1944 through DRC-03. Some appellants are filing appeals after making pre-deposit payments through DRC-30/GSTR-3B. In our view, this has very wide ramifications and certainly requires the CBI & C to step in and issue suitable clarifications/guidelines/ answers to the FAQs. We would expect CBI & C to take immediate action since the issue has been escalated by Mr.Lal over eight months ago."

13. In terms of CBIC's Instruction dated 28.10.2022, I find that the payment made vide Form PMT-06 cannot be considered as valid payment of pre-deposit. In terms of Section 35F of the Central Excise Act, 1944, the Tribunal or Commissioner (Appeals), as the case may be, shall not entertain any appeal unless the appellant has deposited 7.5% of the duty, in case where duty or duty and penalty are in dispute. These provisions have been made applicable to appeals under Section 85 of the Finance Act, 1994. Hence, this authority is bound by the provisions of the Act and has no powers or jurisdiction to interpret the mandate of Section 35F in any other manner. As such, I hold that for entertaining the appeal, the appellant is required to deposit the amounts in terms of Section 35F, which was not done. I, therefore, dismiss the appeal filed by the appellant for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944.

14. In view of the above, the appeal filed by the appellant is dismissed for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944 as made applicable to Service Tax vide sub-section (5) of Section 85 of the Finance Act, 1994.

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

Akhilesh Kumar
(Akhilesh Kumar)
Commissioner (Appeals)
Date: 30th January, 2023

Attested:

सोहनराव चौधरी/SOHANATH CHAUDHARY
अधीनस्थ/SUPERINTENDENT
सेवा-सीमा करगुण एवं सेवाकर (अधीनस्थ), अधिकांशकतः
आर.एस.टी. (अपील), अहमदाबाद.



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Banaskantha, Gujarat

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Commissionerate - Gandhinagar.
3. The Deputy Commissioner, Central GST Division - Palanpur,
Commissionerate : Gandhinagar.
4. The Assistant Commissioner (System), CGST, Appeals, Ahmedabad. (for
uploading the OIA)

✓ 5. Guard File.

6. P.A. File.



