आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
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 : commrappl1-cexamd@nic.in
Website : www.cgstappealahmedabad.gov.in

सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By SPEED POST
DIN:- 20230264SW000082035E

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/1857/2022-APPEAL 18911-15
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-127/2022-23 and 27.02.2023
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	28.02.2023
(ङ)	Arising out of Order-In-Original No. 11/AC/DEM/ST/Tulsi Developers/2021-22 dt. 11.05.2022 passed by the Assistant Commissioner, CGST, Division-Mehsana, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Tulsi Developers, N-40, Narayan Kunal Residency, Radhanpur Road, Dist-Mehsana-384002

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम 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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद 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 हानिकार खाने 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 मे हो माल की प्रकिया 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.

(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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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।

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 डयूटी केडिट 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।

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 प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 अपीलः-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

(2) उक्तलिखित परिच्छेद 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 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004।

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

(3) 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. Registar 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 हैं।

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 संषोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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 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 in 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 (सिस्टेट) एके प्रति अपीलो के मामले में कर्तव्यमांग (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 मांग (Duty Demanded)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए अपील' दाखिल करने के लिए पूर्व शर्त 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)(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।

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

M/s Tulsi Developers, N-40, Narayan Kunal Residency, Radhanpur Road, Mehsana - 384002 (hereinafter referred to as the *"appellant"*) has filed the present appeal against Order-in-Original No.11/AC/DEM/MEH/ST/Tulsi Developers/2022-23, dated 11.05.2022 (hereinafter referred to as the *"impugned order"*), issued by Assistant Commissioner, CGST & C.Ex., Division-Mehsana, Commissionerate - Gandhinagar. (hereinafter referred to as the *"adjudicating authority"*) .

2. Briefly stated, the facts of the case are that the appellant were holding Service Tax Registration No. AALFT7967LSD001 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, when compared with Service Tax Returns of the appellant for the period F.Y. 2015-16 & 2016-17. 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. 2015-16 & 2016-17, letters dated 08.05.2020, 15.06.2020 and 02.07.2020 were issued to them by the department. The appellant filed a reply dated 10.07.2020. Further, it was also observed by the Service Tax authorities that the appellant had not declared actual taxable value in their Service Tax Returns for the relevant period. It was also observed that the nature of services provided by the appellant were covered under the definition of 'Service' as per Section 65B(44) of the Finance Act, 1994, and their services were not covered under the 'Negative List' as per Section 66D of the Finance Act,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. 2015-16 & 2016-17 was determined on the basis of value of difference between 'Sales of Services under Sales/Gross Receipts from Services (Value from ITR)' as provided by the Income Tax department and the 'Taxable Value' shown in the Service Tax Returns for the relevant period as per details below:

TABLE

(Amount in Rs.)

Period	Differential Taxable Value as per Income Tax Data	Rate of Service Tax [Including Cess]	Service Tax Demanded
2015-16	0	14.5 %	0
2016-17	7,50,000	15 %	1,12,500
Total	**7,50,000**		**1,12,500**

4. The appellant was issued a Show Cause Notice vide F.No.V.ST/11A-264/Tulsi Developers/2020-21, dated 18.08.2020, wherein it was proposed to:

- Demand and recover Service Tax amount of Rs.1,12,500/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act,1994 ;
- Impose penalty under Section 77(2), 77(3)(c) and 78 of the Finance Act, 1994.

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

- Demand of Service Tax amount of Rs.1,12,500/- was confirmed under Section 73 of the Finance Act, 1994;
- Interest was imposed to be recovered under section 75 of the Finance Act, 1994;
- Penalty amounting to Rs.1,12,500/- 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 ;
- A penalty @ Rs.200/- per day till the date of compliance or Rs.10,000/-, whichever is higher under Section 77(1)(C) of the Finance Act, 1994 was also imposed.
- Option was given for reduced penalty vide clause (ii) of the second proviso to Section 78(1) of the Finance Act, 1994.

6. Being aggrieved, the appellant have filed the appeal wherein they, *inter alia,* contended as under:-

- The impugned order was issued on account of difference between Income as per ST-3 Returns and Income Tax Returns for F.Y. 2015-16 and 2016-17.
- The impugned order has been issued, without even attempting to find out the "taxable" turnover details of the Appellant and without even a fleeting glance in the ST-3 returns filed by the Appellant, which would have more than clarified why the tax paid by them in the ST-3 returns is correct, legal and proper.
- It is trite law that the revenue authorities cannot simply make out a case on the basis of financial statement such as Profit & Loss account, Balance Sheet/26AS which is populated by third parties and not even controlled by the assessee, and compare it with ST-3 return to demand Service Tax.
- In the case of Mayfair Resorts 2011(22) STR 263(P&H) it is held that any demand of Service Tax based on assumption and presumption cannot be sustained. It was held that in case where disclosures were made to Income Tax department in respect of undisclosed incomes, and when enquiry was not made by revenue department, there is no statutory presumption to treat such amount as proceeds of services. The appellant also submitted that similar view was taken in the case of *Chetak Marmo P. Ltd.- 2015(325) ELT 150 (Tri-Del).*

- They have rendered construction services in context to works contract services and in terms of Rule 2A of the Service Tax (Determination of Value of Taxable Service) Rules, 2006, readwith Notification No.24/12-ST, the service tax was payable only on 40% of the gross charges and not on entire 100% which is wrongly demanded in the impugned order.
- They had duly paid up the said applicable tax and hence, nothing further remains to be paid by them at all. The abatement notification has already been mentioned in ST-3 returns.
- The recovery cannot be based on mere presumption that the differential amount is on account of consideration of taxable services. The Revenue cannot raise demand on basis of such difference without establishing that the entire/ part amount received by our client as reflected in said returns in the Form 26AS is consideration for taxable services provided as held in the flowing cases :-
  a) *M/s Kush Constructions – 2019 (24) GSTL 606 – CESTAT (Allahabad).*

  They further relied on the following case laws:-
  b) *M/s Alpa Management Consultants Pvt. Ltd. - 2007 (6) S. T.R 181 (Tri. Bangalore);*
  c) *M/s Lord Krishna Real Infra Pvt. Ltd. - 2019 (2) TMI 1563 - CESTAT Allahabad;*
  d) *M/s Sharma Fabricators and Erectors Pvt. Ltd.- 2017 (5) G.S.T.L 96.*
- As against an income of Rs.37,84,000/- reflected in the P&L account in F.Y. 2016-17, an income of Rs.30,34,000/- was reflected in the ST-3 return as gross taxable income. This is because an Income of Rs.7,50,000/- was reflected in ST-3 of 2017-18 as the balance payment was received in 2017-18. However being construction income, the Appellant was liable to pay Service Tax on 40% of the service value and thus the Appellant paid service tax amounting Rs.1,13,904/- on Rs.8,13,600/- (40% of the service value Rs.20,34,000/-) after deduction of SSI exemption limit of Rs.10,00,000/- .
- They submitted copies of ITR return along with Balance Sheet and Profit and Loss Account along with Schedules of F.Y. 2016-17. Thus, the appellant submitted that, the difference of Rs.7,50,000/- in F.Y. 2016-17 was considered in the next F.Y. 2017-18. The appellant contended that against an income of Rs. 64,84,000/- reflected in the P&L account in F.Y 2017-18, income of Rs.72,34,000/- was reflected in ST-3 return as gross taxable income. This is because an Income of Rs.7,50,000/- which was short paid in previous F.Y. 2016-17 as it was received in F.Y 2017-18 and thus gross value of receipts in F.Y. exceeds in ST-3 return as compared to P&L account in F.Y. 2017-18. For ready reference, the Appellant enclosed Reconciliation statement as ANNEXURE-I which gives breakup of the total income earned by the Appellant for the F.Y. 2016-17 and 2017-18, as also the taxable component thereof, in light of above legal provisions.

- The whole of demand being sought to be recovered vide the impugned order is patently time-barred.
- It is a well settled principle that an impugned order invoking extended period must elaborate and specify in details the charge for invocation of extended period. The subject impugned order does not discuss in detail the charge on the basis of which the extended period of limitation has been invoked. The appellant relied upon the following case laws:
  a) *Larsen & Toubro Ltd. - (2007) 211 ELT 513.*
  b) *Nasir Ahmed Vs Asst. Custodian- (1980) AIR SC 1157.*
  c) *Continental Foundation Jt. Venture - 2007 (216) ELT 177.*
  d) *Uniworth Textiles Ltd. - (2013) TIOL 13 .*
  e) *Cosmic Dye vs CCE - (2002) TIOL 236 (SC).*
  f) *Chemphar Drugs & Liniments- (1989) 40 ELT276.*
  g) *Pushpam Pharmaceuticals Co. -(1995) 78 ELT 401 .*

The appellant submitted that for the reasons stated hereinabove, neither Service Tax can be recovered from the Appellant, nor interest and/or penalty could be imposed.

7. Personal hearing in the case was held on 10.02.2023. Shri Niraj Shah, Chartered Accountant, authorized representative of the appellant, appeared for the hearing. He re-iterated the submissions made in appeal memorandum.

8. I have carefully gone through the facts of the case and the written as well as oral submissions of the appellant. As per the facts available on record, the demand was made and confirmed on account of difference between Income as per Service Tax Returns and Income Tax Returns for F.Y. 2015-16 and 2016-17.

9. The appellant, in the present appeal, contended that the difference of Rs.7,50,000/- in F.Y. 2016-17 was considered in the next F.Y. 2017-18. The adjudicating authority, however, rejected the same on the grounds, as mentioned at Para 20.1 of the impugned order, that they must have shown the payments in PART-G of said ST-3 return *[i.e. Arrears, Interest, penalty and any other amount etc. paid]* and they have declared taxable value of Rs.72,34,000/- for the month April, 2017 in ST-3 return and had confirmed the demand of Service Tax, along with interest and penalty, vide the impugned order.

9.1 It is observed that the appellant have also submitted copies of (i) Profit and Loss account, (ii) ST-3 Returns, and (iii) Reconciliation statement before this appellate authority. In this regard, I find that when the appellant has adduced evidences of their making payment of differential service tax on the differential value in their return, the

adjudicating authority ought to have given a clear finding of the same. As the demand of service tax was made on account of difference in value declared in ST-3 return and value as per Income Tax Returns, the adjudicating authority should have reconciled the income shown in ITR as well as in the Profit and Loss account with the ST-3 returns.

9.2 I find that the appellant has not produced all the relevant documents before the adjudicating authority required during the adjudications proceedings and therefore the original adjudicating authority did not have the opportunity of considering these submissions of the appellant before passing the impugned order what they have represented before this appellate authority. Therefore, I am of the considered view that it would be in the fitness of things and in the interest of natural justice that the matter is remanded back to the adjudicating authority to consider the submissions of the appellant, made in the course of the present appeal, relevant documents, relied upon judgments etc. and, thereafter, adjudicate the matter.

10. In view of the above, I am of the considered view that in the interest of the justice, the matter is required to be remanded back for denovo adjudication after affording the appellant the opportunity of filing their defense reply and after granting them the opportunity of personal hearing. Accordingly, the impugned order is set aside and the matter is remanded back to the adjudicating authority for adjudication afresh. The appellant is directed to submit their written submission to the adjudicating authority within 15 days of the receipt of this order. The appeal filed by the appellant is allowed by way of remand.

11. 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.

27th February, 2023..

(Akhilesh Kumar)
Commissioner (Appeals)

Date : 27.02.2023

Attested

28/2/23

(Ajay Kumar Agarwal)
Assistant Commissioner [In-situ] (Appeals)
Central Tax, Ahmedabad.

आयुक्तालय, केन्द्रीय कर, (अपील) अहमदाबाद
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3. The Assistant Commissioner, CGST & C.Ex., Division-Mehsana, Commissionerate: Gandhinagar.
4. The Superintendent (System), CGST, Appeals, Ahmedabad. (for uploading the OIA).
5. Guard File.
6. P.A. File.