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

आज़ादी का अमृत महोत्सव

By SPEED POST
DIN:- 20230364SW000000EB2E

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/1003/2022-APPEAL / 9152-56
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-134/2022-23 and 28.02.2023
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	03.03.2023
(ङ)	Arising out of Order-In-Original No. AHM-CEX-003-ADC-PBM-023-21-22 dated 28.02.2022 passed by the Additional Commissioner, CGST, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Dahej SEZ Ltd., 3rd Floor, Block No. 14, Udyog Bhavan, Sector-11, Gandhinagar, Gujarat-382017

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।

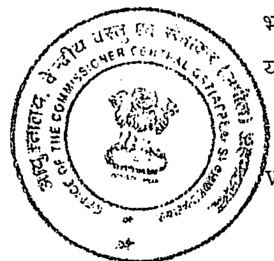
Any person aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way.

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 ड्यूटी 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.

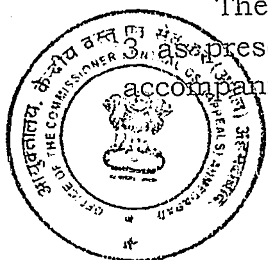
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-
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 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-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."

अपीलियआदेश / ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s. Dahej SEZ Limited, 3rd Floor, Block No.14, Udyog Bhavan, Sector 11, Gandhinagar 382017 [hereinafter referred to as the appellant] against Order-in-Original No. AHM-CEX-003-ADC-PBM-023-21-22 dated 28.02.2022 [hereinafter referred to as the impugned order] passed by Additional Commissioner, Central GST, Commissionerate : Gandhinagar [hereinafter referred to as the adjudicating authority].

2. Briefly stated, the facts of the case are that the appellant was engaged in providing 'Business Support Services' and 'Renting of immovable property services' and holding Service Tax Registration No. AACCD9098ESD001. During the course of Audit of the records of the appellant, for the period April-2016 to June-2017, conducted by the officers of central GST, Audit, Ahmedabad, observations, as per details given below, were raised :

Revenue Para No.1 : Upon reconciliation of the income shown in their financial statements and those shown in ST-3 returns for the same period, it was noticed that the appellant had shortpaid service tax amounting to Rs.91,25,487/- as per details given below :

Reconciliation details	F.Y. 2016-17 (in Rs.)	F.Y.2017-18 (upto June-2017) (in Rs.)
Value as per Balance Sheet/Trial Balance	53,57,59,756/-	19,25,78,270/-
Less : Value of Exempted services as per Finance Act,2019 (Lease of Plots given for 30 yrs and above	27,10,60,188/-	7,25,34,993/-
Less : Value of services provided to SEZ unit	15,65,20,122/-	12,45,103/-
Less: Interest income	49,29,029/-	4,22,33,890/-
Net Taxable Value	10,32,50,417/-	7,65,64,284/-
Less : Value as per ST-3 Returns	9,33,71,921/-	2,56,06,195/-
Difference in Value	98,78,496/-	5,09,58,089/-
Service Tax payable	14,81,774/-	76,43,713/-
Total Service Tax Payable (in Rs.)	91,25,487/-	

It was observed by audit that the activities carried out by the appellant appeared to fall under the definition of 'Service' in terms of Section 65B(44) of the Finance Act, 1994 (FA, 1994) and were not exempted under Section 66D of the FA, 1994 or Notification No. 25/2012-ST dated 20.06.2012. Hence, the services provided by the appellant were considered taxable.

Revenue Para No.2 : Upon reconciliation of the income shown in the sales register vis-à-vis the value shown in their ST-3 return, the audit officers observed that the appellant had collected an amount of Rs. 1,94,78,783/- as Service Tax from their customers located in SEZ during the period F.Y.2016-17, but had deposited an amount of Rs. 1,39,96,465/- only out of the entire amount with the Central Government. Hence, they appeared to have contravened the provisions of Section 73A (1) of the FA, 1994 by short payment of service tax amounting to Rs. 54,82,318/-.

Revenue Para No.3 : It was further observed that in addition to the 'Business Support Services', the appellants were also engaged in providing lease services covered under Section 119(1) of the FA, 2019. The lease services were exempted under provisions of Rule 2(e) of the Cenvat Credit Rules, 2004. Hence, the appellant were engaged in providing taxable as well as exempted services and had availed cenvat credit on common input services such as telephone service and chartered accountant service. As mandated under the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, the appellants were required to reverse cenvat credit availed proportionate to the exempted services. Accordingly, it was ascertained that cenvat credit amounting to Rs.1,13,431/- should be disallowed to the appellant for the period of audit.

2.1 The appellants did not agree with any of the above audit objections. A Show Cause Notice F.No. GATD/55/2020-TECH and LEGAL-OIO COMMR-CGST-ADT-AHMEDABAD dated 14.12.2020 was issued to the appellant, wherein it was proposed to :

- Demand and recover Service Tax amounting to Rs. 91,25,487/- in terms of Section 78(1) of the FA, 1994 alongwith interest under Section 75 of the FA,1994.
- Disallow and recover Cenvat credit amounting to Rs.1,13,431/- in terms of proviso to Section 73(1) of the FA,1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 alongwith interest under the provisions of Section 75 of FA, 1994.
- Demand and recover an amount of Rs. 54,82,318/- under the provisions of Section 73A(3) of the FA, 1994 alongwith interest under Section 73B.

- Penalty under Section 78(1) of the FA, 1994 was proposed in respect of both the demands of service tax as well as for the cenvat credit.

3. The SCN was adjudicated vide the impugned order wherein the demand of service tax amounting to Rs. 91,25,487/- and Rs. 54,82,318/- were confirmed along with interest. Cenvat credit amounting to Rs. 1,13,431/- was denied alongwith interest. Equivalent penalty was imposed on both the amounts of Service Tax confirmed as well as on the Cenvat credit denied.

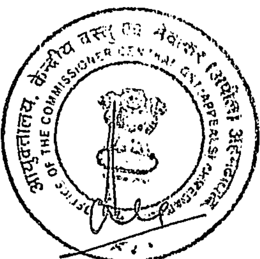
4. Aggrieved with the impugned order, the appellant have filed this appeal on following grounds:

- The impugned order was issued without granting personal hearing. Hence, it is in violation of judicial discipline. In support they relied on the following judgements :
  - Imtiyaz Ahmed Vs Commissioner of Customs, Mangalore 2014 (308) ELT 625 (Tri.Bang.)
  - Tata Motors Insurance Services Ltd. Vs Commr.of S.T., Bangalore 2011 (21) STR 621 (Tri.Bang.)
  - Maiden Paper Tubes (P) Ltd. Vs Commissioner of Central Excise, Kanpur 2006 (196) ELT 434 (Tri.Del.)
- Services rendered by them were classifiable under the category of 'Goods Transport Operator Service' and as a consignee, ONGC, Mehsana was liable to discharge the Service Tax liability under the category of GTA Service, which was mentioned in the 'Letter of Award' issued by M/s ONGC.
- They also contented on the ground of limitation as well as they contended that the Gross Taxable value arrived at by the adjudicating authority was incorrect and their actual income from transportation should be considered as Rs.70,04,555/- (Rs.36,81,110/- + Rs.33,23,445/-).
- The allegations of the SCN were raised during the course of Audit to which they had filed detailed reply and the differences pointed out were reconciled.
- The net taxable income for the F.Y.2016-17 as per their books of accounts comes to Rs.9,89,00,558/- and the same is also reflected in their Annual Report. The liability of service tax was detailed as per table below:

Sr. No.	Particulars	Amount (in Rs.)	Service Tax (in Rs.)
1	Net taxable value as per appellant, for	9,89,00,558/-	1,48,25,709/-

	income booked in 2016-17		
2	Net taxable value as per appellant, for income booked in 2015-16 and Invoices raised in 2016-17 (LR&SC)	3,10,12,347/-	46,51,854/-
3	Interest on service tax viz considered in sales register		1,220/-
4	Taxable value in the F.Y.2016-17 (1+2+3)	12,99,12,905/-	1,94,78,783/-
5	Taxable amount reported in ST-3	9,33,71,921	1,39,96,465/-
6	Invoices not reported in ST-3	3,65,40,984/-	54,82,318/-

- Invoices amounting to Rs.3,65,40,984/- were inadvertently not reported in the ST-3 returns. However, the service tax liability on the said amount was discharged by them.
- The service tax liability on the amount of Rs.7,65,64,284/- for the period F.Y.2017-18 as per the SCN was discharged by them. As mentioned in the impugned order, documents were submitted to substantiate their calculation alongwith the appeal memorandum.
- Regarding the demand of Service Tax allegedly collected but not paid by the appellant, they contended that the said amount actually pertained to the Invoices which were erroneously not included in the ST-3 Return and a separate list of these Invoices were submitted alongwith the appeal memorandum.
- Regarding the amount of Cenvat credit denied by the impugned order, they contended that the Services being rendered to SEZ Units stand exempted and therefore the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004 would not be applicable on such services. In support of their contention, they relied on the following citations :
  - Hewlett Packard India Sales Pvt.Ltd. Vs CCE, C&S.T, Bangalore – 2014 (25) STR 410 (Tri.Bang.)
  - Commissioner Vs Hewlett Packard India Sales Pvt.Ltd. – 2016(43) STR J174 (SC).
  - Link Intime India Pvt.Ltd Vs Commr. of ServiceTax, Mumbai-II – 2015 (38) STR 506 (Tri.Mumbai)
  - Tata Consulting Engineers Ltd. Vs Commr. of Service Tax, Mumbai – 2014 (33) STR 655 (Tri.Mumbai)
- They contested the interest and penalty on the grounds that, since they have discharged their service tax liability correctly, they are not liable for any interest and /or penalty. In support they cited the following judgements :

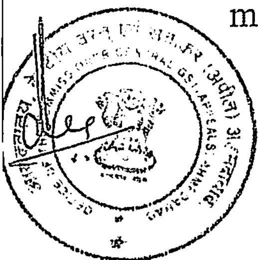


- Hindustan Steel Vs State of Orissa reported as 1978 ELT (J.159)
- Decision of the Hon'ble P&H High Court in the case of CCE, Rohtak Vs M/s Singhal Strips Ltd., CEA No.21 of 2006
- Mangalam Cement Ltd. Vs CCE, Jaipur reported as 2004 (163) ELT 177 (Tri.Del.)
- Greenply Industries Ltd. Vs CCE, Jaipur 2006(4) STR 241 (Tri.Del)
- Vanasthali Textiles Industries Pvt.Ltd. Vs CCE, Jaipur – I reported as 2006 (4) STR 277 (Tr.Del)
- Bright Motors Pvt.Ltd Vs CCE, Delhi – 2006 (2) STR 502 (Tri.Del.)
- Gurubani Security Pvt.Ltd Vs Pr.Addl. Dir.General (Adj.), DGGSTI, New Delhi reported as 2021 (51) GSTL 404 (Tri.Del)

5. Personal hearing in the case was conducted on 09.01.2023. Ms Pradnyali Deshpande, Advocate, appeared for hearing as authorized representative of the appellant. She submitted a synopsis dated 09.01.2023 during the hearing and re-iterated the submissions made in the appeal memorandum as well as in the synopsis.

5.1 In their synopsis submitted during hearing, the appellant have submitted that:

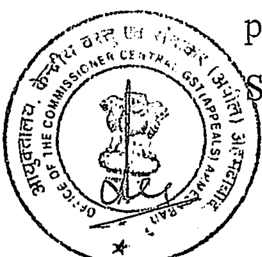
- The period of dispute is F.Y. 2016-17; amount involved is Rs.91,25,487/- + Rs.54,82,318/- + Rs.1,13,431/- alongwith interest and penalty.
- The allegations in the SCN issued on 14/12/2020 are short payment of Service Tax due to difference in reconciliation statement of sales income; service tax collected but not paid to Central Government; and non-payment of amount under Rule 6(3) of the Cenvat Credit Rules, 2004 (CCR, 2004) in respect of exempted services.
- Appellant company is a SEZ Developer promoted by Gujarat Industrial Development Corporation (GIDC). They were holding Service Tax registration and availing the facility of Cenvat Credit under CCR, 2004 and now registered under GST Act, 2017
- They had filed detailed pointwise reply vide their letter dated 06.08.2020 against the observations of the Audit for the period F.Y. 2016-17 and F.Y. 2017-18 (upto June,2017), a copy of the same was enclosed with the appeal memorandum.



- They again submitted a detailed reply vide their letter dated 20.10.2020 during the Pre-consultation of the SCN (a copy of the same was enclosed with the appeal memorandum).
- They had submitted copies of the following documents vide a series of emails between the period 11.09.2019 to 20.02.2020 :
  - List of authorized operations obtained by appellant.
  - Form-A-2 given by the units for the year 2016-17 & 2017-18.
  - MOM of service charges finalized by Development Commissioner for the Year 2016-17 & 2017-18
  - Copies of payment challans for the year 2016-17
  - Reconciliation and outward register for the F.Y. 2016-17
  - Reconciliation sheet for F.Y. 2017-18 till June-2017 and Trial Balance.
  - List of Invoices not considered in ST-3 of F.Y. 2016-17
  - Financials and Trial Balances for the F.Y. 2016-17 and F.Y. 2017-18
  - Sales Register
  - Copies of Invoices
- The adjudicating authority passed the impugned order without granting personal hearing or any link for virtual hearing, which amounts to violation of principles of natural justice.
- The grounds of appeal submitted in their Appeal Memorandum was re-iterated alongwith tabulated details of non-taxable income amounting to Rs. 46,35,050/- wrongly considered by the department in computing the demand of Service Tax.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, oral submissions made during personal hearing as well as in synopsis made by the appellant. The issue before me for decision is whether the impugned order issued by the adjudicating authority, confirming the demand of Service Tax alongwith interest and penalties and disallowing Cenvat credit in the facts and circumstances of the case is legal and proper or otherwise. The demand pertains to the period F.Y. 2016-17 and F.Y. 2017-18 (upto June, 2017).

7. It is observed that, the appellant is functioning as a SEZ Developer and promoted by the GIDC. They were holding Service Tax registration and filing their ST-3 Returns regularly. The SCN in the case has been issued based on audit

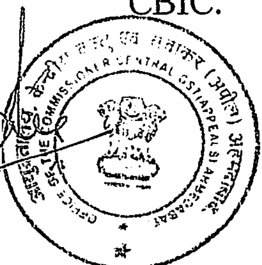


observations. It is also observed that the appellant had filed a detailed reply to the audit objections on 06.08.2020. Thereafter, they once again submitted their explanations and personally explained them during the pre-SCN consultation on 20.10.2020. However, their submissions were not considered for want of corroboration through invoices and SCN was issued on 14.12.2020 on the basis of Audit observations without examining or verifying the documents and explanations submitted by the appellant. Hence, it is observed that the SCN was issued mechanically without application of mind.

7.1 After issuance of the SCN, the appellant submitted their reply before the adjudicating authority and requested for personal hearing (PH). The adjudicating authority vide e-mail dated 23.02.2022 informed that the PH was fixed at 1130 Hrs of 28.02.2022. The appellants accepted the same and requested for issuance of link for virtual hearing (online hearing) on 28.02.2022. However, after non-receipt of any link for online PH, appellant intimated the problem to the adjudicating authority vide e-mail dated 01.03.2022. The adjudicating authority did not respond and confirmed the demand vide impugned order dated 28.02.2022 without granting any personal hearing to them. Hence, the impugned order was issued in clear violation of the principles of natural justice. The CBIC vide Master Circular No. 1053/02/2017-CX dated 10.03.2017 have issued specific guideline for adjudication of cases and it is specified at Para 14.3 of the Circular :

> *14.3 Personal hearing: After having given a fair opportunity to the noticee for replying to the show cause notice, the adjudicating authority may proceed to fix a date and time for personal hearing in the case and request the assessee to appear before him for a personal hearing by himself or through an authorised representative. <u>At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of being heard. Separate communications should be made to the noticee for each opportunity of personal hearing. In fact separate letter for each hearing/extension should be issued at sufficient interval.</u> The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding adjourn the hearing for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a noticee.*

Therefore, in light of facts of the case, it is clear that the impugned order was passed by the adjudicating authority in clear violation of the specific instructions of CBIC.



7.2 I find it relevant to refer to the decision of the Hon'ble High Court of Madras is the case of Amman Match Company Vs Assistant Commissioner of GST & C.Ex, Madurai reported as 2018 (363) E.L.T. 120 (Mad.) wherein the Hon'ble High has held as under :

> ...
>
> *25. Insofar as the impugned order-in-original passed by the first respondent dated 29-7-2016 is concerned, it is passed without affording any opportunity of personal hearing, in contravention of the statutory provision, circular issued by the department as well as contrary to Paragraph No. 15 of the show cause notice. The impugned order passed within two days from the date of lapse of the time granted in the show cause notice is certainly in violation of principles of natural justice and, therefore, it is liable to be set aside.*
>
> *26. In the result, the writ petition is allowed and the impugned order in original dated 29-7-2016 passed by the first respondent is set aside and the matter is remanded back to the first respondent for consideration afresh. The petitioner shall file all his objections, within a period of one month from the date of receipt of a copy of this order. On receipt of objections from the petitioner, the first respondent shall afford an opportunity of personal hearing at least three times, as mandated in the Master Circular with sufficient intervals and thereafter, pass orders on merits and in accordance with law, as expeditiously as possible. No costs.*

From the above discussions and as per the ruling of the Hon'ble High Court, who relying on the Master Circular, had ruled that, at least 03 oppurtunities for personal hearing are required to be accorded by the adjudicating authority before adjudication. Accordingly, it is held that the impugned order has been issued in violation of the principles of natural justice and deserves to be set aside.

8. As regards the demand of Service Tax amounting to Rs.91,25,487/-, the appellants have contended that non-taxable income amounting to Rs. 46,35,050/- was considered in the taxable value, which merits exclusion. It is also observed that the appellants have made similar contentions before the adjudicating authority which is discussed in the impugned order as well. However, the adjudicating authority, while rejecting their claim, has recorded at Para-32.3 of the impugned order, that, they are rejected due to non-submission of documentary evidence in support. It is further observed that the appellants have submitted various reconciliation statements for the relevant period before the adjudicating authority vide various e-mails. Further, they have submitted various documents in appeal memorandum. As the contentions of the appellant were not considered by audit as well as adjudicating authority for want of documentary corroboration, it would be in the interest of justice that the matter is examined by the adjudicating authority again.

9. As regards the confirmation of demand of Service Tax amounting to Rs. 54,82,318/- being collected but not paid, the appellant had contested the demand even at the pre-SCN Consultation stage alongwith various documents submitted vide email. However, the adjudicating authority has again rejected the submissions on grounds of non submission of 'sales ledger' and 'balance sheet' etc. The appellants have claimed to submit Trial Balance for F.Y. 2016-17 and F.Y. 2017-18, Sales Register and Copies of Invoices. It is also observed that although the audit had challenged the issue of non-payment of Service Tax to the Government Exchequer, they have not verified/re-confirmed the fact by verifying the Challans submitted by the appellant. These facts clearly indicate that the documents submitted by the appellant were not scrutinized and verified while issuance of the SCN as well as while adjudication. Hence, the impugned order is a non-speaking order and is legally unsustainable.

10. It is also observed that the SCN has proposed for recovery of the amount of Rs. 54,82,318/- in terms of provisions of Section 73A (3) of the Finance Act,1994. The relevant Section 73A of the Finance Act, 1994 reads as under :

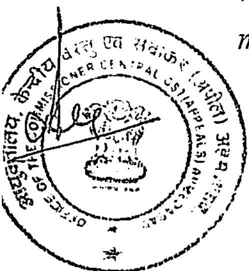
SECTION 73A. Service tax collected from any person to be deposited with Central Government. —

(1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.

(3) Where any amount is required to be paid to the credit of the Central Government under sub- section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine



the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.

(5) The amount paid to the credit of the Central Government under sub-section (1) or sub- section (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).

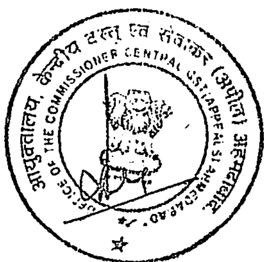
(6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 (1 of 1944) or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount

10.1 Upon applying the legal provisions of Section 73A of FA,1994 to the facts and circumstances of the case, I find that the demand raised in terms of Section 73A(3) of Finance Act, 1994 is required to be quantified and confirmed under Section 73A(4) of the Finance Act, 1994. However, the adjudicating authority, at sub para (iv) of the impugned order (Page-23), has confirmed the demand under the provisions of Section 73A(3) of the Finance Act,1994, which is legally not correct and is liable to be set aside.

11. It is further observed that penalty of Rs.54,82,318/- has been imposed under Section 78(1) of the Finance Act, 1994 vide sub-para (vi) of the impugned order (Page-23) against the demand raised vide Section 73A(3) of the Finance Act, 1994. Section 78(1) of the Finance Act, 1994 is reproduced as under :

SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —

(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :



Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the 24 date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :

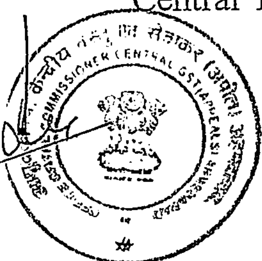
Provided further that where service tax and interest is paid within a period of thirty days of— the date of service of notice under the proviso to (i) sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded; (ii)the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period :

Explanation. — For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.

11.1 The above legal provisions specify that penalty under Section 78(1) of the FA,1994 can be imposed only on demands raised under Section 73(1) of the FA,1994. Applying the legal provisions above to the penalty imposed in the impugned order, I find that penalty amounting to Rs. 54,82,318/- has been imposed vide the impugned order on demand raised and confirmed under Section 73A(3) of the FA, 1994. This is legally not sustainable and is liable to be set aside.

12. As regards disallowing Cenvat Credit amounting to Rs.1,13,431/- and confirming recovery alongwith interest and equivalent penalty, the appellants have submitted that they had provided services to SEZ units, which are exempted and are, therefore, not liable to reverse the Cenvat Credit. Notification No. 3/2011-Central Excise (N.T.) dated 01.03.2011 was issued from F.No.334/3/2011-TRU



vide which the CENVAT Credit (Amendment) Rules, 2011 were made effective from 01.04.2011. The relevant portion of the said notification reads as :

G.S.R. -(E).- In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944) and section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the CENVAT Credit Rules, 2004, namely :-

1. (a) These rules may be called the CENVAT Credit (Amendment) Rules, 2011.

(b) Save as otherwise provided in these rules, they shall come into force on the 1st day of April, 2011.

...

5. In rule 6 of the said rules,-

(i) for the marginal heading, the following shall be substituted, namely:- "Obligation of a manufacturer or producer of final products and a provider of taxable service"

...

(ix) after sub-rule (6), the following shall be inserted with effect from the 1st day of March, 2011, namely:-

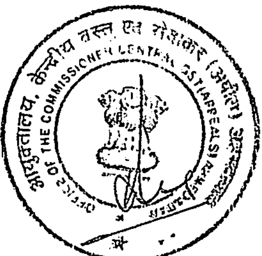
"(6A) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the taxable services are provided, without payment of service tax, to a Unit in a Special Economic Zone or to a Developer of a Special Economic Zone for their authorised operations.".

...

Considering the above legal provisions under the 'CENVAT Credit (Amendment) Rules, 2011', I find that the appellant being a SEZ developer is exempted from the applicability of Rule 6 (3) of the Cenvat Credit Rules, 2004. Consequently, the demand and recovery of Cenvat credit amounting to Rs.1,13,431/- under proviso to Section 73(1) of the Finance Act, 1994 read with provisions of Rule 14(1)(ii) of the Cenvat Rules becomes infructuous. As the demand of Cenvat is not sustainable, the interest and penalty confirmed in the impugned order is also liable to be set aside.

13. In view of the discussions made above, I pass the order as per the details given below :

(i) Demand of Service Tax amounting to Rs. 91,25,487/- confirmed under Section 73(1) of the Finance Act, 1994 alongwith interest under Section 75 of the FA,1994 and penalty amounting to Rs. 91,25,487/- imposed under Section 78(1) of the FA,1994 are set aside. The matter is remanded back to the adjudicating authority to adjudicate the issue afresh after examining the reconciliation statements and documents submitted by the appellant following principles of natural justice.



(ii) The order for payment of Service Tax amounting to Rs.54,82,318/- is remanded back to the adjudicating authority for re-quantification alongwith interest under appropriate provisions of the Finance Act,1994. Penalty amounting to Rs. 54,82,318/- imposed under Section 78(1) of the FA,1994 is set aside.

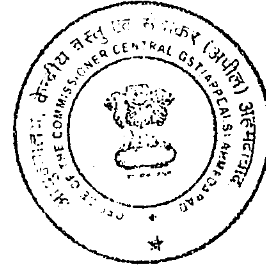
(iii) Demand of Cenvat credit amounting to Rs. 1,13,431/- confirmed and ordered to be recovered under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 alongwith interest under Section 75 of the FA,1994 and penalty amounting to Rs. 1,13,431/- imposed under Section 78(1) of the FA,1994 read with Rule 15(3) of the Cenvat Rules are set-aside.

14. अपीलकर्ताद्वारादर्जकीगईअपीलकानिपटाराउपरोक्ततरीकेसेकियाजाताहै।

The appeal filed by the appellant stands disposed off in above terms.

28 February, 2023.

(AKHILESH KUMAR)
Commissioner (Appeals)
Date: 28th February, 2023



Attested:

(Somnath Chaudhary)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To
Dahej SEZ Limited,
3rd Floor, Block No.14,
Udyog Bhavan, Sector 11,
Gandhinagar 382017

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Gandhinagar
3. The Additional Commissioner, CGST, Gandhinagar.
4. The Assistant Commissioner (System), CGST, Appeals, Ahmedabad. (for uploading the OIA)
5. Guard File.
6. P.A. File.