



आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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By SPEED POST

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(क)	फाइल संख्या / File No.	GAPPL/COM/STP/2329/2023-APPEAL / 9083-87
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-128/2023-24 and 23.11.2023
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील्स) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	05.12.2023
(ङ)	Arising out of Order-In-Original No. 71/ST/OA/ADJ/2022-23 dated 28.02.2023 passed by the Assistant Commissioner, CGST, Division-Himmatnagar, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Nareshkumar Bharatbhai Patel, 18, Pushpanjali Park, Motipura, Himmatnagar, Gujarat-382028

कोई व्यक्ति इस अपील-आदेश से असंतोष 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 पूर्वोक्त 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 में 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 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।

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 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।

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 दिनांक 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 रुपये या उससे कम होतो रुपये 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. 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 पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपील 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 राशि;
- (3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

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

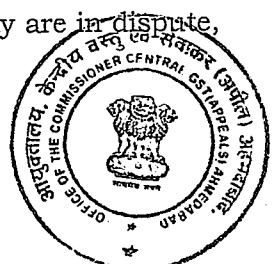
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 मांग 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."



ORDER IN APPEAL

M/s. Naresh Kumar Bharatbhai Parmar, 18, Pushpanjali Park, Motipura, Himmatnagar, Ahmedbad-383001 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. CGST-71/ST/OA/ADJ/2022-23 dated 27.02.2023 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-Himmatnagar, Gandhinagar Commissionerate (hereinafter referred to as '*the adjudicating authority*'). The appellant were engaged in providing taxable services and were not registered with the Service Tax Department. They are holding PAN No. AJEPP8902F.

2. The facts of the case, in brief, are that based on the data received from the Central Board of Direct Taxes (CBDT) for the F.Y. 2015-16, it was noticed that the appellant had earned substantial income by providing taxable services. They neither obtained Service Tax Registration nor paid service tax on such income. After the negative list regime all services are taxable except those covered under negative list. Letters were, therefore, issued to the appellant to provide the details of the services provided during the F.Y. 2015-16 and explain the reasons for non-payment of tax and provide the certified documentary evidences for the same. The appellant neither provided the documents nor submitted any reply justifying the non-payment of service tax on such receipts. Therefore, the service tax was calculated on the income reflected under the heads "Sales / Gross Receipts from Services (Value from ITR)" or "Total Amount paid / credited under Section 194C, 194I, 194H, 194J (Value from Form 26AS)" of the Income Tax Act, 1961, on which no tax was paid.

<i>Sr. No.</i>	<i>F.Y.</i>	<i>Value from ITR or Value of Form 26AS</i>	<i>Service tax rate</i>	<i>Service Tax Payable</i>
01	2015-16	70,17,192/-	14.5%	10,17,493/-

2.1 A Show Cause Notices (SCN) bearing No. V/15-49/CGST-HMT/O&A/2021-22 dated 23.04.2021 was issued to the appellant proposing recovery of service tax amount of Rs. 10,17,493/- along with interest; under Section 73(1) and Section 75 of the Finance Act, 1994. Imposition of penalties under Section 77(1) and Section 78 of the Finance Act, 1994 were also proposed.

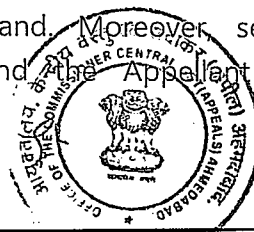
3. The said SCN was adjudicated vide the impugned order wherein the service tax demand of Rs. 10,17,493/- was confirmed alongwith interest. Penalty of Rs. 10,000/- under Section 77(1) and penalty of Rs. 10,17,493/- was also imposed under Section 78 of the Finance Act.

4. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, on the grounds elaborated below:-

- The impugned order was passes without providing any opportunity to be heard or to file the SCN reply. The Appellant relies on the *Ganara Bank vs. Debasis Das* [(2003) 4 SCC 557], where the Hon'ble Supreme Court held that the principles

of natural justice must be adhered to in proceedings before quasi-judicial authorities.

- The impugned order is based on the presumption that the income of Rs.70,17,192/- for the F.Y. 2015-16 pertains to taxable services. However, this income is related to the sale of goods, specifically "SAND" which is not subject to service tax. A close examination of the Profit & Loss Account for F.Y. 2015-16 reveals that revenue from operations consists of sales of goods ("SAND") amounting to Rs. 70,17,192/-. Additionally, Rs. 87,500/- is shown as agriculture income and Rs. 9,556/- as interest income. There is no revenue from any services, and therefore, the impugned demand is baseless and deserves to be set aside. The Appellant relies on the following case laws:
 - M/s Shree Mohangarh Construction Co. Jaisalmer vs. CCE, Jaipur-II –
- The impugned order erroneously applies the provisions of Section 67A of the Finance Act, 1994, to the Appellant's income derived from the sale of goods. The Appellant's income is not associated with any taxable services, and therefore, the invocation of Section 67A is unwarranted and misplaced.
- Additionally, comparing and matching two different values, governed by different laws with distinct standards, is neither proper nor tenable under Service Tax law. The Appellant submits that the learned adjudicating authority has failed to appreciate the facts that the SCN was issued by merely relying on the figures presented in Form 26AS/Income tax returns filed by the Appellant as mandated by the provisions of the Income Tax Act, 1961. In fact the demand was issued to appellant without examining the scope of Service Tax, just in order to fulfill procedural requirements, the department issued two letters dated 29.07.2020 and 17.03.2021, asking the Appellant to provide details of services rendered during FY 2015-16, without verifying if these letters were delivered to the Appellant or not. Owing to the COVID-19 pandemic, no staff were attending the office, and the Appellant remained unaware of these letters.
- Demand is hit by Limitation as the Show Cause period 2015-16 was issued even beyond the extended period. It is also on record that the Appellant has not provided any services and has consistently filed statutory returns, including Income Tax Returns and Balance Sheets, as required by law. In such a scenario, even the imposition of an extended period is not warranted, yet the department has raised the demand beyond the extended period, which is not sustainable under the law.
- Furthermore, the appellant was under the bona fide belief that service tax could not be levied on revenue received from the sale of goods. In the present case, the Appellant has neither charged nor collected any service tax on the sale of goods, i.e. sand. Moreover, service tax is an indirect tax borne by the customers, and the Appellant is required to



collect the service tax from the recipient and deposit it into the government account. There is no burden of service tax on the Appellant, as it was required to be collected from the service recipient. Consequently, there was no intention on the part of the Appellant to evade the payment of service tax. They placed reliance on various case laws:-

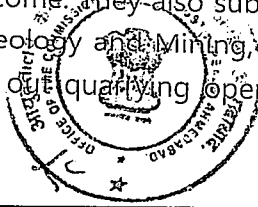
- Bridgestone Services- 2007(8)STR 505-Tri-Bang
- Tamil Nadu Housing board- 1994(74) ELT 9 (SC)
- Apex Electricals (P) Ltd- 1992(61) ELT 41

- For the sake of argument and without admitting, even the sale of sand amounts to provide the taxable services then also, the [earned adjudicating authority has failed to provide the cum-tax benefit to the Appellant. It is a fact an record that the Appellant received a total amount of Rs. 70,17,192/- from the sale of sand. The Appellant collected service tax but did not pay it. The Appellant did not receive any separate service- tax; therefore, the amount of Rs. 70,17,192/- is the gross receipt, including the service tax, if any, that is applicable.
- Imposition of penalties under Sections 77(1) and 78 of the Finance Act, 1994, is unjustified, as the Appellant has not contravened any provisions warranting such penalties. The appellant has shown in our bank statement and in our balance sheet, that there is no case for invoking extended period under Section 78 ibid. Hon'ble Tribunal Delhi branch in the case of M/s. Engineering Versus Commissioner of C. Ex. Chandigarh 2010 (20) S.T.R. 669 (Tri. - Del.) the Hon'ble tribunal held that the ratio of the above judgments of Hon'ble Supreme Court passed in the case of Continental Foundation Jt. Venture with regard to proviso to Section 11A4 (1) of Central Excise Act, 1944 would apply to the provision of Section 78 of the Finance Act, 1994 where identical words have been used.

4. Personal hearing in the case was held on 25.10.2023. Shri Naresh Satwani, Proprietor appeared and reiterated the submissions made in appeal memorandum and of the written submissions and requested to set-aside the impugned order.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the appeal memorandum and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the service tax demand of **Rs. 10,17,493/-** along with interest and penalty, in the facts and circumstance of the case, is legal and proper or otherwise. The demand pertains to the period F.Y 2015-16.

5.1 From the Profit & Loss Account submitted by the appellant, it is observed that the appellant has shown the income of Rs.70,17,192/- under head 'Sales Sand' during the F.Y. 2015-16. They claim that the sale of sand is not a taxable service hence they are not required to discharge any service tax on the said income. They also submitted a Contract dated 22.6.2015 entered with the Department of Geology and Mining, Gandhinagar. As per the contract the appellant is required to carry out quarrying operation of ordinary



sand and to extract, collect or transport and sale gather, the same from River Sabarmati. The said contract is valid for 5yrs and was finalized for the amount of Rs.1,54,44,000/-.

5.2 The appellant has been carry out digging or quarrying operation at River Sabarmati to extract ordinary sand and then collect and transported this sand from river bed for the Department of Geology and Mining, Gandhinagar. Digging and purchasing sand and then subsequently selling to other buyers is a trading activity. It is also evident from the P&L account, where the appellant have shown following expenses;

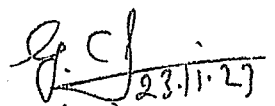
Sr.no.	Expenses	Amount
01	Purchase Sand	30,88,800/-
02	Sand Labour Expenses	23,40,000/-
03	Gross Profit	15,88,392/-
	Total	70,17,192/-

In the income side, they have shown income of Rs.70,17,192/- towards Sales Sand which they have earned from trading activity. As service tax is not applicable on trading activity, the income earned from sale of sand after excavation shall not be a taxable. I, therefore, find that the service tax demand of Rs.10,17,493/- is not legally sustainable.

5.3 When the demand does not sustain there is no question of demanding interest and imposing penalty.

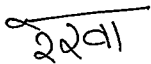
6. In view of the above discussion, I set-aside the impugned order confirming the service tax demand of **Rs.10,17,493/-** alongwith interest and penalties and allow the appeal filed by the appellant.

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


(ज्ञानचंद जैन)
आयुक्त (अपील्स)

Date: 23.11.2023

Attested



(रेखा नायर)

अधीक्षक (अपील्स)

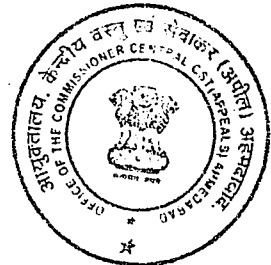
केंद्रीय जी. एस. टी, अहमदाबाद

By RPAD/SPEED POST

To,

M/s. Naresh Kumar Bharatbhai Parmar,
18, Pushpanjali Park,
Motipura, Himatnagar,

Appellant



Ahmedbad-383001

The Assistant Commissioner
CGST, Division- Himatnagar,
Gandhinagar

Respondent

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (H.Q. System), CGST, Gandhinagar.
(For uploading the OIA)
- ✓ 4. Guard File.