



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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आज़ादी का
अमृत महोत्सव

By SPEED POST

DIN:- 20231264SW000031363F

(क)	फाइल संख्या / File No.	GAPPL/COM/STP/3012/2023-APPEAL / 9118-22
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-136/2023-24 and 28.11.2023
(ग)	पारित किया गया / Passed By	श्री ग्यानचंद 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. 139/AC/DEM/ST/Dilipbhai R. Patel/2022-23 dated 17.03.2023 passed by the Assistant Commissioner, CGST, Division-Mehsana, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Dilipbhai Ranchhodbhai Patel, At & Post – Kahoda, Taluka – Unjha, Mehsana, Gujarat-384130

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:-

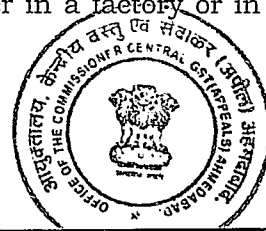
Revision application to Government of India:

(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 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.



(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 मामले 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 ईए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का 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 संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं 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 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 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।

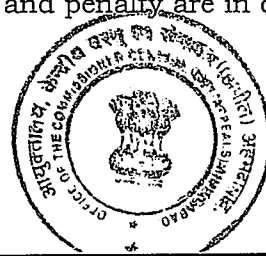
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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



ORDER IN APPEAL

M/s. Dilipbhai Ranchhodbhai Patel, At & Post Kahoda, Unjha, Mehsana-384130 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 139/AC/Dem/ST/Dilipbhai R. Patel/2022-23 dated 17.03.2023 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-Mehsana, Gandhinagar Commissionerate (hereinafter referred to as '*the adjudicating authority*'). The appellant were engaged in providing taxable services but were not registered with the Service Tax Department. They are holding PAN No. ABYPP8926F.

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. 2016-17, it was noticed that the appellant had earned substantial income by providing taxable services. However, they neither obtained Service Tax Registration nor paid service tax on such income. Letters were, therefore, issued to the appellant to provide the details of the services provided during the F.Y. 2016-17 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. The service tax was therefore 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>F.Y.</i>	<i>Value from ITR or Value of Form 26AS</i>	<i>Service tax rate</i>	<i>Service Tax Payable</i>
2016-17	30,75,926/-	15%	4,61,388/-

2.1 A Show Cause Notices (SCN) bearing No. CGST/Div/Mehsana/39/ABYPP8926F/21-22 dated 18.10.2021 was issued to the appellant proposing recovery of service tax amount of Rs. 4,61,388/- along with interest; under Section 73(1) and Section 75 of the Finance Act, 1994. Imposition of penalties under Section 70, Section 77(1)(a) and Section 78 of the Finance Act, 1994 were also proposed.

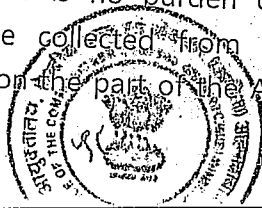
3. The said SCN was adjudicated vide the impugned order wherein the service tax demand of Rs. 4,61,388/- was confirmed alongwith interest. Penalty of Rs. 10,000/- under Section 77(1), penalty of Rs.20,000/- under Section 70 and penalty of Rs. 4,61,388/- was also imposed under Section 78 of the Finance 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 passed against the Appellant without providing any opportunity to be heard or filing a reply to the Show Cause Notice, thereby violating the principles of natural justice. The Appellant contends that due to the Covid-19 pandemic, their office was closed, and they did not receive any communication from the Department. Also, during the material time, the wife of

the appellant was suffering from cancer; therefore, the appellant was busy with her treatment. The non-receipt of the Show Cause Notice and non-participation in the Personal Hearing, due to the pandemic and the illness of the appellant's wife should be considered as reasonable grounds for the Appellant's inability to defend their case. Appellant did not provide any taxable services during the F.Y. 2016-17. Therefore, on this ground alone, the impugned order deserves to be set aside. In this regard, the Appellant relies on Canara 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 passed based on the presumption that the income of Rs. 30,75,926/- for the F.Y. 2016-17 pertains to taxable services. However, this income is related to various services related to repair and maintenance of Public Roads and Buildings provided under contract with the Road and Building Department, Ambaji (Gujarat Government), which is not subject to service tax as it is exempted under at Sr. No. 12, 13, 25 and 39 of mega exemption Notification No. 25/2012-S.T., dated 20.06.2012. From the 26AS/ITR (Exhibit-D), of relevant period, it can be seen that the entire receipt amount is from Executive Engineer, Road & Building Division of Gujarat Government and other income is only interest income. Therefore, on merit, the impugned demand is baseless and impugned 010 required to be set aside, only on this ground itself.
- Revenue cannot raise the demand on the basis of such difference without examining the reasons for said difference and without establishing that the entire amount received by the appellant as reflected in said returns in the Form 26AS being consideration for services provided and without examining whether the difference was because of any exemption or abatement, since it is not legal to presume that the entire differential amount was on account of consideration for providing services.
- The Show Cause Notice (SCN), which has not yet been received by the Appellant, was issued on 18.10.2021 for a demand of service tax pertaining to the period 2016-17, by invoking the extended period. The Appellant has not provided any taxable 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 and 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 services related to public works such as repair & maintenance work of public roads, etc. In the present case, the Appellant has neither charged nor collected any service tax on service provided to the Public Works Department, Government of Gujarat i.e., Road & Building Department. 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. Hon'ble Tribunal Bangalore branch in *Bridgestone Financial Services v. CST, Bangalore* [2007 (8) STR 505 (Tri. -Bang.)) held that where statements and records were given, bonafide belief of non-liability as per statement was claimed, there was no finding of willful suppression with intent to evade payment of service tax, demand was not sustainable on ground of time bar as the SCN was issued after normal period; When the demand for Service Tax is not sustainable on merit as well as on limitation, the impugned order deserves to be set aside.

- For the sake of argument and without admitting, if the service related to repair & maintenance of public roads, provided to Roads and Building Department of Government of Gujarat, amounts to providing taxable services, then also, the learned adjudicating authority has failed to provide the cum-tax benefit to the Appellant. It is a fact on record that the Appellant received a total amount of Rs. 30,75,926/- from the department of Government of Gujarat. Additionally, it is not the case of the department that the Appellant collected service tax but did not pay it. The Appellant did not receive any separate service tax; therefore, the amount of Rs. 30,75,926/- is the gross receipt, including the service tax, if any, that is applicable
 - The imposition of penalties under Sections 77(1)(a), 70 r/w Rule 7, and 78 of the Finance Act, 1994, is unjustified, as the Appellant has not contravened any provisions warranting such penalties. Since the primary demand itself is not sustainable, as established earlier, the question of imposing penalties does not arise. Appellant relies on the following case law: *Ballarpur Industries Ltd.* [2007 (215) E.L.T. 489 (S.C.)], where the Hon'ble Supreme Court held that when the demand is not sustainable, the imposition of penalties under Sections 77 and 78 of the Finance Act, 1994, is not justified. 18.2 Thus, considering the fact that the demand itself is not sustainable due to the misinterpretation of income and the incorrect application of law, the imposition of penalties under Sections 77(1)(a), 70 r/w Rule 7, and 78 of the Finance Act, 1994, is unwarranted and should be set aside. Proviso to Section 11A4 (1) of Central Excise Act, 1944 would apply to the provisions of Section 78 of the Finance Act, 1994 where identical words have been used. Therefore, for imposition of penalty under Section 78 some positive evidence of deliberate mis-declaration of value of taxable service with intent to evade the service tax, other than mere failure to declare the full value of taxable service in ST-3 returns must be produced.
5. Personal hearing in the case was held on 25.10.2023. Shri Naresh Satwani, Tax Consultant appeared on behalf of the appellant and reiterated the submissions made in appeal memorandum and requested to set-aside the impugned order.
6. 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. 44,61,388/- 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 2016-17.



6.1 It is observed that the demand of Rs. 4,61,388/- has been raised on the income of Rs. 30,75,926/- reflect in the ITR/Form-26 AS on which no tax was paid. The appellant however claim that the they have rendered service related to repair & maintenance of Public Road & Buildings provided under contract with the R&B Department of Ambaji (Gujarat Government) which is not subjected to service tax as is exempted vide Entry No.12, 13, 25 and 39 of Mega Notification No.25/2012-ST dated 20.06.2012.

6.2 The appellant have submitted Form-26AS, wherein they have showed following income;

Service Recipient	Income/Amount
Ex. En, Road & Building Division State	28,76,126/-
Sardar Sarovar Narmada Nigam Ltd.	15,028/-
The Mehsana Urban Co-operative Bank Ltd	10,64,490/-

I find that in terms of **Entry No. 12 (d)** of the mega notification services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of canal, dam or other irrigation works and in terms of **Entry No.13** services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a road, bridge, tunnel, or terminal for road transportation for use by general public are exempted. However, the appellant failed to submit copy of contracts entered with Government/governmental authority, therefore it would not be possible to examine whether the income received from Ex. En, Road & Building Division State and Sardar Sarovar Narmada Nigam Ltd. were related to repair and maintenance of canal, dam or other irrigation works and Public Roads and Buildings and are covered under the aforesaid exemption notification.

7. In light of above findings, I remand back the matter to the adjudicating authority to decide the case afresh by following the principle of natural justice and pass a speaking order considering the submissions of appellant. The appellant is also directed to submit all relevant documents/submission including the contract directly to the adjudicating authority.

8. Accordingly, I set-aside the impugned order and remand the matter back to adjudicating authority for deciding the SCN afresh specifically dealing with the contentions raised in the written submissions made by the appellant vis-à-vis the documentary evidences.

9. 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.



G. J.
(ज्ञानचंद जैन)

आयुक्त (अपील्स)

Date: 28.11.2023

Attested

22/11

(रेखा नायर)

अधीक्षक (अपील्स)

केंद्रीय जीटी .एस ., अहमदाबाद

By RPAD/SPEED POST

To,

M/s. Dilipbhai Ranchhodbhai Patel,
At & Post Kahoda, Kahoda,
Unjha, Mehsana-384130

- Appellant

The Assistant Commissioner
CGST, Division-Mehsana,
Gandhinagar

- Respondent

Copy to:

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

