



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
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आज़ादी का
अमृत महोत्सव

By SPEED POST

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(क)	फ़ाइल संख्या / File No.	GAPPL/COM/33/2023-APPEAL/345-849
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-180/2023-24 and 29.12.2023
(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	03.01.2024
(ङ)	Arising out of Order-In-Original No. AHM-STX-003-ADC-031-12 dated 28.03.2012 passed by the Additional Commissioner, erstwhile Central Excise, Commissionerate : Ahmedabad-III	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Shayar Construction Co., 158/1, Opp. ONGC Colony, At- Merda, Tal-Kadi, Dist-Mehsana, Gujarat

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 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 हों।

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 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.

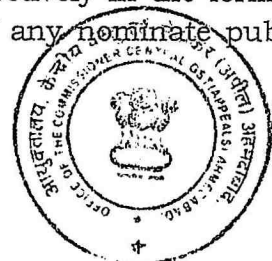
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 पढ़ी 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 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 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."



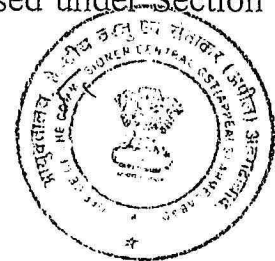
अपीलिय आदेश / ORDER-IN-APPEAL

The present appeal has arisen out of Final Order No. A/10183/2023 dated 31.01.2023 passed by the Hon'ble CESTAT, WZB, Ahmedabad (hereinafter referred to as "CESTAT order") in case of M/s Shayar Construction Co., 158/1, Opp. ONGC Colony, At- Merda, Tal-Kadi, Dist-Mehsana, Gujarat (hereinafter referred to as "the appellant"). The CESTAT order has been passed in the matter arising out of the Order in Original No. AHM-STX-003-ADC-031-12 dated 28.03.2012 (hereinafter referred to as "impugned order") passed by the Additional Commissioner, erstwhile Central Excise, Commissionerate : Ahmedabad-III (hereinafter referred to as "adjudicating authority").

2. Briefly stated, the facts of the case is that the appellant are engaged in the business of laying of underground and over ground pipelines etc. for their clients M/s.ONGC, M/s.GSPC etc. for which they are holding Service Tax Registration No. ABEPR1777NST001 under the category of Commercial/Industrial Building and Civil Structures.

2.1 During the inquiry conducted against the appellant, on scrutiny of the records by the jurisdictional Central Excise officer it was noticed that, the appellant have received an income of Rs.6,06,56,089/- for providing the services of "Construction Services in respect of Commercial or Industrial Building and Civil Structure", for the F.Y. 2010-11. It further noticed that, service tax is required to be paid on 33% of the gross income received as per provisions of Notification No. 1/2006-ST date 01.03.2006. Accordingly, the appellant was required to pay service tax amounting to Rs.20,61,701/- for the F.Y. 2010-11, but paid Rs.7,00,523/- only, thus there was a short payment of Rs.13,61,178/-. Shri Kanjibhai Rabari, authorized representative of the appellant vide his statement dated 20.10.2011, confirmed this fact. He has also stated that they have not filed the service tax returns for the said period in question; they were taking abatement of 67%; there was short payment of service tax and would be paid.

2.2 Therefore, the appellant was issued SCN No. V.ST/15-76/Dem/OA/2011-12 dated 21.10.2011 demanding service tax amounting to Rs.13,61,178/- under Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Imposition of penalty was also proposed under Section 76, 77 and 78 of the Finance Act, 1994.



2.3 The said SCN was adjudicated *ex-parte* vide impugned Order wherein the demand for service tax amounting to Rs.13,61,178/- was confirmed along with interest. Penalty of Rs.13,61,178/- was imposed under Section 78 alongwith option for reduced penalty under proviso to clause (ii) and Penalty of Rs.5,000/- was imposed under Section 77 of the Finance Act, 1994.

3. Being aggrieved with the impugned order, the appellant filed an appeal alongwith stay application before the then Commissioner (Appeals-III), Central Excise, Ahmedabad on the ground that that they have not contravened the provisions of section 66, 68, 70, 73A & 83 of the said Act; they rendered their services as turnkey contractor for construction work with material & labour provider for specific purpose of construction for ONGC i.e. civil work of foundation for pump house for their clients and erection work; they have not worked as construction agency; this work cannot be classified under the category of "Commercial Industrial Construction service & residential construction service"; they discharge duties on receipt basis and not on bill basis; by relying the CBEC Circular No. 137/167/2006-CX-4 dated 03.10.2007 they contended that, if the appellant has paid service tax with interest, then no SCN has to be issued; there was no deliberate delay on their part; they are filing the returns regularly; the delay was occurred due to the reason for the confirmation of account statement and reconciliation of accounting; with regard to suppression of facts, they relied the Hon'ble Supreme Court judgment in case of Pushpam Pharmaceuticals 1995(78)ELT 401(SC). They contended against the invocation of extended time limit and penalty and have relied upon various decisions in support of their claim. They also relied the Tribunal decisions in case of C Ahead Info Technologies India 2009(14)S.T.R. 803(Tri.- Bang.), Adani Enterprises 2010(17)S.T.R. 457 (Tri.- Ahmd.), and Santhi Casting Works 2009(15)S.T.R. 219(Tri.- Chennai).

4. The Commissioner (Appeals - III), Central Excise, Ahmedabad decided the Stay Order vide Order No. 07(Ahd-III)/2012 dated 18.12.2012 whereby the Appellant was asked to deposit 25% of Service tax and 25% penalties under Section 35F of the Central Excise Act, 1944. The appellants failed to comply with the conditions of the 'Stay Order' and they filed miscellaneous application dated 18.01.2013 wherein he reiterated the submissions in the grounds of appeal. Thereafter, the appeal was decided vide Order-in-Appeal No.18/2013(Ahd-III)/SKS/Commr(A)/Ahd dated 29/30.01.2013, wherein the appeal filed by the



appellant was dismissed for non-compliance provisions of Section 35F of the Central Excise Act, 1944.

5. Being aggrieved, the appellant preferred appeal before the Hon'ble CESTAT, WZB, Ahmedabad. The Hon'ble Tribunal has decided the case vide 'CESTAT order' wherein the Tribunal ordered that:

"When the matter was called, Learned AR pointed out that the impugned order is an order of Commissioner (Appeals) rejecting the appeal for non-compliance of erstwhile Section 35F of Central Excise Act, 1944. Subsequently, the appellant has complied with requirement of Section 35F while filing appeal before Tribunal.

Considering the facts of the case and interest of justice, the impugned order is set aside and matter is remanded to the Commissioner (Appeals) to decide afresh on the merit of the case."

6. In compliance of the above order of the Hon'ble CESTAT, the appeal was admitted and the appellants were informed about the same.

7. Personal hearing in the case was held on 18.12.2023. Shri Vipul Khandhar, Chartered Accountant, appeared for personal hearing and re-iterated the contents of the written submission. He requested for remand to original adjudicating authority as the order was passed *ex-parte*.

7.1 Subsequently, In continuation appeal memorandum, they submitted additional submission on during the course of hearing, wherein they inter alia submitted the following grounds :

- The appellant submitted that they had already discharge service tax liabilities, on receipt basis as under :

	Description	F.Y. 2010-11
	Income as per P & L A/c	6,06,56,089/-
Add:	Opening debtors	81,39,632/-
Less:	Closing debtors	1,50,76,955/-
=	Net receipt.	5,37,18,766/-
	Abatement	3,59,91,573/-
	Net taxable value	1,77,27,192/-
	Tax payable	18,25,900/-
	Tax paid.	18,55,143/-
	Difference if any	(29,242/-)

- So discharge of duty by us on receipt basis regularly. Again demand of service tax on bill basis was untenable & unjustifiable. So it is clear that as per rule 6 of service tax rules appellant are liable for service tax on receipt basis only demand of service tax on accrual basis were not sustainable.



Appellant request to drop the demand of service tax & penalties under section 76 & 78 of the finance act, 1994.

➤ In spite of anything contained above Appellant wants to draw your attention that, If assessee has paid service tax with interest suomotu, then no SCN has been issued, if SCN has not been issued, then penalty proceeding may be void ab initio. They rely in support of their claim on the notification issued vide F. No. 137/167/2006-CX-4, dated 3-10-2007 wherein clarifications provided regarding "Payment of Service tax/interest/penalty — Issuance of show cause notice and conclusion of proceedings— Clarifications".

➤ The Appellant also relied on the following clarification in support of their claim :

"frequently Asked Questions (FAQ) on Service Tax FAQ, 4th Edition, December 2008 issued by .G.S.T. Government of India Ministry of Finance (Department of Revenue) Central Board of Excise & Customs, New Delhi, Can show cause notice be waived?"

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise/Service Tax Officer before service of notice on him and inform the Central Excise/Service Tax Officer of such payment in writing, in such a case show cause notice will not be issued. [Refer Section 73(3) of Finance Act, 1994]. However, sub-section (3) of Section 73 of Finance Act, 1994, is not applicable to the cases involving fraud or collusion or willful mis-statement or suppression of facts or contraventions of any of the provisions of Chapter V of the Finance Act, 1994 and the rules made there under with intent to evade payment of Service Tax [Refer sub-section (4) of Section 73 of Finance Act, 1994]"

➤ Further they submitted that thus it would be seen that there was no deliberate defiance on appellant part. The delay was owing to the reason for the confirmation of account statement & reconciliation of accounting. In view of the above a lenient view may please be taken and the proceeding may be dropped in the interest of Justice. Further, they relied upon the various judgements of the Hon'ble Courts and Tribunals.

8. I have gone through the facts of the case, the impugned order, Order-In-Appeal dated 12.04.2011 as well as submissions of the appellant. I find that the present appeal has arisen in terms of the remand order of the Hon'ble CESTAT, WZB, Ahmedabad. The issue to be decided in the present case is whether the impugned order passed by the adjudicating authority, confirming the demand of



service tax amounting to Rs.13,61,178 /- alongwith interest and penalty, is legal and proper or otherwise. The demand pertains to the period F.Y. 2010-11.


9. I find that it has been recorded at Para 5 of the impugned order that the opportunity of personal hearing was granted on 13.12.2011, 27.12.2011 and 23.01.2012, but the appellant had neither filed defence submission nor availed of the opportunity of personal hearing. Thereafter, the case was adjudicated *ex-parte*.

9.1 I find that the appellant has in their appeal memorandum submitted details and various documents in their defense. However, these details and documents were not submitted by them before the adjudicating authority and neither was any of the contentions made in the appeal memorandum raised before the adjudicating authority. Since the appellant did not file any written submission before the adjudicating authority and neither did they attend the personal hearing granted, no oral submissions were made by them in their defense. Accordingly, the adjudicating authority did not have the opportunity of considering the submissions of the appellant before passing the impugned order. Therefore, I am of the considered view that it would be in the fitness of things in the interest of natural justice that the matter is to be remanded back to the adjudicating authority to consider the submissions of the appellant, made in the course of the present appeal, and, thereafter, adjudicate the matter.

10. Accordingly, the impugned order is set aside and the matter remanded back to the adjudicating authority for adjudication afresh. 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.


29.12.23
ज्ञानचंद जैन

आयुक्त (अपील्स)

Dated: 29th December, 2023

सत्यापित/Attested :


रेखा नायर
अधीक्षक (अपील्स)
सी जी एस टी, अहमदाबाद



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2. The Commissioner, CGST & C.Ex., Commissionerate: Gandhinagar.
3. The Additional Commissioner, CGST & C.Ex., Commissionerate: Gandhinagar
4. The Superintendent (System), CGST, Appeals, Ahmedabad. (for uploading the OIA).
- ✓ 5. Guard File.
6. P.A. File.



