



आयुक्त (अपील) कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद - 380015.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad - 380015
07926305065- टेलीफैक्स - 07926305136



DIN: 20230564SW0000444D47

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1859/2022-APPEAL / 1697 - 1807
- ख अपील आदेश संख्या Order-In-Appeal Nos.AHM-EXCUS-003-APP-024/2023-24
दिनांक Date : 15-05-2023 जारी करने की तारीख Date of Issue 16.05.2023
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. 47/ST/OA/ADJ/2021-22 dated 29.03.2022, passed by the Assistant Commissioner, CGST & C.Ex., Division: Himmatnagar, Commissionerate: Gandhinagar.
- घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s. Vidhya Subhash Yadav,
Opp. Collector Office, Palace Road,
Idar Highway, Himmatnagar -303001,
Dist:- Sabarkantha.

2. Respondent

The Deputy/Assistant Commissioner, CGST, Division-Himmatnagar, Sector 10A,
Nr. CH-3 Circle, Opp. St. Xavier School, Gandhinagar-382010.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर 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 परन्तु क 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।

(i) 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 :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने 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।

(ii) 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.



(क) 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।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

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।

(c) 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.

(1) 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 भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो 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 सेवाकर 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 :-

(क) उक्तलिखित परिच्छेद 2 (1) क 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

(a) 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 in para-2(i) (a) above.



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 Appellate 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 मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर 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.

- (7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (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 सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग" (Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) 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.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क 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."



अपीलिंग आदेश / ORDER-IN-APPEAL

The present appeal has been filed by M/s. Vidhya Subhash Yadav, Opposite Collector Office, Palace Road, Idar Highway, Himmatnagar - 383001, Distt : Sabarkantha, (hereinafter referred to as the "appellant") against Order-In-Original No. 47/ST/OA/ADJ/2021-22, dated 29.03.2022 [hereinafter referred to as the "impugned order"], passed by the Assistant Commissioner, CGST & C.Ex., Division - Himmatnagar, Commissionerate: Gandhinagar [hereinafter referred to as the "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant were holding Service Tax Registration No. AFOPY7613LSD001 for providing taxable services of Goods Transport Agency. As per the information received from the Income Tax department, discrepancies were observed in the total income declared in Income Tax Returns/26AS, when compared with Service Tax Returns of the appellant for the period F.Y. 2015-16. In order to verify the said discrepancies as well as to ascertain the fact whether the appellant had discharged their Service Tax liabilities during the period F.Y. 2015-16, appellant were requested to explain the reasons for such difference and to submit documents in support thereof i.e. Balance Sheet, Profit and Loss Account, etc. The appellant failed to file any reply to the query.

3. In the absence of any other available data for cross-verification, the Service Tax liability of the appellant for the F.Y. 2015-16 was determined on the basis of value of difference between 'Sales of Services under Sales/Gross Receipts from Services (Value from ITR)' as provided by the Income Tax department and the 'Taxable Value' shown in the Service Tax Returns for the relevant period as per details below:

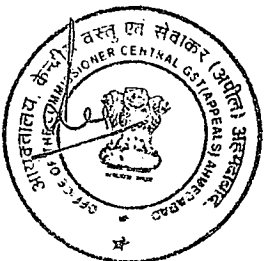
TABLE

(Amount in Rs.)

Period	Total Taxable Value as per Income Tax Data	Value as per ST-3 Returns	Difference of Value	Rate of Service Tax [Including Cess]	Demand of Service Tax
	(1)	(2)	(1) - (2) = (3)	(4)	(5)
2015-16	68,20,285	7,10,346	61,09,939	14.5 %	8,85,941

4. The appellant was issued a Show Cause Notice vide F.No. V/15-15/CGST-HMT/O & A/20-21, dated 30.06.2020, wherein it was proposed to:

- Demand and recover Service Tax amount of Rs. 8,85,941/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 ;
- Impose penalty under Section 78 of the Finance Act, 1994.



5. The said Show Cause Notice was adjudicated, ex-parte, vide the impugned order wherein:

- Demand for Rs. 8,85,941/- was confirmed under the proviso to Section 73(1) of the Finance Act, 1994;
- Interest was imposed to be recovered under Section 75 of the Finance Act, 1994;
- Penalty amounting to Rs. 8,85,941/- was imposed under Section 78 of the Finance Act, 1994;
- Option was given for reduced penalty vide clause (ii) of the second proviso to Section 78(1) of the Finance Act, 1994.

6. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on following grounds:

- The Learned Adjudicating Officer has erred both in law and on facts to issue SCN dated 30.06.2020 which is barred by limitation.
- The Learned Adjudicating Officer has grossly erred both in law and on the facts of the appellant case. The appellant acted as GTA and not liable to pay service tax.
- The Learned Adjudicating Officer has erred both in law and on the fact to confirm the service tax liability of Rs. 8,85,941/- under Section 73(2) of the Act on the differential value of Rs. 68,20,285/- between income / turnover/ gross receipts declared in the ITR and taxable service value declared in ST-3 Returns.
- The Learned Adjudicating Officer has erred both in law and on the facts to levied interest under Section 75 of the Act on the confirmed demand of Rs. 8,85,941/-.
- The Learned Adjudicating Officer has erred both in law and on the facts to imposed penalty of Rs. 8,85,941/- under Section 78(1) of the Act.

7. It is observed that the appellant is contesting the demand of Service Tax along with interest and also imposition of penalty totally amounting to Rs. 17,71,882/- [i.e. Service Tax Rs. 8,85,941/- and Penalty Rs. 8,85,941/-] confirmed / imposed under Section 73(1) and Section 78 of the Finance Act, 1994 , respectively. Upon scrutiny of the appeal papers filed by the appellant on 29.06.2022, it was noticed that they had submitted DRC-03 dated 24.06.2022 showing payment of Rs. 66,445/- towards pre-deposit in terms of Section 35F of the Central Excise Act, 1944.

8. The CBIC had, consequent to the rollout of the Integrated CBIC-GST Portal, vide Circular No. 1070/3/2019-CX, dated 24.06.2019, directed that from 1st July, 2019 onwards, a new revised procedure has to be followed by the taxpayers for making of Central Excise & Service Tax payments through portal "CBIC (ICEGATE) E-



payment". Subsequently, the CBIC issued Instruction dated 28.10.2022 from F.No. CBIC-240137/14/2022-Service Tax Section-CBEC, wherein it was instructed that the payments made through DRC-03 under CGST regime is not a valid mode of payment for making pre-deposits under Section 35F of the Central Excise Act, 1944 and Section 83 of the Finance Act, 1994.

9. In terms of Section 35F of the Central Excise Act, 1944, an appeal shall not be entertained unless the appellant deposits 7.5% of the duty in case where duty and penalty are in dispute or 7.5% of penalty where such penalty is in dispute. Relevant legal provisions are reproduced below:-

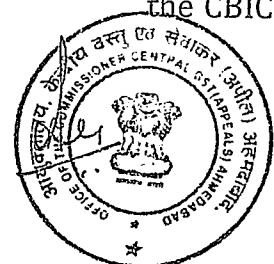
"SECTION 35F: Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. — The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal —

(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];"

10. The appellant was, therefore, called upon vide letter F.No. GAPPL/COM/STP/1859/2022-APPEAL, dated 19.12.2022 to make the pre-deposit in terms of Board's Circular No. 1070/3/2019-CX, dated 24.06.2019 read with CBIC Instruction dated 28.10.2022 and submit the document evidencing payment within 10 days of the receipt of this letter. They were also informed that failure to submit proof of pre-deposit would result in dismissal of the appeal for non-compliance in terms of Section 35F of the Central Excise Act, 1944. A reminder letter F.No. GAPPL/COM/STP/1859/2022-APPEAL, dated 14.02.2023 was also issued to the appellant to make the pre-deposit and to submit the document evidencing payment within 7 days of the receipt of the letter

11. However, no communication was received from the appellant, nor did they submit evidence of pre-deposit in terms of Board's Circular No. 1070/3/2019-CX, dated 24.06.2019. It is observed that though sufficient time was granted to the appellant to make the payment of pre-deposit in terms of Circular No. 1070/3/2019-CX, dated 24.06.2019, they have failed to furnish proof of revised payment of pre-deposit of 7.5% of the duty/ Tax made in terms of CBIC Instruction dated 28.10.2022 issued from F.No. CBIC-240137/14/2022-Service Tax Section - CBEC.

12. I find it relevant to mention that the Instruction dated 28.10.2022 was issued by the CBIC consequent to the directions of the Hon'ble Bombay High Court in the case of



Sodexo India Services Pvt. Ltd. Vs. UOI and Ors. in Writ Petition No. 6220 of 2022, which is reproduced below :

"8 Therefore, it does appear that the confusion seems to be due to there being no proper legal provision to accept payment of pre-deposit under Section 35F of the Central Excise Act, 1944 through DRC-03. Some appellants are filing appeals after making pre-deposit payments through DRC-30/GSTR-3B. In our view, this has very wide ramifications and certainly requires the CBI & C to step in and issue suitable clarifications/guidelines/answers to the FAQs. We would expect CBI & C to take immediate action since the issue has been escalated by Mr.Lal over eight months ago."

13. In terms of CBIC's Instruction dated 28.10.2022, I find that the payment made vide DRC-03 cannot be considered as valid payment of pre-deposit. In terms of Section 35F of the Central Excise Act, 1944, the Tribunal or Commissioner (Appeals), as the case may be, shall not entertain any appeal unless the appellant has deposited 7.5% of the duty, in case where duty or duty and penalty are in dispute. These provisions have been made applicable to appeals under Section 85 of the Finance Act, 1994. Hence, this authority is bound by the provisions of the Act and has no powers or jurisdiction to interpret the mandate of Section 35F in any other manner. As such, I hold that for entertaining the appeal, the appellant is required to deposit the amounts in terms of Section 35F, which was not done. I, therefore, dismiss the appeal filed by the appellant for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944.

14. In view of the above, the appeal filed by the appellant is dismissed for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944 as made applicable to Service Tax vide Sub-section (5) of Section 85 of the Finance Act, 1994.

15. 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.

Akhilesh Kumar
15 May, 2023.
(Akhilesh Kumar)
Commissioner (Appeals)

Date: 15.05.2023

Attested

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



BY RPAD / SPEED POST

To,
M/s. Vidhya Subhash Yadav,
Opposite Collector Office,
Palace Road, Idar Highway,
Himatnagar - 383001,
Distt : Sabarkantha, Gujarat.

Copy to: -

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

