आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
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Website : www.cgstappealahmedabad.gov.in

सत्यमेव जयते

आज़ादी का अमृत महोत्सव

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| (क) | फ़ाइल संख्या / File No. | GAPPL/COM/STP/1786/2022-APPEAL \| 2172 -76 |
| (ख) | अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date | AHM-EXCUS-003-APP-033/2023-24 and 22.05.2023 |
| (ग) | पारित किया गया / Passed By | श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals) |
| (घ) | जारी करने की दिनांक / Date of issue | 12.06.2023 |
| (ङ) | Arising out of Order-In-Original No. 110/AC/DEM/MEH/ST/AVKAR/2021-22 dated 25.03.2022 passed by the Assistant Commissioner, CGST, Division-Mehsana, Gandhinagar Commissionerate | |
| (च) | अपीलकर्ता का नाम और पता / Name and Address of the Appellant | M/s Avkar Petroleum, Beside Avkar Dairy, Near Railway Crossing, Himmatnagar-Mehsana State Highway, At-Vijapur, Mehsana - 384570 |

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 डयूटी 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 अपीलः-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गतः-
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 2ndfloor, 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."

## ORDER-IN-APPEAL

The present appeal has been filed by M/s. Avkar Petroleum, Beside Avkar Dairy, Near Railway Crossing, Himmatnagar-Mehsana State Highway, At: Vijapur, Dist: Mehsana – 384570 (hereinafter referred to as "the appellant") against Order-in-Original No. 110/AC/DEM/MEH/ST/AVKAR/2021-22 dated 31.03.2022 issued on 01.04.2022 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division Mehsana, (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. AACPS1935JSD001. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the Financial Year 2016-17, it was noticed that there is difference of value of service amounting to Rs. 4,14,483/- between the gross value of service provided in the said data and the gross value of service shown in Service Tax return filed by the appellant for the FY 2016-17. The appellant were called upon to submit clarification for difference along with supporting documents for the said period. The appellant had vide email dated 09.05.2020 submitted the required details. On verification of the same, it appeared that the documents submitted by the appellant were unsatisfactory / incomplete.

2.1 Subsequently, the appellant were issued Show Cause Notice No. V.ST/11A-258/Avkar Petrolieum/2020-21 dated 07.09.2020 demanding Service Tax amounting to Rs. 62,172/- for the period FY 2016-17, under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; and imposition of penalties under Section 77(2), Section 77C and Section 78 of the Finance Act, 1994.

2.2 The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority wherein the demand of Service Tax amounting to Rs. 62,172/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period from FY 2016-17. Further, (i) Penalty of Rs. 62,172/- was imposed on the appellant under Section 78 of the Finance Act, 1994; and (ii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(2) of the Finance Act, 1994.

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

- The appellant are engaged in providing Business Auxiliary Services. They are running a Petrol Pump by the name "Avkar Petroleum". The Petrol Pump is a Retail Fuel Filling Unit under the company, "Qwik Supply Chain Private Limited. They are receiving income from Quik Supply Chain Private Limited.

- During the FY 2016-17, their Gross Contract Income was Rs. 21,99,992/- as mentioned in their Audit Report. They have also audited their Books of Accounts with Chartered Accountant. Moreover, they have filed their Income Tax Return showing the said Gross Contract Income and the Income Tax Department has accepted the said figures. They have submitted intimation issued by the IT under Section 143(1) of the Income Tax Act, 1961, as a proof of that.

- They have already paid applicable service tax on the said gross receipt of Rs. 21,99,992/- and shown in their ST-3 Returns filed for the said period.

4. Personal hearing in the case was held on 15.03.2023. Shri Shaikh Irshadahmed Gulamnabi, Advocate, appeared on behalf of the appellant for personal hearing. He reiterated submissions made in appeal memorandum. He submitted a written submissions during hearing.

4.1 The appellant, in their additional written submission produced during the course of personal hearing, inter alia, made the following submission:

- As per Bank Statement, credit entries of "Fine Tech Corporation Private Limited" were as under:

| Details | Amount (in Rs.) |
|---|---|
| Total amount credited from Fine Tech during the FY 2016-17 | 18,60,547/- |
| Receivable amount of FY 2015-16 and received in FY 2016-17 | -1,88,937/- |
| | -189,895/- |
| Receivable amount of FY 2016-17 and received in FY 2017-18 | +27,731/- |
| | +3,50,682/- |
| Net Receipts of FY 2016-17 | =18,60,128/- |
| 2% TDS | +37,962/- |
| Gross Contract Income from Fine Tech | 18,98,090/- |

They have submitted all the invoices issued by them during the FY 2016-17 and also submitted that the deductor has done mistake in filing their 26Q TDS return, so incorrect values are showing in their 26AS.

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 demand of service tax against the appellant 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 FY 2016-17.

6. I find that in the SCN in question, the demand has been raised for the period FY 2016-17 based on the Income Tax Returns filed by the appellant. Except for the value of "Sales of Services under Sales / Gross Receipts from Services" provided by the Income Tax Department, no other cogent reason or justification is forthcoming from the SCN for raising the demand against the appellant. It is also not specified as to under which category of service the non-levy of service tax is alleged against the appellant. Merely because the appellant had reported receipts from services, the same cannot form the basis for arriving at the conclusion that the respondent was liable to pay service tax, which was not paid by them. In this regard, I find that CBIC had, vide Instruction dated 26.10.2021, directed that:

> *"It was further reiterated that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns.*
>
> *3. It is once again reiterated that instructions of the Board to issue show cause notices based on the difference in ITR-TDS data and service tax returns only after proper verification of facts, may be followed diligently. Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate show cause notices. Needless to mention that in all such cases where the notices have already been issued, adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee."*

6.1 In the present case, I find that letters were issued to the appellant seeking details and documents, which were also submitted by them. However, the SCN has been issued only on the basis of details received from the Income Tax department stating that the documents were unsatisfactory, without even specifying the category of service in respect of which service tax is sought to be levied and collected. This, in my considered view, is not a valid ground for raising of demand of service tax specifically when the appellant were registered with the Service Tax department and filing their ST-3 Returns from time to time.

7. It is observed that the main contentions of the appellant are that (i) their total income is Rs. 21,99,992/- as per Audit Report, Profit & Loss Account, Income Ledger and Invoices issued by them for the FY 2016-17 and they have already paid applicable service tax on the total income of Rs. 21,99,992/- and shown in their ST-3 Returns filed for the said period; and (ii) the deductor has done mistake in filing their 26Q TDS Return, so incorrect values are showing in their 26AS.

8. I find that below mentioned facts emerged on verifying the documents available on records:

- The appellant have shown income of Rs. 21,99,992/- in the Income Tax Return filed by them for the FY 2016-17, which was processed without any objection by the Income Tax department and issued intimation under Section 143(1) of the Income Tax Act, 1961 on 09.02.2018.
- The appellant have shown total income of Rs. 21,99,992/- in the Audit Report, Profit & Loss Account, and Income ledger for the FY 2016-17.
- The appellant have shown total gross receipt of Rs. 21,99,992/- in their ST-3 Returns filed for the FY 2016-17 and paid applicable service tax on the same.
- The appellant have issued total 12 invoices during the FY 2016-17, totally amounting to Rs. 21,99,992/-.

9. I also find that in the Form 26AS total credit of Rs. 26,14,475/- has been mentioned. However, the appellant contended in their submission that deductor has done mistake in filing their 26Q TDS return, so incorrect values are showing in their 26AS, which appears to be correct, showing corroborative evidence viz. Audit Report, ITR, and intimation under Section 143(1) of the Income Tax Act, 1961.

9.1 I also find that the Hon'ble CESTAT, in their decision in the case of Kush Constructions v. CGST reported at NACIN 2019 (24) G.S.T.L. 606 (Tri. – All.), has held that "Revenue cannot raise the demand on the basis of such difference without examining the reasons for the 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." Therefore, it can be said that the SCN issued without categorically identifying the nature of taxable service involved only on the difference of the Form 26AS and ST-3 Returns may not be valid on the aforesaid grounds, specifically when the Gross Taxable Service Provided figures of ST-3 Returns for the relevant period exactly matches with the Income figures mentioned in Audited Financial Statements, Profit & Loss Account, Invoices issued and Income Tax Return filed by the appellant.

10. In view of the above discussion, I am of the considered view that the appellant have discharged their service tax liability on the total income shown in their Audit Report and Income Tax Return. Therefore, the impugned order passed by the adjudicating authority confirming demand of service tax for the FY 2016-17 is not correct and legal and is required to be set aside. Since the demand of service tax is not sustainable on merits, there does not arise any question of charging interest or imposing penalties in the case.

11. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

12. अपील कर्ता 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)
Commissioner (Appeals) 22nd May, 2023.

Attested

(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad

Date : 22.05.2023

**By RPAD / SPEED POST**

To,

M/s. Avkar Petroleum,
Beside Avkar Dairy,
Near Railway Crossing,
Himmatnagar-Mehsana State Highway,
At Vijapur, Dist: Mehsana – 384570

Appellant

The Assistant Commissioner,
CGST, Division Mehsana.

Respondent

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Gandhinagar
3) The Assistant Commissioner, CGST, Division Mehsana
4) The Assistant Commissioner (HQ System), CGST, Gandhinagar

(for uploading the OIA)

5) Guard File
6) PA file