



सत्यमेव जयते

आयुक्त ( अपील ) का कार्यालय,  
Office of the Commissioner (Appeal),  
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद  
Central GST, Appeal Commissionerate, Ahmedabad  
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.  
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
07926305065- टेलिफैक्स 07926305136



DIN: 20230164SW00002252B1

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2939/2022-APPEAL / 1539 -M1

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-122/2022-23  
दिनांक Date : 19-01-2023 जारी करने की तारीख Date of Issue 20.01.2023

आयुक्त (अपील) द्वारा पारित  
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No. CGST/A'bad North/Div-VII/ST/DC/66/2021-22  
दिनांक: 18.10.2021, issued by Deputy/Assistant Commissioner, CGST, Division-VII,  
Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Manpasand Infracon,  
A-402, Sangath Pearl, Survey No. 75,  
TP-46, Plot No. 60, Motera, Ahmedabad-380005

2. Respondent

The Deputy/ Assistant Commissioner, CGST, Division-VII, Ahmedabad  
North , 4<sup>th</sup> Floor, Shahjanand Arcade, Memnagar, Ahmedabad - 380052

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) केंद्रीय 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।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> 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 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.



(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 मामले 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 2<sup>nd</sup> माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> 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 के 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 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.

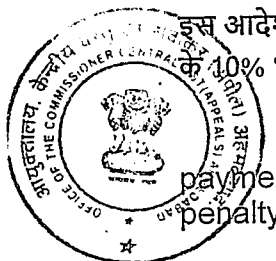
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 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. Manpasand Infracon, A-402, Sangath Pearl, Survey No. 75, TP-46, Plot No. 60, Motera, Ahmedabad – 380035 (hereinafter referred to as “the appellant”) against Order-in-Original No. CGST/A’bad North/Div-VII/ST/DC/66/2021-22 dated 18.10.2021 (hereinafter referred to as “the impugned order”) passed by the Deputy Commissioner, Central GST, Division VII, Ahmedabad North (hereinafter referred to as “the adjudicating authority”).

2.1 Briefly stated, the facts of the case are that the appellant are providing services viz. “Construction of Residential Complex Services” and are holding Service Tax Registration No. AAZFM3704CSD001. During the course of audit of the financial records of the appellant, for the period from April-2014 to March-2017, conducted by the officers of the Central GST, Audit Commissionerate, Ahmedabad, it was observed that the appellant is engaged in activity of construction of residential complex etc. and is availing Cenvat credit of Service Tax paid on the services received by them for their construction activity and utilizing the same for payment of service tax. Out of the various residential premises / flats constructed during the period, some of them had been booked and sold after the issue of the Building Utility permission (BU permission) issued by the Ahmedabad Municipal Corporation on 21.04.2017.

2.2 When the construction is completed and “Completion Certificate” is obtained, what turns out is an immovable property. When such property is sold / transferred after “Completion Certificate” is received, it is deemed to be sale of immovable property which is specifically excluded from the definition of service, in terms of Section 65(B)(44) of the Finance Act, 1994 and such sale does not constitute “Service”.

2.3 The activity of construction attracts Service Tax, if a part or whole of the consideration towards such construction is received prior to Completion Certificate / Building Use permission is received. The activity of construction in which the entire consideration is received after Building Use permission, has been kept out of the scope of “declared services”.

2.4 Accordingly, the appellant is liable to pay Service Tax only for those units, which have been booked / sold before the issue of Building Use (BU) permissions which in the present case is 27.03.2017, under Section 66 of the Finance Act, 1994 read with Service Tax Rules, 1994 and consequentially no Service Tax would be paid for those units which have been sold after the issue of BU Permission.

2.5 The builders undertake the construction of the building having different units. All the material, labour and other expenses are incurred in lump sum. However, the agreement for sale (booking) in respect or different units can be at different stage, right from Bhoomi-poojan to various phases of construction or even after completion or construction and obtaining Completion Certificate/ BU permission. However, during the course of construction of complex,



the builder/ developer utilizes the services of various labour contractors, such as electrical contractors, furniture contractors (for doors/ windows), tiles fitting contractors, colour contractors, architect etc.; constituting major part of expenditure incurred by the builder/ developer. In addition, they also utilize certain services such as security service, telephone service, housekeeping service, etc. The builder/ developer received Service Tax paid invoices from such contractors/service providers and availed the Cenvat Credit of Service Tax paid by the contractors/ service providers.

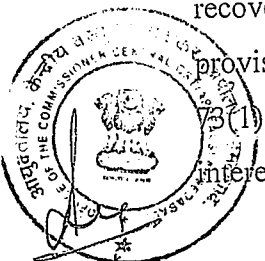
2.6 Consequentially, no Cenvat credit can be availed in terms of Rule 3 of the Cenvat Credit Rules, 2004, till the time a units booked on part/ full payment of consideration, as till such time the person indulged in construction cannot be said to be the "Service provider" and is providing service to self, in so far as the units/ shops not booked/ sold.

2.7 Fact remains that the appellant is very well aware of the booking status of the individual flats/ units and this leads to his knowledge of the fact whether he is an Output Service Provider for that particular units/ shops or otherwise. This position is very clear in light of the provisions of Section 65(22) of the Finance Act, 1994 to which the builder cannot claim ignorance. Thus, the appellant cannot be held to be an Output Service Provider for the individual units/ shops till such time every single units/shops is booked, prior to obtaining Completion Certificate. In a nutshell, till the time a units/shops are booked on payment of part / full consideration, no service is provided or agreed to be provided. Thus, the appellant cannot be said to be an Output Service Provider in respect of such units/shops in as much as there is no service recipient for such units/shops and resultantly no service is provided or agreed to be provided.

2.8 In view of the above, it appeared that the appellant is not entitled to take Cenvat credit proportionate to the services utilized for construction of units/shops which have not been booked/ sold prior to receiving Completion/ BU certificate i.e. Units for which the appellant is not an Output Service Provider. Rule 3(1) of Cenvat Credit Rules, 2004 clearly stipulates that only an output service provider is entitled to take Cenvat Credit.

2.9 The appellant in this case, was eligible to take proportionate credit only for the units booked on payment of consideration, either based on the total area of construction or number of units. However, the appellant had availed full Cenvat credit. Therefore, it was found that the appellant has wrongly taken the Cenvat Credit, in respect of those units which do not constitute service, in violation of the Rule 3(1) of the Cenvat Credit Rules, 2004.

2.10 The above observation were not accepted by the appellant. Hence a SCN bearing No. CTA/04-58/CIR-VII/AP-46/2018-19 dated 16.09.2019 was issued to the appellant proposing recovery of wrongly taken and utilized Cenvat credit to the tune of Rs. 11,18,925/- under the provision of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 read with the proviso of Section 73(1) of the Finance Act, 1994, for the period from April-2014 to March-2017 along with interest under Rule 14(1)(ii) of Cenvat Credit Rules, 2004 read with Section 75 of the Finance



Act, 1994 and proposing penalties under Section 77 of the Finance Act, 1994 and under Rule 15(1) of the Cenvat Credit Rules, 2004 read with Section 76 and Section 78 of the Finance Act, 1994.

2.11 The said SCN was adjudicated ex-parte, vide the impugned order and the demand of recovery of wrongly taken and utilized Cenvat credit amounting to Rs. 11,18,925/- proposed in SCN was confirmed under Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 read with the proviso to Section 73(1) of the Finance Act, 1994 along with interest under Rule 14(1)(ii) of Cenvat Credit Rules, 2004 read with under Section 75 of the Finance Act, 1994. Further, penalty of Rs. 10,000/- imposed on the appellant under Section 77 of the Finance Act, 1994 and penalty of Rs. 11,18,925/- was also imposed on the appellant under Rule 15(1) of the Cenvat Credit Rules, 2004 read with Section 76 and Section 78 of the Finance Act, 1994.

3. Being aggrieved with impugned order, the appellant have filed the present appeal under Section 85 of the Finance Act, 1994 on 07.10.2022. On going through the appeal memorandum, I find that the impugned order was issued on 18.10.2021 and the same was received by the appellant on 31.05.2022 as mentioned by them in ST-4. The present appeal, in terms of Section 85 of the Finance Act, 1994, was filed on 07.10.2022. I also find that the appellant have not filed any application for condonation of delay in filing appeal.

4. It is observed that in terms of Section 85 of the Finance Act, 1994, the appellant were required to file the present appeal on or before 30<sup>th</sup> July, 2022 as the impugned order was received by them on 31.05.2022. However, the appeal was filed on 07.10.2022; after a delay of further 69 days after expiry of period of limitation.

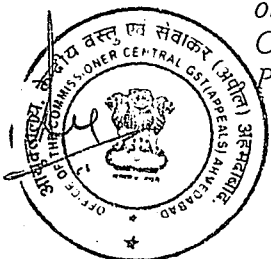
4.1 It is observed that the relevant Section 85 of the Finance Act, 1994, provides that the appeal should be filed within a period of 2 months from the date of receipt of the decision or order passed by the adjudicating authority. Further, under the proviso appended to sub-section (3A) of Section 85 of the Act, the Commissioner (Appeals) is empowered to condone the delay or to allow the filing of an appeal within a further period of one month thereafter, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of two months. Relevant text of Section 85 is reproduced below:

*“SECTION 85. Appeals to the Commissioner of Central Excise (Appeals).—*

*(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).*

*(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.*

*(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority, relating to service tax, interest or penalty under this Chapter, made before the date on which the Finance Bill, 2012, receives the assent of the President:*



*Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.*

*(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter :*

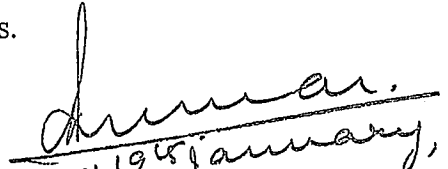
*Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month."*

4.2 I find that in terms of Section 85, the limitation period of two months for filing the appeal in the present cases starts from 31.05.2022 and the appellant were required to file the appeal on or before 30.07.2022. However, the appeal was filed on 07.10.2022, i.e. delay of 69 days of expiry of period of limitation of two months. The Commissioner (Appeals) has power to condone delay for a further period of one month on sufficient cause being shown. But, the appellant has not submitted any application for condonation of delay in filing appeal. Further, the appeal has been filed beyond the period of one month which the Commissioner (Appeals) may condone. Therefore, I reject the said appeal considering Section 85 (3A) of the Finance Act, 1994, as I have no jurisdiction to condone the delay beyond the condonable period of one month.

5. In view of the above discussion and well settled law, without expressing any opinion on the merits of the case, I reject the appeal filed by the appellant on the grounds of limitation.


6. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

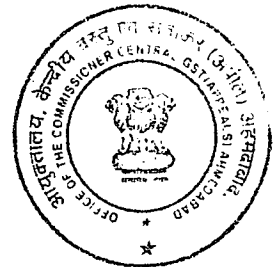
The appeal filed by the appellant stands disposed of in above terms.

  
19 January,  
(Akhilesh Kumar) 2023  
Commissioner (Appeals)

Date : 19.01.2023

Attested

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



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M/s. Manpasand Infracon,  
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Ahmedabad – 380005

Appellant

Respondent

The Deputy Commissioner,  
CGST, Division-VII,  
Ahmedabad North

Copy to :

- 1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
- 2) The Commissioner, CGST, Ahmedabad North
- 3) The Deputy Commissioner, CGST, Division VII, Ahmedabad North
- 4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North  
(for uploading the OIA)

- ✓ 5) Guard File
- 6) PA file

