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- टेलेफैक्स07926305136

सत्यमेव जयते

DIN:20230364SW0000475771

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/3105/2022-APPEAL /9473-77

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-191/2022-23**
दिनाँक Date : **13-03-2023** जारी करने की तारीख Date of Issue 15.03.2023

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

ग Arising out of Order-in-Original No.**06/refund/01/AM/Suryam/2022-23** दिनाँक: **06.07.2022**, issued by Deputy/Assistant Commissioner, CGST, Division-VI, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s Suryam Realtors,
   Shivalik Business Centre,
   B-101, Opp. Kens Villa Golf Academy,
   Behind Rajpath Club, Bodakdev,
   Ahmedabad

2. Respondent
   The Deputy/ Assistant Commissioner, CGST, Division-VI, Ahmedabad North , 7th Floor, B D Patel House, Nr. Sardar Patel Statue , Naranpura, Ahmedabad - 380014

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 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।

(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 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 मामलें 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 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।

(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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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.

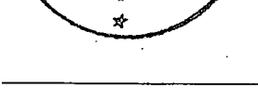
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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. 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 संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर 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.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो 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. Suryam Realotrs, Shivalik Buisness Center, B-101, Opp. Kens Villa Golf Academy, Behind Rajpath Club, Bodakdev, Ahmedabad (hereinafter referred to as "the appellant") against Order-in-Original No. GST-06/Refund/01/AM/Suryam /2022-23 dated 06.07.2022 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division VI, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant are engaged in providing taxable services under the category of Construction of Residential Complex Service and holding Service Tax Registration No. ACNFS6364CSD001. The appellant had filed a Service Tax refund claim on 05.05.2022 for an amount of Rs. 32,93,250/- under Section 11B of the erstwhile Central Excise Act, 1944, as made applicable in the case of Service Tax matter vide Section 83 of the Finance Act, 1994 on the ground that one of their customers, who had made his booking of flat before 1st July, 2017 and had paid partial amount for his booking before implementation of GST law, has cancelled his booking post July 1, 2017. Since the Service Tax had been paid but the output service was cancelled, the service tax was no longer payable and accordingly, they had applied for refund of Service Tax paid by them.

2.1 In the present case, the refund claim has been filed on 05.05.2022, whereas the appellant had made the payment of said amount towards Service Tax made during the period from April-15 to June-2017. Thus, it appeared that the refund claim filed on 05.05.2022 is time barred as per Section 11B of the Central Excise Act, 1944 as made applicable for service tax matters vide Section 83 of the Finance Act, 1994. It was also observed that proportionate Cenvat credit as per Cenvat Credit Rules, 2004 was not reversed by the appellant. Therefore, the appellant were issued a Show Cause Notice No. GST-06/04-07/R-Surya/2022-23 dated 06.05.2022, wherein it was proposed to reject the refund claim under Section 11B of the Central Excise Act, 1944.

2.2 The said SCN was adjudicated by the adjudicating authority vide the impugned order wherein he has rejected the refund claim of Rs. 32,93,250/- under the provision of Section 11B of the Central Excise, Act, 1944 read with Rule 42 of the CGST Act, 2017.

3. Being aggrieved with the rejection of refund claim of Rs. 32,93,250/- vide the impugned order, the appellant have preferred the present appeal on the following grounds:

- The appellant is engaged in providing "Construction of Residential Complex Services" and holding Service Tax Registration No. ACNFS6364CSD001 and GST Registration No. 24ACNFS636401Z0.

- The appellant has started construction of residential units under the scheme named "The Banyan". The appellant had booked various flats in the above-mentioned scheme and received some booking amounts from their customers for which the applicable service tax liability has been discharged as prescribed in Finance Act. The BU for the scheme is received as on 09.01.2020. In the above-mentioned scheme, the unit A-9 has been booked in the pre-GST regime and the advance for the said unit was received in Pre-GST regime. The service tax at the applicable rate on the said advances is duly paid. The unit A-9 was cancelled as on 28-01-2022 i.e., after issuance of BU certificate, and the advance collected is refunded back by the appellant. Therefore, the appellant had filed refund application for claiming refund for service tax paid on advances received from the said customer.

- The provisions of section 11B would be applied in case of tax paid on services, further when there is no service there would be no tax and the amount deposited to the Government would not be considered as Service Tax and the amount deposited would not be covered by the provisions of Section 11B.

- In the present case, the nature of the service falls within the meaning of "Service to be provided". The complete services shall be provided at the time of completion of the residential project. The nature of the service is not a one-time supply, but it is a continuous supply of the service under the agreement which completes over the period of two-three years.

- Further, in the present case the first incidence occurred during the levy of service tax which ultimately cancelled and thereafter the second incidence occurred during the levy of the GST. The Rule 6(3) of the Service Tax Rules, 1994 has clarified that in the event of non-provision of services where the service tax is paid on amount received from the service receiver, the service provider can take the credit of that much amount paid as service tax, subject to the condition that the service provider has returned the entire amount received from the service receiver.

- Thus, in case of non-provision of the services, the service provider had an option to take credit of the service tax paid on the payment received and can be adjusted against the future liability of service tax payment. However, in this case the service was cancelled after implementation of GST and therefore the appellant was not in a position to take the credit as per the provision of Rule 6(3) of the Service Tax Rules, 1994 as the same was not in existence as on the date.

- The service tax paid on such cancelled flat neither can be adjusted against the consequent liability under GST nor the taxes paid can be availed as credit in GST regime. As the taxes paid are refunded to the customer and the ultimate tax burden is

on the appellant, the only option available to the appellant is to opt for refund of the taxes paid on such cancelled flat.

- As per Sub-Section (3) & (5) of the Section 141-Miscellaneous Transitional Provisions- the refund claim filed on or appointed day shall be disposed of in accordance with the provision of existing law and any amount eventually accruing to him shall be paid in the cash.

- Section 11B specifies the time limit of 1 year from the relevant date for claiming refund and the relevant date shall be considered as the date of payment of taxes. However, in the present case the date of cancellation of the flat by the customer shall be considered as the relevant date for calculating the time limit of 1 year for refund, as the event that led to refund of taxes is the cancellation by the customer. If cancellation would not have happened, the refund claim would not have arisen at all. In this regard, they relied upon the following case laws:

  a) CCE, Pune Vs. Ispat Profiles India Ltd. – 2007 (220) ELT 218 (Tri. Mumbai)
  b) SS Agro Industries Vs. Commr. of Cus., Air Cargo (Export), New Delhi - 2014 (309) ELT 334 (Tri. -Del.)
  c) Pallavapuram Tambaram MSW Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai-II - 2018 (6) TMI 1487 - CESTAT MUMBAI

- The adjudicating authority failed to appreciate that no Cenvat should be reversed under Rule 14 of Cenvat Credit Rules, 2004 read with Section 73(1) of the Finance Act, 1994. The completion certificate with respect to scheme "The Banyan" has been granted on 09.01.2020 i.e., in GST regime. The appellant had not availed input tax credit for the transactions that occurred after the date on which the completion certificate was received.

- Merely because a specific transaction is not covered within the ambit of the term "declared service", does not by itself imply that Cenvat credit with regard to the same is not available under the provisions of the Cenvat Credit Rules, 2004 as the intention of the relevant definitions as provided under the Finance Act, 1994 is to determine the taxability or otherwise of a particular transaction. Sub-rule (1) of the Rule 3 to the Cenvat Credit Rules, 2004 clearly stipulates that only an Output Service Provider is entitled to take Cenvat credit of taxes paid. It can be contended that the relevant person should be an output service provider at the time when he is availing the Cenvat credit.

- Service of construction of residential complex and construction services other than residential complex, including commercial/industrial buildings or civil structure is a

"continuous supply of service" and therefore, it will be taxable as and when it will be provided and the provision of the same is concluded when the BU received for the specified scheme. Hence, Cenvat credit availed at the time when construction activity had been in continuance shall be considered legitimate as the appellant was an output service provider at the time of availment of credit.

- Since all the conditions as specified under Rule 3 of the Cenvat Credit Rules, 2004 are met with, the Cenvat credit so availed can neither be denied nor required to be reversed in absence of any specific and direct legal provision. The usage of the words "as is used" in Rule 6 of the Cenvat Credit Rules, 2004 that the intention of law is that in order to determine whether Cenvat credit is required to be reversed or not, the taxability or otherwise of the output service has to be examined only at the time of availment of credit and not subsequently. Eligibility is always determined on the basis of circumstances and law prevailing at the time of taking credit. In order to substantiate the above-mentioned facts, the appellant relied upon the following judicial pronouncements:

    a) The Principal Commissioner Vs. M/s. Alembic Ltd. - 2019 (7) TMI 908 - Gujarat High Court
    b) The Principal Commissioner Vs. M/s. Shreno Ltd. (Real Estate Division) - 2019 (8) TMI 38 - Gujarat High Court
    c) The Principal Commissioner Vs. M/s. Alembic Ltd. - 2019 (7) TMI 1018 - Gujarat High Court
    d) M/s. TPL Developers Vs. Commissioner of Central Tax, Bangalore North - 2019 (3) TMI 37 – CESTAT BANGALORE

- Furthermore, the appellant is referring the Rule 42 of Central Goods and Services Tax Rules, 2017. As per the said rule, proportionate reversal of Input Tax Credit is required in respect of apartments remaining unsold as on date of completion or first occupation, whichever is earlier. The reversal is required to be made on date of completion of project. Such reversal will be on basis of carpet area and not on basis of value (first proviso to Rule 42(i) of CGST Rules, 2017 inserted w.e.f. 1-4-2019).

- Rule 42 of CGST Rules, 2017 explains the method for reversal of input tax credit for units remaining unsold as on receipt of building usage permission. The appellant submits that the reversal of input tax credit as required under Rule 42 of CGST Rules, 2017 is already done at the time of receipt of issuance of completion certificate i.e., 09.01.2020.

- The reversal of the input tax credit amounting to Rs. 2,11,79,303/- has been debited from the credit ledger and cash ledger in the month of September 2020 as per clause

(3) of Rule 42 of CGST Rules, 2017. The reversal for unsold units shall be done before the due date for filing of return for the month of September following the year in which the completion certificate is received.

- As per Rule 42 of CGST Rules, 2017 the appellant has already reversed the total input tax credit amounting to Rs. 2,11,79,303/- (i.e., Rs. 3,77,363/- in IGST, Rs. 1,04,00,970/- in CGST and Rs. 1,04,00,970/- in SGST) while filing GSTR 3B of September 2020. The reversal under Rule 42 of CGST Rules, 2017 has been done by taking all the input tax credit availed by the appellant from the date of 01.07.2017 which is in line with the explanations given under clause (3) of Rule 42 of CGST Rules, 2017.

- The adjudicating authority had rejected the entire claim of refund filed by alleging that the proportionate reversal of input tax credit for units remains unsold as on BU date is not done by the appellant. Whereas in actuality the appellant has complied with the Rule 42 of CGST Rules, 2017 and have reversed the input tax credit for the units remaining unsold as on BU date.

4. Personal hearing in the case was held on 15.02.2023. Shri Arjun Akruwala, Chartered Accountant, and Shri Aashal Patel, Chartered Accountant, appeared on behalf of the appellant for personal hearing. They reiterated submission made in appeal memorandum.

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 case is whether the impugned order passed by the adjudicating authority, rejecting refund claim of Rs. 32,93,250/- under the provision of Section 11B of Central Excise, Act, 1944 read with Rule 42 of CGST Act, 2017 is legal, proper and correct or otherwise.

5.1 It is observed that the adjudicating authority has found the refund claim to be improper and inadmissible for two different reasons, i.e. (i) the refund claim filed by the appellant was time barred as per provision of Section 11B of Central Excise, Act, 1944; and (ii) the appellant has failed to reverse the proportionate Cenvat credit under Cenvat Credit Rules, 2004 / the Input Tax Credit as per Rule 42 of the CGST Rules, 2017.

6. As regard the first issue, i.e. rejection of refund claim as time barred as per provision of Section 11B of Central Excise, Act, 1944, I find that the adjudicating authority had, at Para 18 of the impugned order recorded his finding as under:

"18. I find that the said claimant was required to file the said claim within the stipulated period as provided under Section 11B of Central Excise Act, 1944, which clearly provides that the claim is required to be filed within one year from the relevant

date. The relevant date in this case is date of payment of service tax. In the instant case, the claimant deposited said amount which is well beyond the expiry of one year from the relevant date as provided under the law. I therefore on going through the facts and records find that the said claimant has failed to file the said refund claim within the stipulated period as provided under Section 11B of Central Excise Act, 1944. I therefore conclude that the claim is hit by the limitation of time bar. .... "

6.1 It is the contention of the appellant that no service has been provided and received, therefore, the amount of Service Tax paid by them are in nature of merely deposits and not Service Tax. In this regard, I find that in case of construction of commercial complex services, service tax is required to be paid on the amount received from prospective buyers towards the booking of complex before the issue of completion certificate by the competent authority and this process goes on for years, as has happened in the instant case, and the booking / dealings can be cancelled at any point of time by the buyers before taking of possession of complex by him.

6.2 I find that the service tax is payable on the services provided or to be provided and in this case, once the booking is cancelled and the entire amount is returned to the proposed buyer. Thus, no service has been provided and received. Therefore, the amount of service tax paid by the appellant is in the nature of merely deposits and not service tax.

6.3 In this regard, I also find that the issue has already been decided by the Commissioner, CGST Appeals, Ahmedabad in the case of M/s. Panchratna Corporation, Ahmedabad vide OIA No. AHM-SVTAX-000-APP-023-17-08 dated 29.05.2017, In the said case, it was held at Para 10 of the OIA that *"I find that no service at all has been provided the relevant date of one year and date of payment as per Section 11B of the Central Excise Act, 1944 cannot be made applicable in the instant case."* There is no material on record to indicate that the said OIA has been reversed by any higher appellate authority. Therefore, the said OIA has attained finality.

6.5 I further find that recently Hon'ble Principal Bench of CESTAT, New Delhi, in the case of M/s. Ratnawat Infra Construction Company LLP Vs. CCE & CGST, Jaipur I, in his Final Order No. 50111/2023 dated 06.02.2023 in the Service Tax Appeal No. 51654 of 2022, has allowed the refund of booking amount including service tax to the assessee in similar facts of the case and held that:

"8. Having considered the rival contentions, I find that there is no dispute on facts with regard to booking and cancellation and the refund made by the appellant to the buyer including the amount of service tax. Further, I hold that the appellant is entitled to refund, in view of the Cenvat credit no longer available, in spite of being entitled to

same under Rule 6(3) of Service Tax Rules, the appellant is entitled to refund of such amount u/s 142(3) of CGST Act. I further find that as admittedly the appellant have refunded the booking amount including service tax, the appellant have satisfied the bar of unjust enrichment."

6.6 I further find that similar view also taken by the Hon'ble CESTAT, Mumbai, in the case of M/s. Credence Property Developers Pvt. Ltd. Vs. Commr. CGST & CE, Mumbai East, in his Final Order No. A/85004/2023 dated 05.01.2023 in the Service Tax Appeal No. 85780 of 2020, wherein it has held that:

"5. The first principle of service tax is that tax is to be paid on those services only which are taxable under the said statute. But for that purpose there has to have some 'service'. Unless service is there no service tax can be imposed. For the applicability of the provisions as referred to in the deficiency memo or in the Adjudication order or appellate order, the pre-condition is 'service'. If any service has been provided which is taxable as specified in the Finance Act, 1994 as amended from time to time then certainly the assessee is liable to pay, but when no such service has been provided then the assessee cannot be saddled with any such tax and in that case the amount deposited by the assessee with the exchequer will be considered as merely a 'deposit' and keeping of the said amount by the department is violative of Article 265 of the Constitution of India which specifically provides that "No tax shall be levied or collected except by authority of law." Since Service Tax, in issue, received by the concerned authority is not backed by any authority of law, the department has no authority to retain the same. Buyer booked the flat with the appellant and paid some consideration. The appellant as law abiding citizen entered the same in their books of accounts and paid the applicable service tax on it after collecting it from the buyer. But when the buyer cancelled the said booking on which service tax has been paid and the appellant returned the booking amount along with service tax collected then where is the question of providing any service by the appellant to that customer. The cancellation of booking coupled with the fact of refunding the booking amount along with service tax paid would mean as if no booking was made and if that is so, then there was no service at all. If there is no service then question of paying any tax on it does not arise and the department can't keep it with them. No law authorizes the department to keep it as tax. The net effect is that now the amount, which earlier has been deposited as tax, is merely a deposit with the department and the department has to return it to the concerned person i.e. the assessee. In the fact of this case it can be safely concluded that no service has been provided by the Appellant as the service contract got terminated and the consideration for service has been returned.

6. As per Rule 66E(b), Service Tax Rules, 1994 in construction service, service tax is required to be paid on amount received from buyers towards booking of flat before the issuance of completion certificate by the competent authority and the booking can be cancelled by the buyer any time before the issuance of completion

certificate by the competent authority and the booking can be cancelled by the buyer any time before taking possession of the flat. Once the buyer cancelled the booking and the consideration for service was returned, the service contract got terminated and once it is established the no service is provided, then refund of tax for such service become admissible. The authorities below are not correct in their view that mere cancellation of booking of flats does not mean that there was no service. If the booking is cancelled and the money is returned to that buyer then where is the question of any service? Once it has been held that there is no service then by any stretch 'Point of Taxation Rules, 2011' can't be roped in as for the applicability of the said Rules firstly providing of any 'service' by the Appellant has to be established. Therefore, the authorities below were not justified in invoking the Provisions of Point of Taxation Rules, 2011 for denying the refund.

7. In view of the fact of this case and the discussion held in the preceding paragraphs, I am of the considered view that the Appellant is entitled for refund and the appeal is accordingly allowed."

6.7 In view of the above judicial pronouncements, I find that it is settled position of law that if the service has not been provided, there is no tax and amount paid by the appellant is in nature of merely deposits and Section 11B of the Central Excise Act, 1944 cannot be made applicable in such cases. Therefore, I find that once the booking is cancelled and entire amount is returned, the appellant has not provided any service and whatever the amount paid by them is in the nature of deposits only and they are eligible for the refund, and Section 11B of the Central Excise Act, 1944 cannot be made applicable in such cases. Hence, the impugned order, rejecting the refund on ground that the refund claim filed by the appellant is time barred as per provision of Section 11B of Central Excise, Act, 1944, is not legally sustainable and is liable to be set aside.

7. As regard the second issue, i.e. rejection of the claim for refund on the grounds that they had not reversed the proportionate credit as required under the Cenvat Credit Rules, 2004 / Rule 42 of the CGST Rules, 2017, I find that the appellant, in their ground of appeals, categorically stated that they have already reversed the total input tax credit amounting to Rs. 2,11,79,303/- (i.e., Rs. 3,77,363/- in IGST, Rs. 1,04,00,970/- in CGST and Rs. 1,04,00,970/- in SGST) while filing GSTR 3B of September 2020 under Rule 42 of CGST Rules, 2017 for units remain unsold as on BU date.

7.1 I am also not delving into the merits of the issue that whether proportionate Cenvat credit is required to be reversed / ITC is required to be reversed or not, as in my considered view any recovery, which is not confirmed by way of any order, cannot be recovered from the any refund admissible to the appellant and in the present case, by only alleging that appellant not reversed proportionate Cenvat credit / ITC, cannot debar the appellant from getting refund. If the department is of the view that the appellant are required to reverse Cenvat

credit / ITC, separate proceeding should be initiated under the appropriate provisions of law. Hence, the impugned order alleging that the appellant failed to reverse the proportionate Cenvat credit under Cenvat Credit Rules, 2004 / the Input Tax Credit as per Rule 42 of the CGST Rules, 2017 for rejecting refund is not legally sustainable and is liable to be set aside on this count also.

8. In view of the above discussion, I set aside the order passed by the adjudicating authority and allowed the appeal filed by the appellant.

9. 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) 13.03.2023..
Commissioner (Appeals)

Attested

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

Date : 13.03.2023

By RPAD / SPEED POST

To,

M/s. Suryam Realotrs, Appellant
Shivalik Buisness Center, B-101,
Opp. Kens Villa Golf Academy,
Behind Rajpath Club, Bodakdev,
Ahmedabad

The Assistant Commissioner, Respondent
CGST, Division-VI,
Ahmedabad North

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Assistant Commissioner, CGST, Division VI, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North (for uploading the OIA)
5) Guard File
6) PA file