



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: 20221164SW000000CB21

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/2512/2021-APPEAL /5135- 4~
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-60/2022-23
दिनांक Date : 18-11-2022 जारी करने की तारीख Date of Issue 24.11.2022
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. GST/D-VI/O&A/08/Sarthak/AC/AMP/2019-20
दिनांक: 29.07.2019, issued by Deputy/Assistant Commissioner, CGST, Division-VI,
Ahmedabad-North
- घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Sarthak Developers, 1st Floor, Block-D, Signature-2, Nr. Sarkhej
Sanand Circle, Sanand Road, Ahmedabad-382210

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) 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, 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।

(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 हों।

(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/- की 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, अपीलों 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 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.

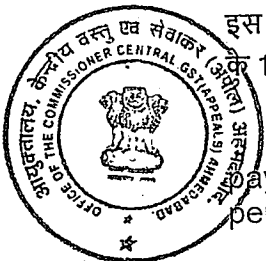
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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. Sarthak Developers, 1st Floor, Block-D, Signature-2, Nr. Sarkhej Sanand Circle, Sanand Road, Ahmedabad-382210. (hereinafter referred to as "the appellant") against Order-in-Original No.GST/D-VI/O&A/08/Sarthak/AC/AMP/2019-20 dated 29.07.2019 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise and Service Tax, Division-VI, Ahmedabad North Commissionerate (referred as the "adjudicating authority" for brevity). The appellant is engaged in providing services of Construction Services and was holding Service Tax Registration Number ACJFS8766LSD001.

2: During the course of audit conducted by the officers of Central Tax Audit, Audit Commissionerate, Ahmedabad for the period April, 2014 to March, 2017, on verification of the Cenvat credit records, it was observed that the appellant has been providing the services for construction of residential complex and was availing Cenvat credit of the 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 Use (B.U.) permission issued by Ahmedabad Municipal Corporation on 25.04.2017.

2.1 Under the negative list regime, certain activities had been made chargeable to service tax, as 'declared services' by virtue of Section 66E of the F.A., 1994. One such declared service is 'construction service'. When the construction is complete, the 'Completion certificate' is obtained and what turns out is the immovable property. When the 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 F.A.,1994, therefore such sale does not constitute service. Thus, the activity of construction attracts service tax, if a part or whole of the consideration towards such construction is received prior to Completion Certificate/B.U. Permissions. The activity of construction in which the entire consideration is received after B.U. permission has been kept outside the scope of 'declared service'. In construction service, service is said to be provided to each individual who books / purchases flats/units/shops, on payment of part/full consideration and not in respect of the entire building constructed. Accordingly, the appellant is deemed to be provider of output service and liable to pay service tax only for those units/residence/flats which have been booked/ sold before obtaining B.U. Permission dated 25.04.2017. Consequently, no Cenvat credit can be availed in terms of Rule 3(1) of the CCR, 2004, till the flat/unit is booked on part/full payment of consideration as till such time the person indulged in construction cannot be said to the 'service provide' and is providing service to self. In view of the above, the appellant is not entitled to take the Cenvat credit proportionate to the services utilized for construction of flats/units which have not been booked / sold prior to receiving the B.U. permission, for which the appellant is not the service provider.

2.2 It, therefore, appeared that the appellant had taken proportionate Cenvat credit the extent of Rs.5,56,443/- and utilized the same for the part of construction in which no element of service was involved. Accordingly, a Show Cause Notice (SCN)



No.CTA/04-214/CIR-VII/AP-44/2017-18 dated 04.07.2018, was issued proposing recovery of wrongly taken Genvat credit amount of Rs.5,56,443/- alongwith interest. Penalty u/s 76, 77 & 78 was also proposed.

2.3 The said SCN was adjudicated vide impugned order wherein the demand was confirmed alongwith interest and penalty. Penalty of Rs.10,000/- was also imposed u/s 77.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant has preferred the present appeal on various grounds made in appeal memorandum.

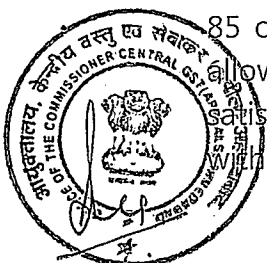
4. On going through the appeal memorandum, it is noticed that the impugned order was issued on 29.07.2019 whereas the present appeal, in terms of Section 85 of the Finance Act, 1994, was filed on 04.10.2021. It was stated that the impugned order was received on 29.09.2021 i.e. after two years. As considerable delay was noticed in the receipt of OIO, the appellant was called upon to submit the proof of acknowledgment of the OIO. The appellant in reply, vide letter dated 11.11.2021, stated that the date mentioned in Appeal Memorandum should be considered as the actual date of acknowledgment.

5. Personal hearing in the matter was granted on 17.08.2022 in virtual mode. However, the appellant sought adjournment. Therefore, another date was granted on 01.09.2022. The appellant vide letter dated 31.08.2022, filed additional submission and informed that they do not want to avail personal hearing and finalise the appeal after considering the records.

6. Meanwhile, letters were also issued to the adjudicating authority on 02.11.2021, and reminder was issued on 19.09.2022, to ascertain the date of acknowledgment of the OIO. In reply to the letters, it was informed that as per the records available, the impugned order was dispatched on 30.07.2019. An excerpt of the register was also attached as proof.

7. Before going into the merits of the case, I will first deal with the delay noticed in filing the present appeal. The appellant claim that the impugned order issued on 29.07.2019 was received by them on 29.09.2021 i.e. after a period of two years. The department, however, has informed that the order was dispatched on 30.7.2019. It is observed that the order was posted for delivery to their registered address: 102, 1st Floor, Signature-II, Opposite Relief Hotel, Sarkhej Sanand Road, Sarkhej, Ahmedabad-382210, the same address which is mentioned by the appellant in their appeal memorandum and because the impugned order dispatched was not returned back by the postal department, it can safely be assumed that the order was delivered to the appellant. In case the order was received only after 2 years, the onus to prove the same remains on the appellant, which I find was not established.

8. 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. 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.....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.]

8.1 I find that in terms of Section 85 of the Finance Act, 1994, the appellant were required to file the present appeal within two months from the date of receipt. Two years is a too long period to justify the postal delivery delay and as no proof was produced before me to justify the date of actual receipt, I find that the present appeal is hit by limitation.

8.2 Further, as per Section 27 of *The General Clauses Act, 1977*, where any Central Act or regulation made authorized or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then unless a different intention appears, the service shall be deemed to be affected by properly addressing, prepaying and posting by registered post, a letter containing the document and unless contrary is proved, to have been effected at the time at which a letter could be delivered in the ordinary course of post.

Relevant text is reproduced below;

27. Meaning of service by post— Where any Act made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expressions, "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered, in the ordinary course of post.

8.3 Hon'ble Supreme Court in *Madan and Co. V. Wazir Jaivir Chhand (1989) 1 SCC 264, 1989 AIR 630*, while dealing with the question as to whether the duty of the landlord was complete by sending the notice with reference to the presumption under Section 27 of General Clause Act, held that once there is proper tender of the demand notice at the correct address then there is service demand notice in view of the



presumption as per Section 27. Similar view was taken by Hon'ble Principal Bench, New Delhi in the case of Oswal Paper & Allied Industries- 2005 (187) E.L.T. 22 (Tri. - Del.).

8.4 I find that in the present case, the impugned order was sent by Registered Post A.D. Therefore, the presumption is that, it would have been served on the appellant within a reasonable time. The appellants could not establish by any evidence that the impugned order was actually received after two years nor did they file any application seeking condonation of delay. Therefore, *prima facie* they have not been able to make out a case in their favour.

8.5 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.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stand disposed off in above terms.

Aruna
(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 11.2022

Attested
Rekha Nair
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Sarthak Developers,
1st Floor, Block-D, Signature-2,
Nr. Sarkhej Sanand Circle,
Sanand Road,
Ahmedabad-382210

The Assistant Commissioner,
CGST and Central Excise, Division-VI,
Ahmedabad North
Ahmedabad

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North.
(For uploading the OIA)
4. The Superintendent (System), CGST, Appeals, Ahmedabad, for uploading the OIA on the website.
5. Guard File.



Appellant

Respondent

