
 सत्यमेव जयते	<b>केंद्रीय कर आयुक्त (अपील)</b> <b>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,</b> केंद्रीय कर शुल्क भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015 टेलीफोन: 079-26305065	 7 <sup>th</sup> Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015 टेलीफैक्स: 079-26305136
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क फाइल संख्या : File No : **V2(ST)308/A-II/2016-17**

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-002-APP-283-17-18**

दिनांक Date : 23/01/2018 जारी करने की तारीख Date of Issue 13-2-2018

**श्री उमा शंकर**, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **SD-02/REF-280/VJP-16-17** Dated **15.02.2017**  
 Issued by **Assistant Commr STC**, Service Tax, Div-II, Ahmedabad

ध अपीलकर्ता का नाम एवं पता  
Name & Address of The Appellants

**M/s. Ashish Construction**  
**Ahmedabad**

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-  
 Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

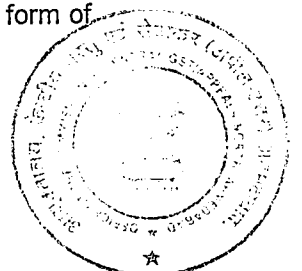
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी.- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of

a file



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219K केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल हैं-

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

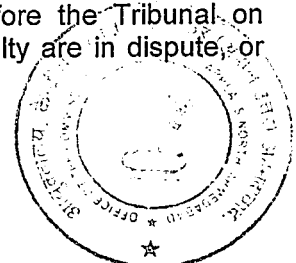
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, 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।

4(1) 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

M/s. Ashish Construction, 105, Krishna Complex, Near Gandhi Bridge, Income Tax, Ahmedabad, (hereinafter referred to as "The appellant") have filed the present appeal against Order-in-Original No. SD-02/Ref-280/VTP/16-17 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Service Tax, Division-II, Ahmedabad (hereinafter referred to as 'the adjudicating authority').they holds Service Tax registration under GTA and Works contract service .

2. Briefly stated facts of the case are, the appellant had filed refund claim on 27.10.2016 for Service Tax amount Rs.17,03,865/-under Section 102 of the Finance Act,1994.the adjudicating authority issued SCN dated: 09.12.2016 for rejecting the refund claim and refund should not be transferred to The Consumer Welfare Fund as per Section 11B of Central Excise Act,1994. The adjudicating authority contended that the CENVAT credit availed during April 2015 to March 2016 is liable to be reversed under Rule 6(3) of CENVAT Credit Rules, 2004 as the same is used in exempted as well as taxable services and also it was hit by the doctrine of unjust enrichment. Accordingly, rejected refund claim to the tune of Rs. 5,20,207/-and the balance amount of Rs. 11,83,658/- was ordered to be credited to The Consumer Welfare Fund.

3. Being aggrieved by the impugned order, the appellant has filed this appeal against the impugned order on the following grounds;

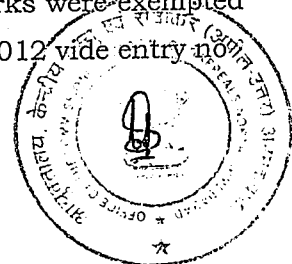
a. that the refund claim is not hit by doctrine of unjust enrichment and that the said amount should not be transferred to consumer welfare fund as the appellant has satisfied the clause (d) of proviso to section 11B(2) of the Central Excise Act, 1944 and accordingly they are eligible for the refund claim.

b. when the contract was entered into with GSPHCL, there was no service tax applicable on the said work which means that service tax was not included in term 'all taxes applicable'. There is no question of collection of service tax from the recipient. The certificate dated 05.01.2017 issued by Gujarat State Police Housing Corporation Ltd. certifies as follows:-

*"M/s. Ashish Construction who was awarded the .....No tax, including service tax, has been separately paid/reimbursed to the contractor by the Corporation. CENVAT availed by the corporation on the contractor's service tax portion has been reversed in the month of March-2016."*

when the contract was entered into with GSPHCL, there was no service tax applicable on the said work which clearly means that service tax was not included in term 'all taxes applicable'. Hence, there is no question of collection of service tax from the recipient.

c. Doctrine of unjust enrichment is not applicable- The appellant has provided Works contract Services to Governmental Authority". The said works were exempted under Mega Exemption Notification no. 25/2012-ST dated 20.06.2012 vide entry no.



12(a), (c) and (f) up to 31.03.2015.W.e.f 01.04.2015, items (a), (c) and (f) in entry 12 of the notification ibid were omitted and were made taxable. The appellant has already entered into agreement with the Governmental Authority before such amendment. As per the agreement, all the taxes were to be borne by the appellant in respect of the works executed for "Governmental Authority". While entering into agreement there was no service tax on the said work, hence in agreement also there is no clause of service tax.

d. The appellant paid service tax from its own pocket and the liability is not passed on to the service receivers. Therefore, the question of unjust enrichment does not arise. Further, the appellant has already submitted the copies of RA Bills which clearly depicts that Service Tax has not been charged separately from the service recipient.

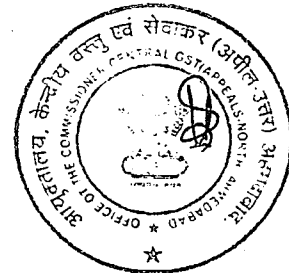
e. The above items (a), (c) and (f) in entry 12 were again inserted in form of entry 12A with retrospective effect from 01.04.2015 with the condition that contract should have been entered into prior to the 1<sup>st</sup> March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date Section 102 inserted w.e.f. 14.05.2016, the appellant is not liable for service tax. Hence, the appellant has filed the refund claim.

f. In the following cases the refunds were granted, wherein the facts are similar to the appellant's case: 1. M/s. Anand Associates Vs. Assistant Commissioner, Service Tax Division Ahmedabad-III, 2. M/s. P.R.Patel & Co. Vs. Assistant Commissioner, Service Tax Division, Bhavnagar, 3. Commr.CE&S.T., Bhavnagar Vs. Modest Infrastructure Ltd. 2013 (31) S.T.R. 650 (Guj.). 4. In case of Addison & Co. Vs. Commissioner of Central Excise, Madras (2003 - TIOL- 396- HC- MAD- CX), 5. *Purnima Advertising Agency Pvt Ltd. Vs. Union of India [2016(42) S.T.R 785(Guj.)]*

That when the amount of service tax is not received from the service recipient then there is no question of unjust enrichment. Hence the appellant is entitled for refund

g. Further, the said amount not be transferred to consumer welfare fund as the doctrine of unjust enrichment is not applicable to the appellant. The incidence of Service Tax and interest paid by the service provider has not been passed on to any other person. Therefore, the appellant has fulfilled the condition of the clause(d) of proviso to section 11B(2) of the Central Excise Act, 1944.

h. Provisions of Rule 6(3) are not applicable- that the appellant has filed refund claim only for the period April-Sept 2015. Accordingly there is no question of reversing CENVAT credit of Rs. 4,89,643/- availed during the period Oct-Mar 2016 as no exempted services were provided during or after the period Oct-March 2016.the CENVAT credit of Rs. 30,564/- is concerned, the said input services were exclusively used against taxable services provided during April-Sept 2015. Accordingly such amount is also not required to be reversed under Rule 6(3) of CENVAT Credit Rules, 2004.



i. Interest is payable for delay beyond period of three months. Section 11BB of the Central Excise Act, 1944, made applicable to Service Tax. They relied on the case of Ebiz.com Pvt Ltd. Vs. Commissioner of Central Excise, Custom & S.T. 2017 (49) S.T.R. 389 (All.).

4. Personal hearing in the case was granted on 4.10.2017. Shri Bishan R. Shah, CA on behalf of the said appellant appeared before me and reiterated the contention of their submissions of GOA. He has submitted copy of the certificate from Gujarat State Police Housing Corporation Ltd. I have carefully gone through the facts of the case on records, Grounds of the Appeal Memorandum, written submission filed by the appellant and oral submission made at the time of personal hearing.

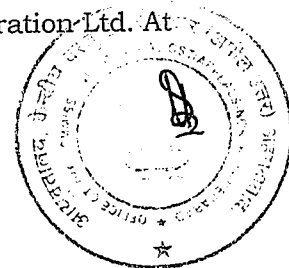
5. I find that, the appellant had filed refund claim on 27.10.2016 for Service Tax amount Rs.17,03,865/- under Section 102 of the Finance Act, 1994. The adjudicating authority issued SCN dated: 09.12.2016 for rejecting the refund claim and refund should not be transferred to The Consumer Welfare Fund as per Section 11B of Central Excise Act, 1994. The adjudicating authority contended that the CENVAT credit availed during April 2015 to March 2016 is liable to be reversed under Rule 6(3) of CENVAT Credit Rules, 2004 as the same is used in exempted as well as taxable services and also it was hit by the doctrine of unjust enrichment. Accordingly, rejected refund claim to the tune of Rs. 5,20,207/- and the balance amount of Rs. 11,83,658/- was ordered to be credited to The Consumer Welfare Fund.

6. In this case, I find that the adjudicating authority has rejected the appeal on two grounds, (a) Rs. 5,20,207/- was rejected on the ground that the appellant has availed and utilized CENVAT credit used in exempted services as well as taxable services, and [b] The claim is hit by the doctrine of unjust enrichment as the appellant did not reimburse the amount of Service Tax collected from the client. Therefore, the Balance amount of Rs. 11,83,658/- ordered to be credited in the Consumer Welfare Fund.

Now, I would like to discuss the issue point wise.

7. As regards the first issue, I find that Rs. 5,20,207/- was rejected on the ground that the appellant has availed and utilized CENVAT credit used in exempted services as well as taxable services. In this regard, I find that, there is no question of reversing CENVAT credit of Rs. 4,89,643/- availed during the period Oct-Mar 2016 as no exempted services were provided during or after the period Oct-March 2016. For the CENVAT credit of Rs. 30,564/- is concerned, the said input services were exclusively used against taxable services provided during April-Sept 2015. Accordingly such amount is not required to be reversed under Rule 6(3) of CENVAT Credit Rules, 2004. In view of the above, I am quite satisfied that the appellant is eligible for the refund of amount of Rs 4,89,643/- rejected by the adjudicating authority.

8. Now, I am going to discuss the second issue that is the claim is hit by the doctrine of unjust enrichment as the appellant did not reimburse the amount of Service Tax collected from the client. I find that, the work order was issued to the appellant before 01.03.2015 by Gujarat State Police Housing Corporation Ltd. At



that time, the service was exempted from payment of service Tax vide Mega Exemption Notification number 25/2012-ST dated 20.06.2012. Thus, it is well understood that at the material time, the remuneration offered to the appellant by the Gujarat State Police Housing Corporation Ltd. was devoid of Service Tax. However, the exemption was withdrawn vide notification number 06/2015-st dated 01.03.2015. Now to collect service tax (which was not included in the work order) the appellant was needed to receive a revised work order from their client. But that never happened. In fact the appellant submitted a certificate from the Gujarat State Police Housing Corporation Ltd. dated 05-01-17, I quote, verbatim, the required contents of the last paragraph of the said certificate as below;

*".....and to whom the payments were made by the corporation during the year FY 2015- 16 are inclusive of all taxes and duties. No tax, including service tax, has been separately paid/reimbursed to the contractor by the Corporation. CENVAT availed by the corporation on the contractors' service tax portion has been reversed in the month of March 2016."*

9. From the above, it is quite clear that the payment made to the appellant during the F.Y.2015-16 were inclusive of the taxes that were prevailing at the material time when the work started or to be precise, when the work order was prepared and handed over to the appellant. The second sentence of the said certificate very clearly says that no tax, including service tax, was separately paid of reimbursed to the contractors by the corporation. This is very clear to assume that whatever payments were getting released to the appellant, were exclusive of the service tax as per Mega Exemption Notification number 25/2015-ST date 20.06.2012. Thus I find force in the argument of the appellant that he never recovered service tax from the client and paid the tax from his own account. The appellant paid service tax from his own pocket and the liability is not passed on to the service receiver. Therefore, the question of unjust enrichment does not arise. I rely on the case laws of

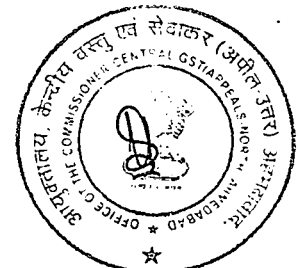
1. Hon'ble High Court of Gujarat In case of Commr.CE&S.T., Bhavnagar Vs. Modest Infrastructure Ltd. 2013 (31) S.T.R. 650 (Guj.). held that;

*"Once the raw material supplier/customer themselves issued certificate that the amount of Service Tax was not received by the assessee from their customers .....and appeal is liable to be dismissed - Section 11B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994."*

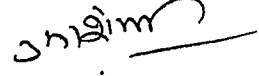
2. In case of Addison & Co. Vs.CCE, Madras (2003 - TIOL- 396- HC- MAD)

3. Purnima Advertising Agency Pvt Ltd. Vs. UOI [2016(42) S.T.R 785(Guj.)

10. Therefore, I confirm that the burden of tax was borne by the appellant and he did not pass the same to his client. In view of the above, I hold that the doctrine of unjust enrichment is not applicable to the instant case and the amount of Rs. 11,83,658/-credited to the consumer welfare fund needs to be recovered and credited to the account of the appellant.



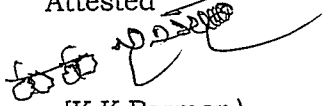
11. In view of my above discussion and findings, I set aside impugned order and allow the appeal with consequential relief.
12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
12. The appeal filed by the appellant stand disposed off in above terms.



[उमा शंकर]  
आयुक्त (अपील्स)

date- /01/18

Attested

  
[K.K.Parmar )  
Superintendent (Appeals)  
Central tax, Ahmedabad.

By Regd. Post AD.

M/s. Ashish Construction,  
105, Krishna Complex,  
Near Gandhi Bridge,  
Income Tax,  
Ahmedabad,



Copy to-

1. The Chief Commissioner, CGST Central Excise, Ahmedabad zone.
2. The Commissioner, CGST Central Excise, Ahmedabad-North.
3. The Asstt. Commissioner, CGSTC.EX. Div-VII, Ahmedabad-North
4. The Asstt. Commissioner (Systems), CGST C.EX. Ahmedabad-North.
5. Guard file.
6. PA File.

