


	केन्द्रीय कर आयुक्त (अपील)	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), GENERAL TAX केन्द्रीय कर शुल्क भवन सातवीं मजिल पॉलिटेकनिक के पास आम्बावाडी, अहमदाबाद-380015	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
 079-26305065		 079-26305136

क फाइल संख्या : File No : **V2(ST)225/A-II/2016-17**

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-002-APP-353-17-18**

दिनांक Date : **28/02/2018** जारी करने की तारीख Date of Issue **23.3.2018**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **SD-02/16/AC/2016-17** Dated **30.09.2016**

Issued by **Assistant Commr STC**, Service Tax, Div-II, Ahmedabad

ध अपीलकर्ता का नाम एवं पता

Name & Address of The Appellants

**M/s. B&H Engineers
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 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

quard

रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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 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 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.

- (6) 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।

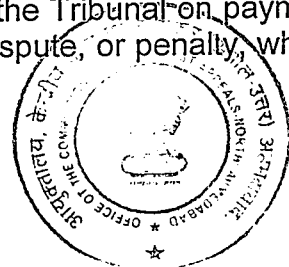
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 सन्दर्भ में इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो मांग 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

M/s. B & H Engineers [hereinafter referred to as the 'appellant'], situated at 118, Ajanta Commercial Centre, Opp. Vidhyapith, Ashram Road, Ahmedabad, are providing the Maintenance or Repair Service and hold Service Tax Registration No. AKIPD9648RST001. The appellant had shown less amount of taxable income in their ST-3 returns when compared to the amount shown as income in the 26AS Certificate of Income Tax for the period 2011-12 to 2013-14. The appellant had also wrongly availed Cenvat credit of Rs.2,48,956/-. Accordingly, a show cause notice was issued to the appellant on the above mentioned grounds. The Adjudicating authority vide Order-in-Original No. SD-02/16/AC/2016-17 dt.30.09.2016 [hereinafter referred as the 'impugned order'], confirmed the demand of Rs.96,114/-, and recovery of wrongly availed Cenvat credit of Rs.2,48,956/-, along with interest and also imposed penalties on the appellant. Being aggrieved by the OIO, the appellant has filed this appeal before me.

2. The facts of the case, in brief are that, on verification of the ST-3 returns and Form 26AS (Annual Statement under Section 203AA of the Income Tax Act, 1961) for the year 2010-2013-14 of the appellant, it was noticed that the gross amount shown in the ST-3 returns was less as compared to the amount shown in the Form 26AS Certificate and hence it was presumed that they had short paid Service Tax thereon amounting to Rs. 1,61,307/-. The said appellant had also not filed half-yearly ST-3 returns for the period from April'13 to September'14. On scrutiny of the ST-3 returns for the period 2010-11, it was found that the said appellant had claimed threshold exemption vide Notification No. 8/2008-ST dt.01.03.2008, as amended, and they have not paid Service Tax. But the main condition of the exemption Notification stated that the aggregate value of taxable services rendered by a provider of taxable service should not exceed ten lakh rupees in the preceding financial year. The jurisdictional officer sought the appellant's income for the year 2009-10, but the appellant did not submit the information and nor did they filed the ST-3 return for the concerned period, and therefore it was decided to deny the exemption to the appellant and demand Service tax amounting to Rs. 65,193/-, from them. On scrutiny of the ST-3 returns for the period 2011-12 filed on 13.01.2015, it was noticed that the appellant had taken Cenvat Credit of Rs.2,48,956/-. As per Rule 4(1) of the Cenvat Credit Rules, 2004, the Cenvat credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output services. As the appellant had not fulfilled the above condition, it was assumed that the

appellant had wrongly taken and utilised the Cenvat Credit of Rs.2,48,956/-, during the year 2012-13, and therefore the same was to be recovered from them. The appellant had suppressed the facts in the instant case in as much as they had not declared the above-mentioned facts at the relevant time and contravened the provisions of Rule 4 of the Cenvat Credit Rules, 2004, with an intent to evade payment of duty. Therefore a Show cause notice was issued to the appellant on 14.10.2015. The Adjudicating Authority vide the impugned order dt. 30.09.2016, confirmed the demand of Rs.96,114/-, and recovery of wrongly availed Cenvat credit of Rs.2,48,956/-, along with interest and also imposed penalties on the appellant.

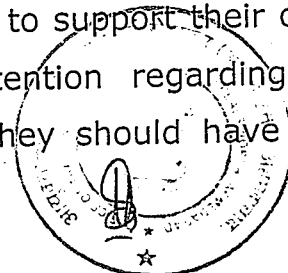
3. Being aggrieved by the said OIO dt. 20.01.2017, the appellant has filed this appeal before me on the grounds that (i) there is total non-application of mind by the adjudicating authority by not giving any reasons for not accepting the submissions of the appellant; (ii) the action of determining value of such works contracts under Rule 2A(ii)(C) of the Service Tax (Determination of Value) Rules, 2006, is illegal; (iii) excessive penalty has been imposed illegally; (iv) the Service Tax demand on 60% of gross value and not on 40% of gross value would have no benefit to the department as it is a revenue neutral matter; and (v) the services rendered by the providers were undoubtedly used for execution of original work and so cannot be categorized under the residuary Clause (C) of Rule 2A(ii).

4. The appellant was provided opportunity for personal hearing in the matter on 14.09.2017, 12.10.2017, 1.11.2017, 20.12.2017, 13.01.2018 and 2.02.2018, but the appellant did not attend any of the hearings.

5. I have carefully gone through the facts of the case on record, grounds of appeal in the Appeal Memorandum and submissions made by the appellant.

6. The question to be decided is as to whether i) the demand of Rs. 96,144/-, being erroneous should be dropped; (ii) the Cenvat credit of Rs. 2,48,956/-, should be allowed as if complies with the terms and conditions of the Cenvat Credit Rules, 2004; and (iii) Penalty may be dropped under section 78 and limitation period may not be invoked under Section 73(1) of the Finance Act, 1994.

7. The appellant's plea that the Department has erred in calculating the service tax demand in the show cause notice is based on their own assumption, without any documentary evidence to support their contention. If the appellant wants to justify their contention regarding improper calculation of the service tax demand, then they should have submitted



some documentary proof to substantiate their contention. Even if an assessee requires the Department the assessable value to be calculated on a cum duty price method, he needs to provide accounting records, invoices, etc. to justify the same. In the absence of any such documentary evidence, I don't find any reason to differ with the impugned order of the Adjudicating Authority in this regard.

8. As regards the wrongly availed Cenvat Credit amounting to Rs. 2,48,956/-, in the Show Cause Notice, the appellant contends that the Cenvat Credit has been availed in 2012 itself and not on 13.01.2015. They contended that only the return has been filed on 13.01.2015, while the Cenvat credit has been taken in time. Their contention that the Cenvat Credit Rules, 2004, does not deter an assessee to avail the Cenvat credit if he has not furnished the return in time cannot be overlooked. The Cenvat Credit Rules, 2004, requires availing of Cenvat Credit immediately after receipt of the inputs. The appellant had not filed their ST-3 returns for the period 2011-12 till 13.01.2015. However, they had utilized the Cenvat Credit of Rs.2,48,956/-, for the payment of Service tax for the year 2012-13, as indicated in the Show Cause Notice dt.14.10.2015. The availment of Cenvat Credit is not linked with the ST-3 return filed by an assessee. Therefore, the Cenvat Credit of Rs.2,48,956/-, is allowed as the appellant had availed Cenvat Credit and utilized the same for payment of Service tax for the year 2012-13. As the Cenvat Credit is allowed, the Penalty of Rs.2,48,956/-, imposed under Rule 15(3) of the Cenvat Credit Rules, 2004, is also set aside.

9. I therefore, partially uphold the impugned order dt.30.09.2016, as indicated above and set aside the demand pertaining to the Cenvat Credit of Rs.2,48,956/-.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeals filed by the appellant, stands disposed off on above terms.

उमा शंकर

(उमा शंकर)
आयुक्त (अपील्स)

ATTESTED



(R.R. NATHAN)
SUPERINTENDENT,
CENTRAL TAX APPEALS, AHMEDABAD.



To,

M/s. B & H Engineers,
118, Ajanta Commercial Centre,
Opp. Vidhyapith, Ashram Road,
Ahmedabad-380009.

Copy to:

- 1) The Chief Commissioner, Central Tax, GST, Ahmedabad Zone.
- 2) The Commissioner, CGST, Ahmedabad (North).
- 3) The Dy./Asst. Commissioner, Division-VII, CGST, Commissionerate-Ahmedabad(North).
- 4) The Asst. Commissioner(System), CGST, Hqrs., Ahmedabad(North).
- 5) Guard File.
P.A. File.

