



# आयुक्त का कार्यालय, (अपीलस)

Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

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क फाइल संख्या : File No : V2(ST)104 /North/Appeals/2018-19

7588/07592

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-EXCUS-002-APP-116-18-19

दिनांक Date : 20-Nov-18 जारी करने की तारीख

Date of Issue 10/11/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-06/08/AC/Shah Industries/16-17 Dated 15-Dec-16 Issued by Assistant Commissioner , Central GST , Div-VI , Ahmedabad North.

घ अपीलकर्ता का नाम एवं पता

Name & Address of The Appellants

## M/s Shah Industries Unit No. 1

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:-

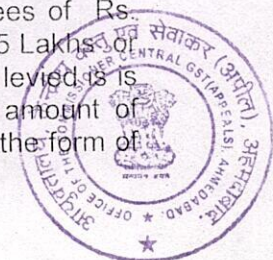
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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



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 **अधीक्षक** 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, 1994 की धारा 34फ के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 43 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 अर्जी एवं अपील को लागू नहीं होंगे।

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

This appeal is filed by M/s. Shah Industries, Unit No. 1, C-1/257, 258, 270, 271 and 273, Phase-1, GIDC Estate, Naroda, Ahmedabad 382 330 [for short –‘appellant’] against OIO No. SD-06/08/AC/Shah Industries/16-17 dated 14.12.2016 by the Assistant Commissioner, Service Tax Division VI, Ahmedabad [for short – ‘adjudicating authority’].

2. Briefly, the facts are that the appellant was issued a show cause notice dated 7.1.2016, inter alia alleging that they had failed to pay differential interest on late payment of service tax. The notice also proposed penalty on the appellant under section 78 of the Finance Act, 1994.

3. The adjudicating authority vide his aforementioned impugned OIO confirmed the demand of interest and further imposed penalty on the appellant under section 78 of the Finance Act, 1994.

4. Feeling aggrieved, the appellant has filed this appeal. I am reproducing the grounds of appeal in toto, for the sake of ease of reference:

**: GROUNDS OF APPEAL :**

That the adjudicating authority has not appreciated the facts and circumstances of the case. Therefore, the OIO passed for demanding interest and imposing penalty deserves to be set aside.

That while audit party had audited records of the appellant's unit for the period November'2012 to February'2014 , the appellant has not paid service tax on foreign commission and as per the direction of the audit party, the appellant has paid an amount of Rs. 639359/- vide E. No. 1483 of RG 23A Pt. II. The interest of Rs. 64669/- vide challan No. 51658 dtd. 23/03/2014 and penalty too . When whole amount is paid along with interest and penalty, no further amount is required to be paid. Therefore, on this basis of above , no Show cause notice was issued and the proceedings were come to conclude.

That further audit was conducted for the period February'14 to deceiver'2014, it was observed that the appellant has taken credit of Rs. 639359/- on sales commission agents and it was again reversed under protest vide debit E. No. 1112 dtd. 07/01/2015 as it was required to be paid in cash under RCM. When the amount of service tax paid under RCM is available as credit to the Appellant, demand of interest and imposing penalty is improper and illegal and the said OIO requires to be set aside to that extent.

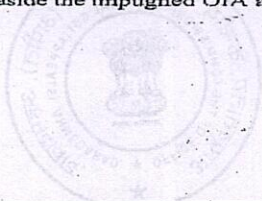
Page No.4.....

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Further as per the judgment of Hon'ble HC of Gujarat in the case of **INDSUR GLOBAL LTD** , the Hon'ble HC held that duty can be debited from Cenvat account and cenvat amount is considered as duty and on the basis of this judgment, other HC has held the same view and held that it is not required to pay in cash though it is violation of Rule 8(3A) of CER,1944. So the same ratio is also applicable in this case. Therefore, the appellant has earlier debited from cenvat account was right way and considered it valid by audit party but all of sudden for the next audit party has taken different view when the matter is already in knowledge of the deptt. Therefore, in this case, interest and penalty is not leviable.

That when the said amount was debited on direction of the audit officer and it was on record of the deptt., the deptt can not reopen the said period without authority of Law and again directed forcefully to debit service tax in cash . Therefore, the said audit party has intentionally done this process to save his skin. Therefore, in view of the above, the OIO passing for demanding interest and imposing penalty which is completely unsustainable in Law .

In view of the submissions made above, Your Honour is requested to allow the appeal and set aside the impugned OIA appealed against and oblige.



5. Personal hearing in the matter was held on 26.10.2018, wherein Shri N.K.Oza, Advocate appeared on behalf of the appellant. The learned advocate reiterated the grounds of appeal.

6. I have gone through the facts of the case, the grounds of appeal and the oral submission made during the course of personal hearing.

7. I am constrained to note that the appeal has been filed in the most cavalier fashion. The appeal papers do not contain the show cause notice against which the impugned OIO dated 14.12.2016, was issued. Though the appeal was received in this office via courier on 20.7.2018, in the form ST-4, under Sr. No. 4, which depicts the date of communication of the impugned OIO to the appellant, the date of receipt is shown as 25.9.2018 by the appellant. Since this looked bizarre, the appellant was called up to ascertain the correct date and it was informed that they had received the impugned OIO on 25.4.2018.

8. Surprisingly, the OIO issued on 15.12.2016, was received by the appellant on 25.4.2018. On going through the statement of facts, the grounds of appeal, which has been reproduced in toto *supra*, I find that they have not given or even stated anything as to how this OIO was received so late by the appellant. It was incumbent on the appellant to inform the reasons as to why this was so. The appellant has filed the appeal on 20.7.2018. Section 85 of the Finance Act, 1994 deals with appeals to Commissioner, which states as follows:

Section 85. Appeals to the [Commissioner] of Central Excise (Appeals). —

[(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.]

The appellant was supposed to file the appeal latest by 24.6.2018, which he failed to do. The appeal is received on 25.4.2018 which is beyond the stipulated time. Further, the appellant has not filed any application for condonation of delay. No sufficient cause is made out which could enable me to condone the delay in terms of the proviso to Section 83(3A) of the Finance Act, 1994. **Ideally, the appeal should fail on limitation.**

9. But after having said so, it would be prudent if the merit in the matter is also examined. The appellant, [as I understand from what is available in the appeal papers], was supposed to pay service tax on reverse charge mechanism in respect of services of foreign agents received from outside India. The appellant paid the amount through CENVAT credit when they should have discharged the liability through PLA. The amount was subsequently paid through PLA. Therefore, the audit pointed out that they were liable to interest of Rs. 1,33,372/- in respect of the late payment. It goes without saying that the appellant is liable for interest since their earlier payment of duty through CENVAT was in violation of explanation of Rule 3(4) of the



CENVAT Credit Rules, 2004, which prohibits utilization of CENVAT credit for payment of service tax in respect of services where the person is liable to pay tax as a service recipient, viz.

[Explanation. - CENVAT credit cannot be used for payment of service tax in respect of services where the person liable to pay tax is the service recipient.]

The appellants next contention by relying on the case of Indsur Global Limited [2014 (310) E.L.T. 833 (Guj.)] would not be applicable since this is a judgement pertaining to Rule 8(3A) of the Central Excise Rules, 2002, which is not at all a dispute in the present case. In view of the foregoing, I uphold the confirmation of interest by the adjudicating authority.

10. The appellant has also argued that penalty is not leviable. No reasoning/ground is put forth as to why the imposition of penalty in the impugned OIO is wrong/not legally tenable. Without pointing out what is wrong with the impugned OIO imposing penalty, I cannot interfere with the impugned OIO as far as penalty is concerned.

11. In view of the foregoing, the appeal fails on merit and limitation. The appeal stands rejected.

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

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

*उमा शंकर*

(उमा शंकर)

आयुक्त (अपील्स)

Date 20.11.2018

Attested

*Vinod Lukose*  
(Vinod Lukose)  
Superintendent (Appeal),  
Central Tax,  
Ahmedabad.

By RPAD.

To,  
M/s. Shah Industries,  
Unit No. 1, C-1/257, 258, 270, 271 and 273,  
Phase-1, GIDC Estate,  
Naroda,  
Ahmedabad 382 330.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad North Commissionerate.
3. The Assistant Commissioner, Central Tax Division- I, Ahmedabad North Commissionerate.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad North Commissionerate.
5. Guard File.
6. P.A.



