



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)124 /North/Appeals/2018-19

9845709850

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-EXCUS-002-APP-165-18-19

दिनांक Date : 11/01/2019 जारी करने की तारीख Date of Issue 26/3/2019

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-OriginalNoDiv-VII/North/108/Refund/Patel Cement/18-19 Dated 16/08/2018 Issued by Assistant Commissioner , Central GST , Div-VII , Ahmedabad North.

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

M/s Patel Cement Products

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 :-

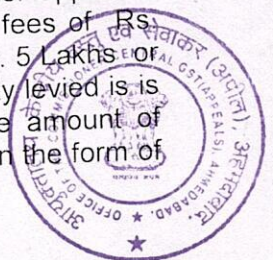
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी 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 नाभित 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 is 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, 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 है --

- (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 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. Patel Cement Products, 3, S.F. Swastic Super Market, Ashram Road, Navrangpura, Ahmedabad (hereinafter referred to as the 'appellant') has filed the present appeal against Order-in-Original NO. Div-VII/North/108/Refund/Patel Cement/18-19 Dated 16.08.2018 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Central Tax & Service Tax Division VII, Ahmedabad-North (hereinafter referred to as 'adjudicating authority').

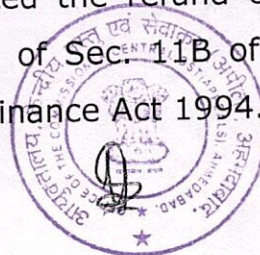
2. The facts of the case, in brief, are that the appellant is holding Service Tax Registration number AADFP3055DSD001. They had filed refund claim of Rs. 32,55,869/- vide their letter dated 27.04.2018, before the adjudicating authority. The said refund application was received in the office of the adjudicating authority on 01.05.2018. The appellant, in their ground of refund claim, had submitted that -

(a) the services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of in relation to common Effluent Treatment plant (In short known as CEPT) is exempted from levy of service tax by virtue of entry No. 13D of Notification No. 25/2012-Service Tax dated 20.06.2012.

(b) during the year from 2014-15 to 2016-17, the appellant has provided works contract services relating to Common Effluent Treatment Plant and had wrongly paid service tax of Rs. 32,55,869/- under works contract service category during that period.

(c) the appellant had wrongly paid the service tax despite of exemption was provided to construction of common effluent treatment plant, therefore refund of Rs. 32,55,869/- arise.

3. On scrutiny of the refund application the adjudicating authority found that the refund application was filed after the expiry of the due date. Further, in the present issue it is not forthcoming as to whether the service tax as claimed by the appellant was born by them and not recovered from the ultimate consumer. In the ground of refund they have not indicated the same. The adjudicating authority, vide the above mentioned impugned order, rejected the refund claim on the ground of limitation under the provisions of Sec. 11B of the Central Excise Act 1994 read with Sec. 84 of the Finance Act 1994.



4. Feeling aggrieved, the appellant has filed the present appeal against the rejection of the refund claim, on the grounds *which are inter alia mentioned* that:

(a) Principle of natural justice has not been followed and the impugned order was passed without giving ample opportunity to the appellant.

(b) the adjudicating authority finding, in the impugned order that it is not forthcoming as to whether the service tax as claimed by the appellant was born by them and not recovered from the ultimate consumer, is baseless, cryptic and vague. The appellant has already submitted the invoices raised to customers and from the invoices it is very clear that the appellant has not charged any service tax from the customers. Service provider has not passed the burden of the service tax paid by him to the customers. The appellant has paid the service tax from his own pocket.

(c) Service tax provided by the appellant is exempted vide entry no. 13(d) of the Mega Exemption Notification No. 25/2012-Service Tax dated 20.06.2012. So, there is no question to collect the service tax from the consumers and appellant has also not collected service tax from the customers.

(d) the refund claim was rejected considering it as time barred, without going further into the merits of the case.

(e) Section 11B of the Central Excise Act, 1944 is not applicable on wrong deposit of tax. Section 11B of the act states procedure of refund of duty or tax paid under the provisions of the law.

5. Personal hearing in the matter was held on 13.12.2018 wherein Shri. Nitin Patel, partner of M/s Patel Cement Products and Shri. Devang Gajjar, Chartered Accountant, appeared on behalf of the appellant and reiterated the contents of appeal memorandum. Further, in the Tender Documents of 'Narol Textile Infrastructure & Enviro Management (NTIEM)', it was pointed out during P.H. that the Section C2(C.2.1.1) of the said Tender documents shows price to be cum duty. Further, the section A.1.22 of the tender documents also talks about prices inclusive of all taxes. It was asked during P.H. that why it should not be presumed that they chose to pay duty and did not avail exemption.



6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum, oral submissions made by the appellant at the time of personal hearing and additional submission made by the appellant. I find that issue to be decided is whether the appellant chose not to avail exemption and whether they are eligible for refund or otherwise.

7. In the present case, I find that the appellant had decided to file the claim of refund on the ground that they had erroneously paid the service tax of Rs. 32,55,869/- under works contract service category during the financial year from 2014-15 to 2016-17. They had erroneously paid the service tax despite the fact that exemption was available for services provided by way of construction of common effluent treatment plant under Notification No. 25/2012-Service Tax dated- 20th June, 2012, as amended. Further, on going through the para 9 of the impugned order, I find that the appellant has claimed for refund of the erroneously paid amount after expiry of one year from the date of the payment.

8. Further, The appellant has submitted Tender Documents in connection with 'Narol Textile Infrastructure & Enviro Management (NTIEM)' and pointed out Section C2(C.2.1.1) of the said Tender documents which shows price to be cum duty. I reproduce here the copy of the said part of Section C2(C.2.1.1) of the said Tender document.

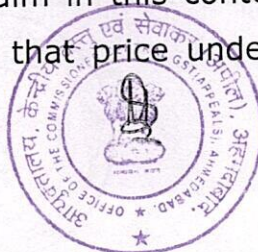
C-2: ADDITIONAL GENERAL

SECTION: C-2

C.2.1 TAXES AND DUTIES ON INDIGENOUS MATERIAL

C.2.1.1 All charges on account of Octroi, Terminal Entry Tax, Sales Tax, Excise Duty, etc and other duties on indigenous material obtained for the works from any source shall be borne by the contractor (subject to provisions made in the tender). As per the amendment of Sales Tax Act which came into force from Aug. 1985, Sales Tax on Works Contracts shall be paid by the Contractor and no reimbursement will be made by NTIEM for the same.

In view of the above, it is evident that the price has been indicated as Cum-Duty-price. Even Section A.1.22 categorically say that "the rates quoted by the tenderer shall be inclusive of all taxes, duties, octroi, etc. and no claim in this context shall be entertained." Therefore, there is no doubt that price under consideration was cum duty price.



9. Now, I would like to reproduce the relevant paras of Section 11B of the Central Excise Act, 1944 (as made applicable in the case of Service Tax matter vide Section 83 of the Finance Act, 1944) for proper clarity;

"Section 11B. Claim for refund of duty and interest, if any, paid on such duty -

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

.....

.....

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

.....

....."

[Emphasis supplied]

10. On examining the refund claim in this backdrop I find that the appellant could not file the refund claim within the stipulated time limit prescribed under Section 11B of Central Excise Act, 1944. Now, the main issue remains to me is whether the adjudicating authority has rightly rejected the claim on the ground of limitation, or otherwise. The claim was rejected mainly on the ground that it was filed late. It is very clear that the appellant was supposed to apply for the refund within a period of one year from the date of payment. However, all their arguments fall flat as the Section 11B of Central Excise Act, 1944 itself, very clearly, states that they had to apply for the refund within a period of one year from the date of payment of such duty. Their argument has no impact on the case as the issue is not a procedural matter to be overlooked or condoned. Further, in the period of self assessment choosing of a notification is voluntary which can not be



termed as mistake of law. Law and rules are very clear and it was chosen voluntarily. Therefore, the judgments of various Tribunals, quoted by the appellant, will not be applicable to the present case. As the appellant had filed the refund claim beyond the time limit prescribed under Section 11B of the Central Excise Act, 1944 (as made applicable in the case of Service Tax matter vide Section 83 of the Finance Act, 1944) , I proclaim that they are not eligible for the refund claim. In view of the above, I find that the adjudicating authority has rightly rejected the claim as time bar under Section 11B of the Central Excise Act, 1944.

11. Therefore, I do not find any reason to interfere in the impugned order and in view of above discussions, I up held the impugned order passed by the adjudicating authority and reject the appeal filed by the appellant.

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

(उमा शंकर)

प्रधान आयुक्त (अपील्स)

Attested

S. Dutta
(S. Dutta)

Superintendent (Appeals)
Central Tax, Ahmedabad

To,

M/s. Patel Cement Products,
3, S.F.Swastic Super Market,
Ashram Road, Navrangpura,
Ahmedabad-380009.



Copy to:

- (1) The Chief Commissioner, Central GST, Ahmedabad Zone.
- (2) The Commissioner, Central GST, Ahmedabad North.
- (3) The Assistant Commissioner, Central Tax & Service Tax Division VII, Ahmedabad-North.
- (4) The Assistant Commissioner(RRA), Central GST, Ahmedabad North.
- (5) The Asstt. Commissioner(System), Central GST HQ, Ahmedabad.
(for uploading the OIA on website)
- (6) Guard file

