



सत्यमेव जयते

आयुक्त का कार्यालय),अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-
Ahmedabad



जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad-380015
☎ 26305065-079 : टेलिफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20210164SW0000666EA7

स्पीड पोस्ट

- क फाइल संख्या : File No : File No : GAPPL/COM/STP/156/2020-Appeal/321
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-046/2020-21**
दिनांक Date : **19.01.2021** जारी करने की तारीख Date of Issue : **29.01.2021**
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **Div. VII/North/29/Refund/Lyka/19-20** dated **04.03.2020**,
passed by Assistant Commissioner, Central GST & Central Excise, Div.-VII, Ahmedabad-North
- ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- - M/s Lyka Engineering Services, 02nd Floor, Baronet Shopping Centre,
Sabarmati, Ahmedabad.

Respondent- Assistant Commissioner, Central GST & Central Excise, Div.-VII, Ahmedabad-North

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) केन्द्रीय 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.



o/c

(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 हो।

(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 प्रतियां 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/- 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, अपीलो 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.

- (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 रु.10 करोड़ रूप 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 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

This appeal has been filed by M/s. Lyka Engineering Services, 2nd Floor, Baronet Shopping Centre, Sabarmati, Ahmedabad (here-in-after referred to as the “appellant”) against the Order-in-Original No.Div.VII/North/29/Refund/Lyka/19-20 dated 04.03.2020 (here-in-after referred to as the “impugned order”) issued by the Assistant Commissioner, CGST & C.Ex, Division-VII, Ahmedabad North (here-in-after referred to as the “adjudicating authority”).

2.1. The facts of the case, in brief, are that the appellant was engaged in providing taxable services viz. Erection, Commissioning & Installation Service and Management, Maintenance & Repair Services and was having Service Tax Registration No. ADKPM5955FST001. Acting on intelligence, the officers of Service Tax department initiated inquiry against the appellant and found that they were indulging in service tax evasion by way of providing taxable service and collecting service tax on it but **not paying** the same in the Govt. of India’s account. Accordingly, a Show Cause Notice was issued on 24.10.2008 demanding service tax alongwith interest and imposition of penalty. During investigation, the appellant had paid Rs. 2,00,000/- on 07.01.2008, Rs. 50,000/- on 22.02.2008 and Rs. 5,50,000/- on 21.03.2008. The said SCN was decided vide OIO No. STC-07/JC/ 2010-11 dated 26.05.2010 wherein service tax demand amounting to Rs. 18,63,323/- on Management, Maintenance & Repair Services and Rs. 5,74,297/- on Erection, Commissioning & Repair Service were confirmed and was ordered for recovery alongwith Interest. The adjudicating authority also imposed penalty under Section 76, Section 77 and Section 78 of the Finance Act, 1944.

2.2. Being aggrieved with the OIO dated **26.05.2010**, the appellant preferred an appeal before the Commissioner (Appeals-IV), Central Excise, Ahmedabad, who vide OIA No. 66/2011 (STC)/K. Anpazhakan/Commr(A)/Ahd dated 25.03.2011 rejected the appeal filed by the appellant.

2.3. Being aggrieved with the OIA dated 25.03.2011, the said appellant preferred an appeal before the Hon’ble CESTAT, Ahmedabad who vide Order No. A/11901/2019 dated 30.09.2019 abated the appeal due to death of Proprietor of appellant firm. Subsequently, the said appellant filed refund claim amounting to Rs. 8,00,000/- which was the amount paid during the investigation. The adjudicating



authority rejected the refund claim vide impugned order dated 04.03.2020 on the ground that the Hon'ble CESTAT has abated appeal filed by the appellant and hence the case has attained the finality for the outstanding amount only and not for the amount which was already paid; that the amount of Rs.8,00,000/- paid by the appellant was nothing but the amount paid towards the service tax for the services rendered by them; that the Hon'ble CESTAT has not discussed the legality of the demand but abated due to death of the proprietor of the firm which does not mean that the Hon'ble CESTAT has set aside the order passed by the original adjudicating authority.

3. Being aggrieved by the impugned order dated 04.03.2020, the appellant have filed the instant appeals on the grounds that:

- That the amount during investigation is deemed to have been paid under protest and relied upon judgement of Hon'ble CESTAT and also various judgement of Hon'ble High Court;
- That once factum of death of proprietor is known to the department, proceeding required to be dropped and relied upon the judgement of Hon'ble CESTAT, Chandigarh in case of M.K. Enterprise vs Chandigarh-I;
- That amount of Rs.8,00,000/- paid during investigation is to be treated as deposit and the same cannot be retained by the revenue and to be refunded with interest. In support of the same, the appellant relied upon the judgement of Hon'ble Delhi High Court in case of Surinder Singh vs Union Of India 2006 (204) E.L.T 534 (Del.), judgement in case of Kuil Fireworks vs CCE 1997(95) E.L.T 3 (SC) and CCE Hydereabd vs ITC 2005 (179) E.L.T 15(SC), judgement of Hon'ble Allahabad High Court in case of EBIZ.COM Pvt. Ltd vs Commissioner of C.Ex, Customs & Service tax and others etc.

4. Personal hearing in the matter was held on 17.12.2020 through virtual mode. Shri Bishan R. Shah, CA appeared on behalf of the appellant for hearing and reiterated the submissions made in Appeal Memorandum.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the Appeal Memorandum. I find that the issue to be decided in the matter is as to whether in the facts and circumstances of the case, the appellant's



claims for refund by treating it as deposit is legally permissible as per the provisions of Section 11B of the Central Excise Act, 1944 or otherwise?

6.1 I observed that the appellant in appeal memorandum contended that the amount paid during investigation is deemed to have been paid under protest; that once factum of death of proprietor is known to the department, proceeding required to be dropped and amount paid during investigation is to be treated as deposit and the same cannot be retained by the revenue and to be refunded with interest & relied upon various judgements in support of the same. It is observed that in the present case, the Hon'ble CESTAT, Ahmedabad vide their order dated 30.09.2019 decided the appeal due to death of Proprietor of the appellant and passed order as under:

The appellant is proprietary concern. Sh Bishan R Shah Ld. Chartered Accountant appearing for the appellant submits that the Proprietor Smt. Parulben has expired and he submitted her death certificate issued by Government of Gujarat, Department of Health and Family Welfare. Considering the submissions made by the Ld. Counsel, the appeal is abated and disposed of, accordingly.

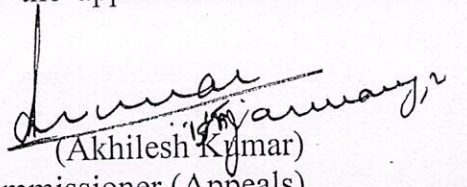
6.2. From the above, I find that Hon'ble CESTAT vide their order dated 30.09.2019, has held that the appeal filed by the appellant before the Hon'ble Tribunal is abated due to death of the proprietor of the appellant firm. It is observed that legal effect of abatement of an appeal is only termination of appeal proceedings preferred before the appellate forum and it does not terminate the entire proceedings *ab initio*. Therefore, when an appeal gets abated, the order which is appealed against stand revived. Consequently, the liability which stands confirmed against the late proprietor by the lower authorities does not get extinguished on account of the abatement of appeal. But recovery proceedings in such situation in respect of sums due to the exchequer from the said appellant may not be possible in view of the decision of the Hon'ble Supreme Court in the case of Shabeena Abraham Vs. Collector of Central Excise & Customs [2017 (50)STR 241 (S.C.)]. It does not mean in any way that the demand which stand confirmed gets set aside and the amount if any already paid in the matter becomes refundable as a result, as is seem to be understood by the applicant of the refund. So long as the demand confirmed is not set aside, the amount if any paid stand appropriated against the demand so confirmed and there does not arise any situation of refund in the matter.

Therefore, the case has attained finality for the outstanding amount only and not

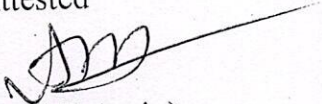


dropping the demand in respect of the amount which was already paid by the appellant. Refund of tax, if any, would arise only in a situation when the demand is set aside, which is not the case here. Therefore, I do not find any force in the contention made by of the appellant and hold that the appellant is not eligible for the refund and adjudicating authority has correctly decided the refund claim of the appellant.

7. In view of facts discussed herein above, I uphold the impugned order and reject the appeal filed by the appellant. The appeal filed by the appellant stands disposed of in above terms.


(Akhilesh Kumar)
Commissioner (Appeals)
Ahmedabad
19 / 01/2021

Attested


(Atul B Amin)
Superintendent (Appeals)
CGST, Ahmedabad

By R.P.A.D

To

M/s. Lyka Engineering Services,
2nd Floor, Barinet Shopping Centre,
Sabarmati, Ahmedabad.



Copy to:

1. The Principal Chief Commissioner, Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner, CGST & C.Ex, Division-VII, Ahmedabad North.
4. The Assistant Commissioner, System-CGST, Ahmedabad North.
5. Guard File.
6. P.A. File.

