



आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५,
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टेलिफैक्स 07926305136



DIN: 20231064SW0000909D3

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1498/2023-APPEAL/7226-32
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-122/2023-24
 दिनांक Date : 25-10-2023 जारी करने की तारीख Date of Issue 30.10.2023
 आयुक्त (अपील) द्वारा पारित
 Passed by Shri Shiv Pratap Singh, Commissioner (Appeals)
- ग Arising out of Order-In-Original No. 247/AC/DEMAND/22-23 दिनांक: 30.11.2022, Issued by The Assistant Commissioner, CGST Division-I, Ahmedabad North
- घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s. Mukeshkumar Baldevbhai Patel, E-201, Shukun City, Opp. Aaryavilla Flat, New Ranip, Ahmedabad - 382470

2. Respondent

The Assistant Commissioner, CGST Division-I, Ahmedabad North, Ground Floor, Jivabhai Mansion, Ashram Road, Ahmedabad-380009

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 :

(i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में एवरोष द्वारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, सीधी सचिवालय, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(ii) 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 :

(iii) 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 प्रक्रिया के दौरान हुई हो।

(iv) 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.



- (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 मामले 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.

अतिरिक्त उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट प्राप्त की गई है और ऐसे आदेश जो इस द्वारा एवं नियम के मुताबिक आयुक्त, अपील को द्वारा पारित हो लागू कर या बाद में विल अधिनियम (नं०) 1998 द्वारा 109 द्वारा नियुक्त किए गए हैं।

- (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.

- (i) केन्द्रीय उत्पादन शुल्क (अपील) नियमवली, 2001 के नियम 9 के अंतर्गत डिभिजेंट प्रपत्र संख्या ईए-8 में दो प्रतियों में प्रेषित प्रदेश के प्रति आवेदन प्रेषित दिनांक से तीन महीने के भीतर भुक्त-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ संवित आवेदन किया जाना चाहिए। उससे साथ खाता है, या मुख्यशरीर के अंतर्गत धारा 35-ई में निर्धारित की के भुगतान के समूह के साथ टीआर-6 चालान की प्रती गी 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) विधिवत आवेदन के साथ यहाँ संलग्न रहन एक लाख रुपये या उससे कम हो तो रुपये 200/- कीस भुगतान की जाए और यहाँ संलग्न रहन 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.

- (i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-ई के अंतर्गत—

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

- (क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा गी अपील, अपील के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (ट्रिब्यूनल) की पहिली क्षेत्रीय पीठिका, अहमदाबाद में 2^म 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 सम्मेलन होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि सिखा फीस 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 वहां संशोधित की अनुसूची-1 को अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णय 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 और 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 (हार्मोनाइज्ड) 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.

- (7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (डिस्ट्रेट), के प्रति अपील को लगने 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) सैंड 11D के तहत निर्धारित राशि;
- (ii) सिद्ध गलत सेनैट क्रेडिट की राशि;
- (iii) सेनैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

→ यह पूर्व जमा 'संबंधित अपील' में पहले पूर्व जमा की सूचना में, अपील दाखिल करने के लिए पूर्व जमा करना 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 आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क का 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. Mukeshkumar Baldevbhai Patel, E-201, Shukan City, New Ranip, Opp. Aaryavilla Flat, Ahmedabad- 382470 (hereinafter referred to as "*the appellant*") have filed the present appeal against Order-in-Original No. 247/AC/DEMAND/2022-23 dated 30.11.2022 (hereinafter referred to as "*the impugned order*") passed by the Assistant Commissioner, Central GST, Division I, Ahmedabad North (hereinafter referred to as "*the adjudicating authority*"). The appellant are holding PAN No. AFSPP4477K.

2. Briefly stated, the facts of the case are that on the basis of the data received from the Central Board of Direct Taxes (CBDT) for the Financial Year 2015-16, it was noticed that the appellant during the F.Y 2015-16 had reflected an income of Rs. 30,97,163/- under the heads ("Sales / Gross Receipts from Services" in the ITR) filed before the Income Tax department on which no service tax was discharged. Letters were, therefore, issued to the appellant to explain the reasons for non-payment of tax and to provide certified documentary evidences for said period. The appellant neither provided any documents nor submitted any reply justifying the non-payment of service tax on such receipts. The detail of the income is as under;

Table-A

<i>F.Y.</i>	<i>Value as per ITR/P & Account</i>	<i>Service tax rate</i>	<i>Service Tax liability</i>
2015-16	30,97,163/-	14.5%	4,49,089/-

2.1 A Show Cause Notice No. STC/AR-1-15-16/UNREG/21-22/259 dated 23.04.2021 was issued proposing Service Tax demand amounting to Rs.4,49,089/- for the period F.Y 2015-16, under proviso to Section 73(1) of the Finance Act, 1994. Recovery of interest under Section 75 of the Finance Act, 1994 and imposition of penalties under Section 77(1) (a) and Section 78 of the Finance Act, 1994 were also proposed.

2.2 The Show Cause Notice was adjudicated, ex-parte, vide the impugned order by the adjudicating authority wherein the Service Tax demand amounting to Rs. 4,49,089/- was confirmed along with Interest. Penalty of Rs. 4,49,089/- under Section 78 and Penalty of Rs. 10,000/- under Section 77(1)(a) of the Finance Act, 1994 was also imposed.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the following grounds:

- They claim that during F.Y 2015-16, they had traded in shares and securities to the tune of Rs. 30,97,163/- and had not provided any services as alleged in the impugned order. Copy of ledger of share delivery- 'Sales & Sales Trading' Sales-F&O' shown in the books of accounts, ledger of Broker- Nirmal Bang Securities Pvt. Ltd., Balance Sheet & P&L account, ITR Form 26AS are submitted as provided.



➤ As per provisions of Section 65 B (44) of Finance Act, 1994, 'Service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-(a) an activity which constitutes merely- (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution. Further, the term goods is defined in Section 65B (25) wherein "goods" means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Thus, on conjoint reading of above provisions, it can be said that goods includes securities. As the appellant had entered into transactions for sale of shares and securities to the tune of Rs. 30,97,163/- and have not provided any taxable service hence the differential amount was on account of above consideration, which is not a taxable income. Therefore, demand of Rs. 4,49,089/- alongwith interest and penalty is bad in law and liable to be quashed as no taxable service was provided by the Appellant.

➤ Imposition of penalty under Section 77(1) (a) and Section 78 as relevant provisions of Finance Act, 1994 are not applicable as the demand itself is void *ab initio*.

4. The appellant was granted hearings on 11.08.2023, 21.08.2023 and 11.09.2023. On 11.09.2023 they appeared before the then appellate authority. However, due to change in appellate authority fresh personal hearing was granted on 11.10.2023, but nobody appeared for personal hearing. Since enough opportunity was granted to the appellant, I proceed to decide the appeal on the basis of the submissions made during earlier hearing and the documents available on record.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum, submissions made during earlier hearing and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of Rs. 4,49,089/- against the appellant along with interest and penalty, in the facts and circumstance of the case is legal and proper or otherwise. The demand pertains to the period F.Y 2015-16.

6. It is observed that the entire demand has been raised on the basis of third party data. The income of Rs. 30,97,163/- earned by the appellant in the F.Y. 2015-16 and reflected under the head 'sale of service' in their ITR has been considered as a taxable income. The appellant, however, claim that during said period they were engaged in trading of share & securities. They claim that securities are covered under the definition of 'goods' defined under Section 65B (25) and since trading of share and securities being sale of goods, are excluded from the definition of 'service' defined under Clause (44) of Section 65B of the F.A., 1994. Hence, they are not liable to discharge any service tax on the income earned through trading activity.

6.1 The appellant submitted Ledgers of Share, Balance Sheet, Profit & Loss Account, ITR, Sales, Sale of Securities, have gone through the



above documents and it is observed that the appellant in their Profit & Loss account have shown Sales income of Rs. 30,97,163/-. Out of which Rs.23,20,813/- is shown as income from Share delivery and Rs. 7,76,350/- is shown as income from Share trading Sales. I find that Share Delivery Sale & Share trading is in respect of sale of shares which is considered as goods and not a service. The term 'service' is defined under clause (44) as;

"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

- (a) *an activity which constitutes merely,—*
 - (i) *a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
 - (ii) *such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or*
 - (iii) *a transaction in money or actionable claim;*
- (b) *a provision of service by an employee to the employer in the course of or in relation to his employment;*
- (c) *fees taken in any Court or tribunal established under any law for the time being in force.*

6.2 Further, I find that 'goods' is defined in clause (25) of Section 65B as;

"goods" means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

6.3 Similarly, I find that 'Securities' has the meaning assigned in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 as;

(h) *"securities" include—*

- (i) *shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;*

6.4 The appellant has earned income of Rs.30,97,163/- from sale of shares & securities. Since shares are also a type of security, I find that they are covered under the scope of the definition of term 'goods' defined in clause (25) which explicitly includes 'securities'. Further, sale of goods being excluded from the scope of the definition of 'service', I find that the above income of Rs.30,97,163/- earned from sale of share / trading of shares cannot not be considered a taxable income considering the explicit inclusion in the definition of goods and exclusion given in the definition of 'services', as contained in clause (25) and clause (44) of Section 65 B of the Finance Act. The appellant have produced sufficient evidences to establish that the income earned was from share trading & share delivery sales. Hence, I find that the disputed income cannot be treated as a taxable income.



7. In view of the foregoing, I find that the appellant is not liable to pay service tax amounting to Rs.4,49,089/- on the above disputed income.

8. When the demand does not sustain, question of interest and penalties also does not arise. Accordingly, I find that the impugned order confirming the service tax demand of Rs.4,49,089/- alongwith interest and penalties is not sustainable on merits.

9. In view of the above discussion, I set-aside the impugned order and allow the appeal of the appellant.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.


(मानचंद वैना)
आयुक्त (अपील)

Date: 25.10.2023

Attested


(रैखा नावर)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,

M/s. Mukeshkumar Baldevbhai Patel,
E-201, Shukan City, New Ranip,
Opp. Aaryavilla Flat,
Ahmedabad- 382470

The Assistant Commissioner,
Central GST, Division I,
Ahmedabad North

Appellant

Respondent

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North.
(For uploading the OIA)

4. Guard File



