



सत्यमेव जयते

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



DIN:20230564SW0000612282

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/02/2023-APPEAL / 1136 - 40
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-020/2023-24
 दिनांक Date : 02-05-2023 जारी करने की तारीख Date of Issue 09.05.2023
 आयुक्त (अपील) द्वारा पारित
 Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. CGST/WT07/HG/329/2022-23 दिनांक: 17.08.2022,
 issued by Deputy/Assistant Commissioner, CGST, Division-VII, Ahmedabad-North
- ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Mehul Shivkumar Gupta,
 E-502, Trisha Apartment, Near Sakar English School,
 New C.G. Road, Chandkheda, Ahmedabad-382424

2. Respondent

The Deputy/ Assistant Commissioner, CGST, Division-VII, Ahmedabad
 North, 4th Floor, Shahjanand Arcade, Memnagar, Ahmedabad - 380052

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) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतः 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 प्रक्रिया 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.



(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 प्रतियों 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 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 अनुसूचि-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.

- (7) 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.

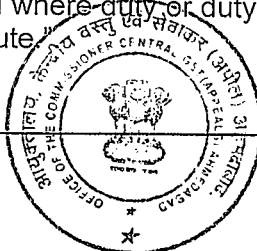
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 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

M/s. Mehul Shivkumar Gupta, E-502, Trishala Apartment, Near Sakar English School, New C.G. Road, Chandkheda, Ahmedabad- 382424 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. CGST/WT07/HG/329/2022-23, dated 17.08.2022, (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-VII, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*'). The appellant were engaged in providing taxable services but were not registered with the Service Tax Department.

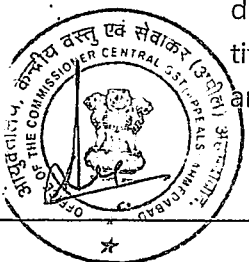
2. The facts of the case, in brief, are that on the basis of the data received from the Central Board of Direct Taxes (CBDT) for the F.Y. 2014-15, it was noticed that the appellant had earned substantial income by providing taxable services. They had earned income of Rs. 18,05,650/- during the F.Y. 2014-15, which they reflected under the heads "Sales / Gross Receipts from Services (Value from ITR)" or "Total Amount paid / credited under Section 194C, 194I, 194H, 194J (Value from Form 26AS)" of the Income Tax Act, 1961, on which no tax was paid. Letters were, therefore, issued to the appellant to explain the reasons for non-payment of tax and to provide certified documentary evidences for the F.Y. 2014-15 as well as for the F.Y. 2015-16 to 2017-18 (upto June, 2017). The appellant neither provided any documents nor submitted any reply justifying the non-payment of service tax on such receipts. The service tax liability was, therefore, quantified considering the income of Rs. 18,05,650/- as taxable income, based on the data provided by the Income Tax Department and the service tax liability of Rs. 2,23,178/- for F.Y. 2014-15 was accordingly worked out.

2.1 Show Cause Notice (SCN) No. CGST/AR-V/Div-VII/A'bad-North/TPD UR/88/2020-2021 dated 27.09.2020 was, therefore, issued to the appellant proposing recovery of service tax amount of Rs. 2,23,178/- not paid on the value of income received during the F.Y. 2014-15 along with interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalties under Section 77(1), 77(2) and Section 78 of the Finance Act, 1994 were also proposed. Service Tax demand for the F.Y. 2015-16 to 2017-18 (upto June, 2017) to be ascertained in future was also proposed.

2.2 The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs. 2,23,178/- was confirmed alongwith interest on the taxable services provided during the F.Y. 2014-15. Penalty of Rs. 10,000/- under Section 77(1), Penalty of Rs. 5000/- under Section 77(2) and penalty of Rs. 2,23,178/- was also imposed under Section 78 of the F.A., 1994.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, alongwith application seeking condonation of delay in filing the appeal, on the grounds elaborated below:-

- The income of Rs. 18,05,650/- shown in the Balance Sheet/ITR during the F.Y. 2014-15 is relating to trading activities on which service tax is not levied. In term of the definition of 'service' provided under Section 65B (44), activity of mere transfer of title in goods by way of sale is excluded. Balance Sheet and Profit & Loss Account are submitted as evidence.



- Demand notice was issued without investigation and merely on the data received from I.T. department, which is not sustainable in law.
- The SCN has been issued without verifying the facts and without granting sufficient opportunity to the appellant to submit the documents. Another opportunity ought to have been granted as the records were not readily available due to COVID pandemic. The notice proposes demand for the F.Y. 2014-15 whereas the adjudicating authority has confirmed the demand for the F.Y. 2015-16.
- Proprietor of appellant firm is a handicapped person and is a small time trader engaged in the sale of goods (stationary items like note books, pen, pencils) for which neither VAT nor Service Tax registration was required to be obtained. In single letter three different dates were granted within a span of five days and during that period the appellant was out of station hence could not attend the same.
- As there was no need to obtain registration and file returns, wilful suppression of case cannot be alleged. Nor penalty under Section 77 (1), Section 77 (2) or Section 78 is imposable.

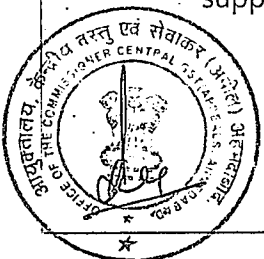
3.1 On going through the appeal memorandum, it is noticed that the impugned order was issued on 17.08.2022 and was claimed to be received by the appellant on 12.09.2022. However, the present appeal in terms of Section 85 of the Finance Act, 1994, was filed on 09.12.2022 i.e. after a delay of 27 days from the last date of filing appeal. The appellant, therefore, filed a Miscellaneous Application seeking condonation of delay. The appellant have stated that they were not registered with the department hence were not aware of the appeal procedures in Service Tax matters. Further, as the Proprietor is handicapped person having restricted movement, there was delay in filing the appeal. They, therefore, requested to condone the delay of 27 days, as the same is within the condonable period.

4. Personal hearing in the COD matter was held on 16.03.2023. Shri M.K. Kothari, Consultant, appeared on behalf of the appellant. He reiterated the submissions made in the Miscellaneous Application seeking condonation of delay in filing the appeal.

4.1 Thereafter, another personal hearing was granted on 18.04.2023 which was attended by Shri M.K. Kothari, Consultant, on behalf of the appellant. He reiterated the submissions made in the appeal memorandum and also submitted additional written submissions dated 17.04.2023.

5. In the additional submissions dated 17.04.2023, they have submitted that the service tax demand confirmed was without ascertaining the facts and corroboration from the service receiver, hence, cannot sustain. They also contended that the income data provided by CBDT cannot be a basis for determining the service tax liability unless there is any evidence to show that it was due to a taxable service. In support of their contention, they placed reliance on following case law. Further they also contended that since the income and working of the appellant was in the public domain suppression cannot be alleged. Thus, the demand invoking extended period shall not sustain in the absence of suppression.

- Vatsal Resources Pvt. Ltd.-2023 (68) GSTL 279 (Tri-Ahmd)
- Reynolds Petro Chem Ltd.-2023 (68) GSTL 292 (Tri-Ahmd)



6. Before taking up the issue on merits, I will first decide the Miscellaneous Application filed seeking condonation of delay. As per Section 85 of the Finance Act, 1994, an appeal should be filed within a period of 2 months from the date of receipt of the decision or order passed by the adjudicating authority. Under the proviso appended to sub-section (3A) of Section 85 of the Act, the Commissioner (Appeals) is empowered to condone the delay or to allow the filing of an appeal within a further period of one month thereafter if, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of two months. Considering the cause of delay as genuine, I condone the delay of 27 days and take up the appeal for decision on merits.

7. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as the additional submissions made vide letter dated 17.04.2023. The issue to be decided in the present case is as to whether the service tax demand of Rs. 2,23,178/- confirmed alongwith interest and penalties in the impugned order passed by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise?

The demand pertains to the period F.Y. 2014-15.

7.1 It is observed that the entire demand has been raised in the SCN based on the income data shared by the CBDT, on which no service tax was paid by the appellant. The appellant did not file any reply to the SCN nor did they appear for personal hearing before the adjudicating authority. It is observed that three personal hearing dates (01.08.2022, 03.08.2022, 05.08.2022) were communicated to the appellant vide single letter dated 27.07.2022. As, the appellant did not avail any of these opportunities, the adjudicating authority had decided the case ex-parte considering the evidences available on record since there was neither a reply to the Show Cause Notice issued nor any attendance during the personal hearings granted.

7.2 In the appeal memorandum, however, the appellant have claimed that the income reflected in the Balance Sheet / ITR relates to trading activity. They claim that they are engaged in trading activity (i.e. selling of school stationary items like books, pens, pencils etc) which in terms of the definition of 'service' provided under Clause (44) of Section 65B of the F.A., 1994 is excluded. They also submitted copy of Balance Sheet, P& L Account for the F.Y. 2014-15, in support of their contention.

7.3 On going through the Balance Sheet submitted by the appellant, it is observed that the appellant have received income of Rs. 18,40,820/- by Sale of Goods i.e. by trading. However, they also earned 'Other Income' amounting to Rs. 2,36,710/-, out of which Rs. 2,12,000/- was earned by Rent and Rs. 24,710/- was earned as Commission. Thus, the appellant has earned income from trading as well as from non-trading activity. So, their claim that they were only involved in trading activity is not maintainable. Further, it is observed that the SCN has proposed service tax demand on the income of Rs. 18,05,650/- and considering the fact that the appellant, other than trading activity, have also earned income from commission, I find that it would be imperative to examine the nature of service rendered by the appellant against which commission was received. In the present case this was not examined as the appellant did not produce relevant documents before

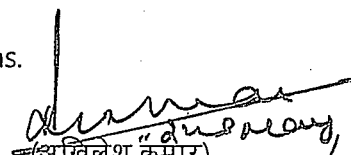


the adjudicating authority. Further, the appellant's claim that trading activity is excluded from the purview of 'service' also needs to be examined especially when transfer of title in goods by way of sale is excluded and categorically covered under the negative list.

8. Board, vide Instruction dated 26.10.2021, has directed that where the show cause notice were issued based on the third party data, the adjudicating authority should pass judicious order after proper appreciation of facts and submission of the noticee. The appellant, before the adjudicating authority, did not submit the above documents hence the adjudicating authority could not examine the exemption claimed under various notifications. Now, since the appellant have produced Balance Sheet & Profit & Loss Account which were not submitted before the adjudicating authority, I, therefore, in the interest of justice, remand back the case to the adjudicating authority to decide the case afresh and for passing the speaking order in view of submission made by the appellant and keeping in mind the CBIC Instruction dated 26.10.2021 as well as the observations made above. The appellant is also directed to submit all the relevant documents like reconciliation statement showing the income received from said trading activity, services for which commission was earned during the disputed period, copy of Invoices reflecting commission, ITR, corroborating their above contention, to the adjudicating authority, within 15 days. The adjudicating authority shall decide the case afresh on merits and accordingly pass a reasoned order, following the principles of natural justice. The appellant is also directed to avail the opportunity of personal hearing granted in the matter and make necessary submission before the adjudicating authority. Accordingly, I remand the matter back to the adjudicating authority, who shall pass the order after examination of the documents and verification of the claim of the appellant.

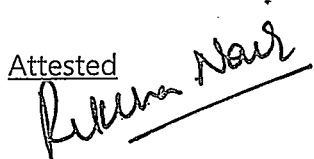
9. In light of above discussion, I set-aside the impugned order confirming the service tax demand of Rs. 2,23,178/- alongwith interest and penalties and allow the appeal filed by the appellant by way of remand.

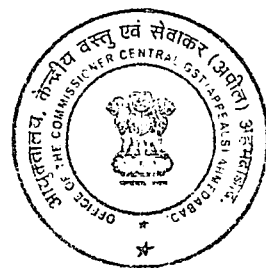
10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.


(अखिलेश कुमार)
आयुक्त(अपील्स) 02.05.2023

Date: 02.05.2023

Attested


(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad



By RPAD/SPEED POST

To,
M/s. Mehul Shivkumar Gupta,
E-502, Trishala Apartment,
Near Sakar English School,

Appellant

New C.G.Road, Chandkheda,
Ahmedabad- 382424

The Assistant Commissioner,
Central GST, Division-VII,
Ahmedabad North
Ahmedabad

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.

