



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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आज़ादी का
अमृत महोत्सव

By SPEED POST

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(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/4396/2023/1609-13
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-EXCUS-002-APP-211/23-24 and 30.01.2024
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	31.01.2024
(ङ)	Arising out of Order-In-Original No. 296/AC/DEMAND/22-23 dated 16.12.2022 passed by The Assistant Commissioner, CGST Division-I, Ahmedabad North	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	Mehulkumar Manubhai Trivedi C/o. Parth Mehta & Associates, 1217, Shivalik Shilp-2 Opp ITC Narmada, Nr. Keshvbaug Party Plot Vastrapur, Ahmedabad

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 :-

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 :-

(क) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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।

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.

(ख) 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।

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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(घ) 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।

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.

(2) 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 भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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 :-

(2) उक्तलिखित परिच्छेद 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।

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 above para.

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 पढ़ी 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 अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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 (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) एके प्रति अपील के मामले में कर्तव्यमांग (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 सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की मांग (Duty Demanded)।

- (1) खंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिया गलत सेनवैट क्रेडिट की राशि;
- (3) 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.

(6) (i) 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. Mehulbhai Manubhai Trivedi, C/o Parth Mehta & Associates, 1217, Shivalik Shilp-2, Opposite ITC, Narmada, Near Keshavbaug Party Plot, Vastrapur, Ahmedabad-380015 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No.296/AC/Demand/2022-23 (referred in short as '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-I, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

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. 2015-16, it was noticed that the appellant had earned substantial income by providing taxable services. They declared Sales / Gross Receipts of Rs.40,14,250/- in their ITR, on which no service 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. 2015-16. The appellant neither provided any documents nor submitted any reply justifying the non-payment of service tax on such receipts. The service tax liability Rs.5,82,066/- was, therefore quantified considering the income of Rs.40,14,250/- as taxable income.

Table-A

F.Y.	Sale of service as per ITR	Service tax rate	Service tax payable
2015-16	40,14,250/-	15%	5,82,066/-

2.1 A Show Cause Notice (SCN) No. AR-II/Mehulkumar Manubhai Trivedi/Un-Reg/2015-16 dated 09.06.2021 was issued to the appellant proposing recovery of service tax amount of Rs.5,82,066/- not paid on the value of income received during the F.Y. 2015-16, along with interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalty under Section 77(1), Section 77(2) and Section 78 of the Finance Act, 1994 was proposed.

2.2 The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs.5,82,066/- was confirmed alongwith interest. Penalty of Rs. 10,000/- each was imposed under Section 77(1) & Section 77(2). Penalty of Rs.5,82,066/- was also imposed under Section 78.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, on the grounds elaborated below:-

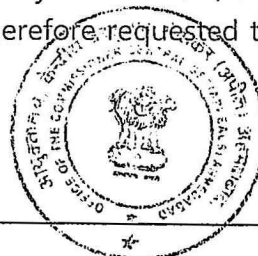
- The appellant is a Proprietor of Matangi Motors, residing at 63, Sarthi Bunglows, Kathwada Road, Naroda, Ahmedabad. The appellant is engaged in Purchase and Sales of Pre-Owned/Second Hand Cars under the name of Matangi Motors and in no way engaged in providing any Services.
- The OIO dated 05.08.2022 was issued to the appellant for F.Y. 2015-16 and subsequently another OIO dated 16.12.2022 was issued to the appellant for the



same assessment year and for same PAN number. The Assistant Commissioner has conducted separate proceedings for the same year and same appellant. Copy of both the assessment orders are submitted for your reference. Such action of Assistant Commissioner is arbitrary as after through verification of substantiated documents, OIO dated 05-08-2022 was passed in favour of the appellant. However, for the very same financial year, Ld. Assistant Commissioner has passed an order raising substantial demand simply by relying upon Sale of Goods turnover reported by appellant in their Income Tax Return.

- Initial notice dated 23-11-2020 was the first LETTER issued to the appellant to furnish the documents. Therefore, conclusively, such a LETTER cannot be termed as SCN. The impugned demand is raised for the FY 2015-16. It is relevant to note here that although for the sake of arguments it is to be believed that extended period of limitation of five years could be invoked, time limit for issuance of SCN expired on 25-04-2021. After letter dated 23-11-2020, next notice or hearing opportunity was provided only on 21-11-2022 i.e. admittedly after expiry of limitation period. Nowhere in the impugned OIO, would find mention of issuance of SCN before such date.
- The extended period of limitation is not invokable in the present case as there was no suppression of facts with intent to evade payment of service tax. Therefore, the demand for the period 2016-17 is barred by limitation.
- When the tax demand is not sustainable, there can be no question of payment of any penalty or interest by the Appellants under Section 75/78 of the Finance Act, 1994. As the provisions of section 78 of the Act mentions that penalty is levied only in case Person is found liable to pay service tax as determined under section 73(2).
- When the appellant is not liable to pay service tax or required to obtain service tax registration, the appellant shall not be liable for penalty u/s 77(1)(a) of the Act.
- The appellant was not issued any Show Cause Notice for levy of penalty u/s 77(1)(c) of the Act. Hence, penalty is not leviable on this ground alone as Ld. Assistant Commissioner has violated principles of natural justice and levied penalty without affording opportunity to the appellant.

4. On going through the appeal memorandum, it is noticed that the impugned order was issued on 16.12.2022 and same was claimed to be received by the appellant on 17.02.2023. However, the present appeal, in terms of Section 85 of the Finance Act, 1994, was filed on 15.05.2023 after a delay of 27 days. The appellant in the Miscellaneous Application have stated that since two OIOs were issued for same assessment year, they were under the bonafide belief that the subsequent demand is unenforceable as it was raised on the basis of arbitrary order. However, as the demand was not nullified and due to lack of reasonable resolutions by learned A.C., the appellant had no option but to avail the option of appeal. They therefore requested to condone the delay considering the cause as sufficient.



4.1 In terms of 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.

4.2 It is observed that the appeal in the present case was filed on 15.05.2023, after a delay of 27 days. Considering, the legal provisions under Section 85(3A) of the Finance Act, 1994 and the cause mentioned in the miscellaneous application as satisfactory, I condone the delay of 27 days as the same being within the condonable period prescribed in Section 85(3A).

5. Personal hearing in the appeal matter was held on 17.01.2024. Shri Parth Mehta, Chartered Accountant appeared on behalf of the appellant for personal hearing. He reiterated the grounds of appeal and stated that in the matter an adjudicated for the F.Y. 2014-15 was done wherein the demand was dropped. In that OIO also the period 2015-16, 2016-17 (upto June) was considered. However, in the present OIO, the demand for the F.Y. 2015-16 was again confirmed. Mis-communication arose as nobody appeared for personal hearing and no written submission could be made. The notice was not received as the address in ITR is different than the actual place of business. Even in earlier case they were contacted through justdial. The client sells and purchases second hand cars and being goods are not liable for Service tax. Further, commission from RTO consultancy is below threshold limit. He also requested for two days time to submit the ITR for current and previous year.

6. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum 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.5,82,066/-** 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**.

6.1 First and foremost contention of the appellant is that they have been issued two demand notices for same assessment year. The demand raised in the first notice was adjudicated vide OIO dated 05.8.2022 wherein the demand was dropped. However, the second demand for same period was confirmed vide impugned order, which is arbitrary in nature.

6.2 I have gone through the OIO No.102/AC/Demand/2022-23 dated 05.08.2022, which covers the demand for the period 2014-15 involving service tax amount of Rs.3,77,546/- on the taxable value of Rs.30,54,577/- and the said demand was dropped on the findings that the appellant during the F.Y. 2014-15 have earned income of Rs.30,54,577/- from sale of pre-owned cars which is not taxable and earned commission income Rs.4,64,884/- which is below the threshold limit. I find that the subsequent demand adjudicated vide the impugned order is for the period 2015-16, thus the claim made by the appellant that the demand in both the orders were for same assessment is not correct, hence not acceptable.



6.3 I find that the demand of Rs.5,82,066/- in the impugned order pertains to the income of Rs.40,14,250/- earned by the appellant during the F.Y. 2015-16. The demand was confirmed ex-parte against the appellant. In respect of the said demand the appellant have submitted the ITR filed F.Y. 2015-16 and the P&L account to substantiate their claim that the disputed income pertains to sale of pre-owned vehicles. It is observed that in the P&L Account the appellant have shown income of Rs.40,14,250/- under head sale of pre-owned vehicles. I find that sale of goods (i.e. vehicles in the instant case) is not covered within the scope of the definition of term 'service' defined under clause (44) of Section 65B of the F.A, 1994. Relevant text is reproduced below;

(44) "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;

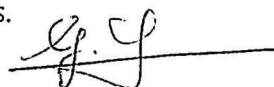
(c) fees taken in any Court or tribunal established under any law for the time being in force.

6.4 In terms of above definition, transfer or supply of goods which is deemed to be a sale shall not be considered as a service. Even the negative list prescribed in Section 66D includes trading of goods. Trading of goods is not a taxable service being a sale and not a service. Hence, I find that the appellant is not liable to discharge any tax liability on the income earned from sale of vehicles as such activity is excluded from the definition of service and included in the negative list.

7. In light of above discussion and findings, I set-aside the impugned order confirming the service tax demand of Rs.5,82,066/- alongwith interest and penalties.

8. 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.



(ज्ञानचंद जैन)

आयुक्त (अपील्स)

Date: 20.1.2024

Attested



(रेखा नायर)

Superintendent (Appeals)



CGST, Ahmedabad

By RPAD/SPEED POST

To,

M/s. Mehulbhai Manubhai Trivedi,
C/o Parth Mehta & Associates,
1217, Shivalik Shilp-2, Opposite ITC, Narmada,
Near Keshavbaug Party Plot, Vastrapur,
Ahmedabad-380015

Appellant

The Assistant Commissioner
CGST, Division-I,
Ahmedabad North

Respondent

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Superintendent (System), CGST, Ahmedabad (Appeals) for uploading the OIA
- ✓ 4. Guard File.

