



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- टेलिफैक्स 07926305136



DIN: 20230864SW0000222C96

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/697 /2023-APPEAL /567 - 21
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-84/2023-24
दिनांक Date : 25-08-2023 जारी करने की तारीख Date of Issue 28.08.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Shiv Pratap Singh, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. CGST/A'bad North/Div-VII/REF/AC/298/2022-23
दिनांक: 20.10.2022, issued by The Assistant Commissioner, CGST Division-VII,
Ahmedabad North
- घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s. Shree Kirshna Construction, B-704, Satyam Skyline, Nr. Torrent Power, Sola Road, Naranpura, Ahmedabad-380013

2. Respondent

The Deputy/Assistant Commissioner, CGST, Division-VII, Ahmedabad North, 4th Floor, Shajanand Arcade, Nr. Helmet Circle, 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 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 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 हों।

(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 गूल-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।

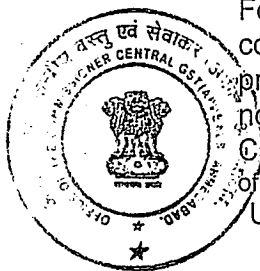
Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो 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. Shree Krishna Construction, B-704, Satyam Skyline, Near Torrent Power, Sola Road, Naranpura, Ahmedabad-380013 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. CGST/A'bad North/Div-VII/Ref/AC/298/2022-23 dated 20.10.2022, (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-VII, Ahmedabad North (hereinafter referred to as '*the refund sanctioning authority*').

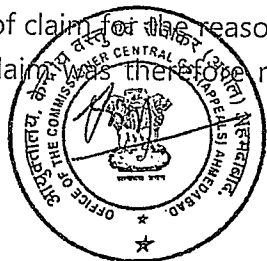
2. The facts of the case in brief are that the appellant worked as a sub-contractor of M/s. Malani Construction, who were awarded the contract for construction of a building at Institute of Kidney Disease Research Centre (IKDRC) at Ahmedabad. M/s. Malani Construction availed exemption under Notification No. 25/2012-ST dated 20.6.2012 vide (Sr. No.12) and by virtue of Sr. No. 29(h) of the said notification, therefore, the appellant also claimed exemption from payment of service tax.

2.1 After amendment of Notification No.25/2012-ST, M/s. Malani Construction became ineligible for the above availed exemption. Thus, the appellant paid service tax of Rs.13,75,439/- during the period from 01.04.2015 to 20.02.2016 for rendering the said services.

2.2 Subsequently, by virtue of retrospective exemption provided vide Section 102 of the F.A., 2016, in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration etc service tax was held not to be leviable for the period from 1.4.2015 and ending with the 29.2.2016. According, the service tax paid during said period could be claimed as refund within six months from the date of assent to the F.A., 2016, by the President.

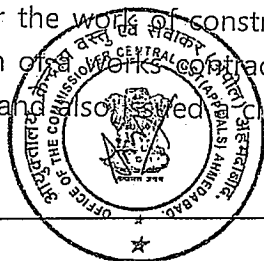
2.3 Consequently, the appellant filed a refund application for **Rs.13,75,439/-** which was rejected vide O-I-O No. SD-01/Refund/28/AC/Shree Krishna/2016-17 dated 14.10.2016 passed by the A.C., Division-I. Aggrieved by the order, the appellant preferred appeal before Commissioner (A). Their appeal was rejected vide O-I-A No.AHM-EXCUS-002-APP-41-17-18 dated 30.08.2017. Against the said O-I-A they preferred appeal before Hon'ble CESTAT. Hon'ble CESTAT vide Final Order No. A/10545-10546/2018 dated 20.03.2018, remanded the matter back to the refund sanctioning authority to examine whether the claim of the appellant as to whether they had provided works contract service to the main contractor and accordingly eligible to claim the refund of service tax paid during said period.

2.4 The draft O-I-O was sent for pre-audit and audit noticed certain discrepancies. Accordingly, the appellant was directed to submit documents to prove that the said sub-contract awarded to them was under Works Contract which included the transfer of property (MS Wire) used in the construction of slabs. A SCN dated 30.09.2023 was issued to the appellant proposing rejection of claim for the reason that the said contract appears for labour work only. The refund claim was therefore rejected vide impugned order.



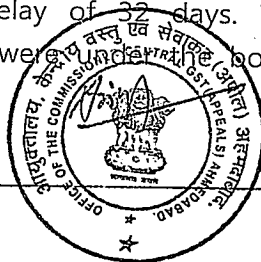
3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant preferred the present appeal alongwith the Miscellaneous Application seeking condonation of delay on the grounds elaborated below:-

- The Adjudicating Authority has erred in confirming the proposal made in the show cause notice without complying with the direction issued by the Hon'ble Appellate Tribunal in its order dated 12.03.2018. The Hon'ble Appellate Tribunal categorically remanded the case to the adjudicating authority to ascertain the claim of the appellant that they had provided works contract service to the principal contractor during the relevant period. There was no cause to issue a fresh notice when the direction of the Appellate Tribunal remained pending, and no order was passed after examining the documents submitted by the Appellant. Therefore, the impugned order is illegal, contrary to the provision of law and without any authority.
- The Adjudicating Authority has not followed the direction issued by Hon'ble Appellate Tribunal. The Hon'ble Tribunal has considered the eligibility of refund of service tax paid during the year by the Appellant. Thus, the facts that remain to be scrutinized is whether the appellants have provided 'work contract services' to M/s. Malani Construction, and accordingly, is eligible to claim a refund of the service tax paid during said period. The ledger account and communication from the principal contractor claiming that they had provided work contract services to the principal contractor during said period. This evidence has not been placed before the adjudicating authority. Therefore, the case was remanded to the adjudicating authority to comply with the order and issued a show cause notice, which is contemptuous action and not permissible under the law.
- The Adjudicating Authority has rejected the claim on the ground that mere provision of MS wires for binding work is not sufficient enough to prove that the claimants were providing works contract serve as defined under Section 65B (54). However, the findings of the Adjudicating Authority are completely contrary to the provision of the Finance Act, 1994 and therefore, the impugned order passed by the Adjudicating Authority is not tenable. In light of the definition of the Works Contract, one has to satisfy that there was transfer of property in goods involved in the execution of such a contract is leviable to tax as the sale of goods. Department never contested that the MS wires supplied by the Appellant were not subjected to the levy of sales tax. As the volume of the appellant was below the exemption limit, they were not liable to pay any sales tax, nor was the supplier exceeding the exemption limit. In this view of the matter, the Appellant satisfied the first criteria of the definition that the materials were supplied in the execution of the contract. Hence, the findings of the Adjudicating authority are contrary to the definition itself; hence the impugned order needs to be quashed and set aside.
- The Adjudicating Authority accepted the fact that the Appellant had supplied MS Wires for the work of construction of the slab, which is sufficient to satisfy the definition of a works contract. Even the principal M/s. Malani Construction also certified and issued clarification in respect of the supply of materials. The



principal has given a notarised undertaking to this effect, which was submitted during the denovo adjudication proceedings, but there is no reference to the said undertaking in the entire order. The Appellant had discharged its burden to prove that the materials were supplied along with the labour. If the Adjudicating Authority is not satisfied with the documents submitted in support of the claim, then specific findings should have been given in the impugned order.

- The Adjudicating Authority has seriously erred in holding that MS Wires are consumables/fixtures materials supplied while providing labour services and not an essential component of construction. These findings clearly establish that the Adjudicating Authority has exceeded its jurisdiction. He could not have gone into the background, whether MS wires are consumables/materials or whether it is an essential component of consultations or not. He could not have disputed the agreement arrived between the parties. When the parties and the principal wanted something in a particular manner, it is the contractual obligation between the parties to fulfill the same. The Government Agency, especially, Revenue authorities have no jurisdiction to examine the correctness of the terms of the agreement. Once there is no dispute that the Appellant supplied the MS wires, they cannot be denied the benefit of Notification at Sr No. 29 (h).
 - M/s. Malani Construction is AA class Large & reputed contractor working since 1967, so they are experts on the subject and to decide whether MS Wires forms part of the goods involved in the contract or not. Once the principal to such standing/ expertise has confirmed the reasoning the Adjudicating Authority has no jurisdiction to doubt the necessity of the said materials.
 - That the law does not provide an obligation on the assessee to prove that the materials supplied with the labour are essential or not, and therefore findings based on the said term is not sustainable.
 - The Adjudicating Authority neither examined nor gave any reasoning for the documents such as CA certificates, agreement produced which confirm that the MS Wires was supplied during the contract period. Ledgers and Purchase invoice that why all these documents have not been taken into consideration while deciding the civil right of the Appellant.
 - The Adjudicating Authority has erred in relying upon the Order-in-Appeal No. AHM-EXCUS-002-APP-41-17-18 Dated 30.08.2017, which has already been set-aside by the Hon'ble Appellate Tribunal and remanded the case back with a direction. Therefore, the findings of the said order have no percentage value while deciding the denovo proceedings. The impugned order should be rejected on this ground itself in the interest of justice.
4. On going through the appeal memorandum, it is noticed that the impugned order was issued on 20.10.2022 and same was claimed to be received by the appellant on 22.10.2022. However, the present appeal, in terms of Section 85 of the Finance Act, 1994, was filed on 23.01.2023 after a delay of 32 days. The appellant in the Miscellaneous application stated that they were under a bonafide belief that the



appeal is to be filed within three months from the date of communication hence the delay. They have claimed that the appeal was required to be filed by 21.12.2022, but was filed on 23.01.2023 as 21st & 22nd were Saturday & Sunday. Hence, the delay went beyond 30 days i.e. extra 2 days of delay occurred due to holidays.

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. Relevant text of Section 85 is reproduced below:

SECTION 85. Appeals to the [Commissioner] of Central Excise (Appeals). — [(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the [Principal Commissioner of Central Excise or Commissioner of Central Excise] may appeal to the Commissioner of Central Excise (Appeals).]

(2) Every appeal.....in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of [such adjudicating authority], relating to service tax, interest or penalty under this Chapter [made before the date on which the Finance Bill, 2012, receives the assent of the President]:

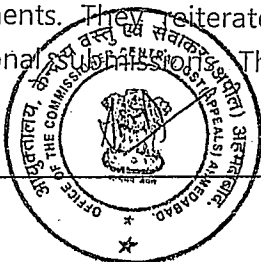
Provided that the [Commissioner] of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

[(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:]

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.]

4.2 It is observed that the appeal in the present case was filed on 23.01.2023, after a delay of 32 days. Considering, the legal provisions under Section 85(3A) of the Finance Act, 1994, the Commissioner (Appeals) is empowered to condone the delay of only one month provided he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months. In the instant case delay of 32 days is noticed and extra 2 days delay beyond condonable period is due to the fact that the 21st & 22nd were Saturday & Sunday else the delay would have been within condonable period. When the last day of limitation falls on holiday, in terms of Section 10 of General Clause Act, 1897, the appellant can file the appeal on the next working day. As the appeal was filed in next working day, I find that excluding Saturday & Sunday there is a delay of only 30 days which is within the condonable period prescribed in Section 85(3A). Considering the fact that the preamble of the impugned order mentions appeal period as 3 months, I regard their bonafide belief as sufficient cause and allow the appeal after condoning the delay of 30 days.

5. Personal hearing in the matter was held on 04.08.2023. Mr. Shilpang V. Karia, Chartered Accountant and Shri Dhaval K. Shah, Advocate appeared for personal hearing and handed over additional written submissions dated 03.08.2023 along with supporting documents. They reiterated that the submissions in the appeal, and those in the additional submissions. They submitted that the appellant provided works contracts



services which were exempted under serial number 12 A of the Notification No. 25/2012, which was withdrawn and re-introduced by way of entry of serial number 12 A and it covered retrospective period of 11 months subject to the condition that the contract was already executed before 01.03.2015. Since, they had already paid the service tax during the intervening period, they applied for refund which was rejected, and they had to approach up to Learned Tribunal, who remanded the case back as the documentary evidence available were not examined by the lower authority. On remand, the adjudicating authority has issued another show cause notice and thereafter, has rejected the refund claim. They submitted that the adjudicating authority has gone beyond the original direction of the tribunal, which was to examine the documents and decide the case as per the earlier show cause notice, instead of issuing a fresh show cause notice. Even on merits, the adjudicating authority has wrongly interpreted the supply of works contract service with materials as a supply of labour contract service only because the amount of materials consumed appears to him as marginal or insufficient. The lower authority has ignored the certificate given by the CA in this respect and other related documents. They have submitted all the relevant evidence with the appeal, and the relevant judgments based upon, which the case is very clear. Therefore, they requested to set aside the impugned order and to allow the refund with interest. They submitted that they will submit evidence of communication of the impugned order in a few days.

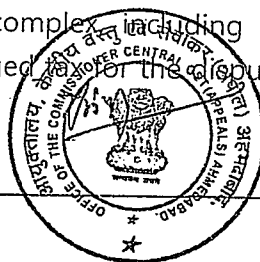
6. I have carefully gone through the facts of the case, the impugned order passed by the refund sanctioning authority, submissions made by the appellant in the appeal memorandum as well as those made during personal hearing. The issue to be decided in the present case is whether the refund of **Rs.13,75,439/-** rejected vide the impugned order, in the facts and circumstances of the case, is legal and proper or otherwise.

Period of dispute involved is F.Y.2015-16.

6.1 The main grounds for rejecting the refund by the adjudicating authority was that the work order is for slab work i.e. RCC Basement & Raft of Basement, Second Basement Slab, which seems to purely Labour Work only. Further, in Slab RCC Work, cement, M S Bars, Concrete, sand etc are required which find no mention in the original contract. He observed that the M S Wires is at most consumable fixtures material while providing labour service and is not an essential component of construction. Mere provision of MS Wires is not sufficient to establish that the appellant was providing Works Contract service. Further, the invoice raised was not in accordance of Rule 4A (1) of the Service Tax Rules, 1994. Moreover, there is only one bill dated 01.03.2016 of Rs. 1.14 Cr for the total service provided by the appellant which is unusual in the case of Works Contract service where generally every months bills are generated after deducting TDS.

6.2 As the relevant documents were not produced before the adjudicating authority, Hon'ble CESTAT vide the remand order had directed to examine whether the appellant has rendered Works Contract Service to the main contractor and accordingly eligible to claim the refund of service tax paid during said period.

6.3 The appellant are registered with Service Tax department for providing Construction service other than residential complex including Commercial/Industrial building or civil structures. They have discharged tax for the disputed period under said



service. During the disputed period they were awarded the contract for construction of a building at Institute of Kidney Disease Research Centre (IKDRC) at Ahmedabad by the main contractor M/s. Malani Construction. As the main contractor availed exemption under Notification No. 25/2012-ST dated 20.6.2012 vide (Sr. No.12), they claim by virtue of Sr. No. 29(h) of the said notification, they are liable for exemption from payment of service tax under Works Contract Service.

6.4 The term 'Works Contract' is defined under Clause 54 of Section 65B as;

(54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;

6.5 The main contractor was granted the works contract by Chief Engineer, Commissionerate of Health, Project Implementation Unit, Gandhinagar for construction of a building at Institute of Kidney Disease Research Centre (IKDRC) at Ahmedabad, wherein the Cement and TMT Bar steel is to be brought by the agency and quarterly bills shall be submitted. This work contract was subsequently sub-contracted by the main contractor to the appellant, vide Work Order dated 06.05.2014. The appellant was required to provide labour and carry out construction activity. M/s. Malini Construction Co. also submitted a Certificate dated 13.10.2017, certifying that the appellant carried out part of the construction work and consumed various stores, spares consumables and have also utilized 'MS Wires' for binding irons used in slab. The MS Wires were used in execution of the works contract. They also certified that the total material used was approx 7400 Kg valued at Rs.2.87 Lacs. The appellant also submitted their Ledger account showing the payment made towards Stores & Consumable Expenses and the VAT invoices evidencing the VAT paid on such purchases. Further, Challan for material used as a part of RCC Labour Work Bill was also submitted wherein the appellant has raised the Material 'MS Wires' bill to M/s Malini Construction Co. It also mentions that the said material should be considered as sale of goods forming the part of construction slab. Further, it also mentions that the Sales tax is not applicable as supply of such material does not exceed Rs. 5 Lakhs for Sales Tax applicability.

6.6 From the above it is clear that the appellant was providing construction service including supply of material on which VAT was not paid as was below Rs. 5 Lacs. The certificate issued by the main-contractor clearly mentions that the construction contract included supply of labour and material. The fact that the appellant has carried out construction service for the main-contractor cannot be denied because they were given the contract to carry out construction, for which labour was used. Hence bills were raised for labour and material. Supply of 'MS Wires' cannot be ignored because the appellant was also providing labour.

6.7 Works Contract is a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or



immovable property or for carrying out any other similar activity or a part thereof in relation to such property. The appellant used M S Wires and various other spares consumables which included transfers of property in goods as these were used in execution of the contract. M/s. Malini Construction also issued a certificate to this effect that the total of 11500 kg of MS Wires was purchases from the appellant and the same was used by the appellant as part of the construction service at their site. Thus, from the facts of the case and in terms of the above definition of works contract, I find that the work carried out by the appellant was construction of slab including supply of MS Wires hence can be considered as Works Contract defined above,

6.8 The adjudicating authority held that the work order is for slab work i.e. RCC Basement & Raft of Basement, Second Basement Slab, which is purely Labour Work. I find that under pure labour, labour is provided without involving any material however Works Contract Service includes pure labour plus material. The main contractor sub-contracted some part of the construction work to the appellant which included supply of MS Wires and therefore the observation of the adjudicating authority that mere provision of MS Wires is not sufficient to establish that the appellant was providing Works Contract service, is not justifiable. Also, merely because there is only one bill dated 01.03.2016 of Rs. 1.14 Cr for the total service provided by the appellant, also cannot be a ground for not classifying the service under Works Contract Service when the supply of material is not disputed by the department.

7. The appellant have claimed that the above works contract falls under clause (a) of Serial No.12 and 12A of Notification No.25/2012-ST dated 20.06.2012 and Notification No. 09/2016 respectively, hence exempted. To examine the issue relevant text of the said notification is reproduced below:-

Notification No.25/2012-ST dated 20.06.2012

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

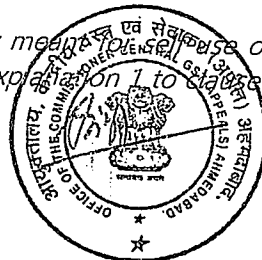
(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or

(f) a residential complex predominantly meant for use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65B of the said Act;



7.1 In the above entry, items (a), (c) and (f) was omitted vide [Notification No. 6/2015-S.T., dated 1-3-2015]. However, vide Section 102 of the Finance Act, 2016, special provision was inserted, wherein retrospective exemption was provided to certain cases relating to construction of Government buildings. Section 102 is reproduced below;

SECTION 102. Special provision for exemption in certain cases relating to construction of Government buildings. — (1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of —

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;

(b) a structure meant predominantly for use as —

(i) an educational establishment;

(ii) a clinical establishment; or

(iii) an art or cultural establishment;

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act,

under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all the material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President.

7.2 Thereafter vide Notification No.09/2016-ST dated 01.3.2016, after entry 12, with effect from the 1st March, 2016, the following entry shall be inserted, namely -

"12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

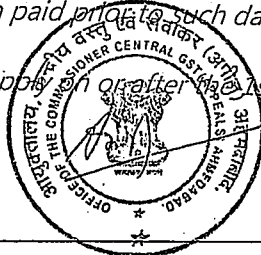
(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or

(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act;

under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date :

provided that nothing contained in this entry shall apply on or after the 1st April, 2020;";



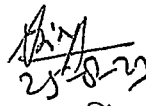
7.3 In terms of **serial no.12 clause (a)** of the Notification No.25/2012-ST dated 20.06.2012, the services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession are exempted. The main contractor M/s. Malini Constrction has provided construction services to Institute of Kidney Disease Research Centre (IKDRC) at Ahmedabad. IKDRC is a Research Centre, functioning under Health Department hence IKDRC is a governmental authority. The terms "governmental authority" is also defined at clause (s) of para-2 of the mega notification, which means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution. IKDRC has been registered under Societies Registration Act as vide no. Guj/1232/Ahmedabad dated 29.11.1986 and is registered as a public trust vide no. F/1173/Ahmedabad dated 29.11.1986. The institute is recognized as Institute of National Importance by Department of Science and Technology, Govt. of India. Hence, is governed by the State Government of Gujarat and are responsible to establish, operate, promote, run and manage institutions engaged in service, education and research pertaining to the field of Nephrology, Urology, Transplantation, Hematology, Autoimmune and Genetic disorders. Therefore, the works contract service provided by the main contractor by way of construction of a new IKDRC shall be treated as exempted as was rendered to governmental body.

7.4 In the present case the above works contract was subsequently sub-contracted by M/s. Malini Construction to the appellant. The appellant has rendered the construction service to the main contractors and therefore in terms of Sr. No.29 (h) of Notification No.25/2012-ST, the services provided by sub-contractor by way of works contract to another contractor providing works contract services which are exempt shall also be exempted. Since the services of main contractors are exempted, I find that the services rendered by the appellant shall also be exempted. Hence, they are not liable to pay tax on such services.

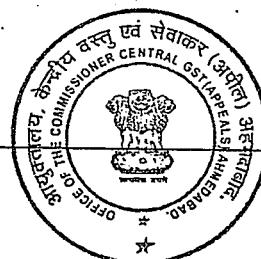
8. Accordingly, I find that the refund of **Rs.13,75,439/-** rejected is not sustainable in law. Therefore, I order for sanction of refund, with consequential interest.

9. In light of above discussion, I set-aside the impugned order and allow the appeal filed by 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.


(शिव प्रताप सिंह)
आयुक्त (अपील्स)

Date: 25/08/2023



Attested

Rekha A. Nair

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



By RPAD/SPEED POST

To,
M/s. Shree Krishna Construction,
B-704, Satyam Skyline,
Near Torrent Power, Sola Road,
Naranpura,
Ahmedabad-380013

Appellant

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

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.



