



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय कर शुल्कभवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015



☎ : 079-26305065

टेलिफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(ST)010/A-II/2017-18

ख अपील आदेश संख्या : Order-In-Appeal No. 116/0122 **AHM-EXCUS-001-APP-236-17-18**

दिनांक Date : 29-12-2017 जारी करने की तारीख Date of Issue 16-1-2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No **STC/19/KM/AC/D-III/16-17** Dated 08.02.2017

Issued by Assistant Commr **STC**, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता

Name & Address of The Appellants

M/s. Dharti Madrid county

Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी.- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनसे से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नाभित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फॉर्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगाना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों का सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है। द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल हैं -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ों एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

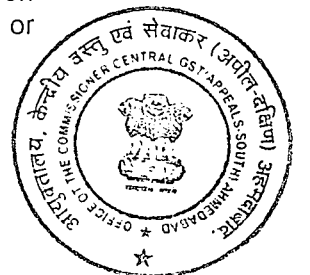
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, 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।

4(1) 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

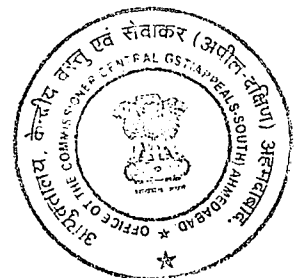
These appeals have been filed by M/s Dharti Madrid County (herein after referred to as the appellants) against the OIO No. STC/ 19/KM/AC/D-III/16-17 dtd. 08.02.20176 (herein after referred to as the impugned order) passed by the Assistant Commissioner, Division-III, Service Tax, Ahmedabad (herein after referred to as the adjudicating authority).

2. The brief facts of the case are that on reconciliation of figures of taxable income as appearing in their Balance Sheets / P & L Account vis-à-vis Taxable value declared in their half yearly ST-3 returns filed with the Service Tax department, it was noticed that the appellants had short paid their service tax by Rs. 5,14,229/-. On enquiry, the appellants replied that an amount of Rs. 3,82,675/- had been paid in excess and the remaining amount of Rs. 1,31,554/- had been paid along with interest of Rs. 45,386/- and penalty of Rs. 27,626/-. It was found that the appellants had not adjusted the said excess amount paid by them as per the provisions of Rule 6 (3) of the Service Tax Rules (STR for brevity) and they had not provided any documentary evidence that they have returned the value of taxable service and service tax thereon to the person from whom it was received. Further it was also found that the appellants had not satisfied the conditions of Rule 6 (4) of the STR. Accordingly a show cause notice dtd. 26.02.2016 was served upon the appellants demanding short paid service tax along with interest and proposed imposition of penalty. The adjudicating authority, vide the impugned order, confirmed the demand along with interest and also imposed penalty.

3. Being aggrieved by the impugned order, the appellants have filed this appeal on the following grounds:

- a) That they are giving the reconciliation table showing excess payment of service tax according to which it is clear that they had paid service tax on Rs. 2,33,39,029/- whereas the net taxable income as per books of accounts was Rs. 1,96,23,736/-;
- b) That they had not claimed the excess paid amount as refund which was otherwise refundable to them and they have adjusted the same towards their service tax liability and the balance amount has been paid along with interest and penalty;
- c) That in terms of Section 73 (3) of the Finance Act, 1994, once they have paid the entire amount of service tax along with interest, the department should not have issued any show cause notice;

(Handwritten signature)



d) The appellants relied on the case laws cited at 2012-TIOL-37-CESTAT-AHM, 2011-TIOL-1522-CESTAT-MAD, 2011-TIOL-635-HC-KAR-ST and 2011-TIOL-175-CESTAT-AHM, Powercell Battery India Ltd. – 2010 (19) STR-400 (Tri-Bang.), Nirma Architects & Valuers – 2006 (1) STR-305 (Tri-Del.), Aurore Trust – 2010 (17) STR-376 (Tri-Chen.), Agrimas Chemicals Ltd. – 2008 (10) STR-424 (Tri-Del.), Narnolia Securities Pvt. Ltd. – 2008 (10) STR-619 (Tri-Kol.) and a few more.

4. The personal hearing in the case was held on 20.11.2017 in which Shri R. Subramanya, Advocate appeared on behalf of the appellants. He reiterated the grounds of appeal and particularly stressed upon the details given by them about the excess payment of duty and the decisions quoted by them in their favour. He had assured that necessary CA certificate would be submitted within a week's time but has not been able to do so far.

5. I have carefully perused the documents pertaining to the case and submitted by the appellants along with the appeal. I have considered the arguments made by the appellants in their appeal memorandum as well as oral submissions during personal hearing.

6. I find that the issue to be decided in the instant case is whether the suo moto adjustment of excess payment of service tax is permissible.

7. I find that the appellants have given the reconciliation table showing excess payment of service tax and contend that that they had paid service tax on Rs. 2,33,39,029/- whereas the net taxable income as per books of accounts was Rs. 1,96,23,736/-. I find that the appellants have not produced any documents in support of this contention. While perusing the impugned order, I find that the adjudicating authority has noted in para 5 that no details of excess payment have been provided by the appellants. Even at the time of filing of appeal and thereafter so far, they have not produced any documents in support of their contention making it impossible to consider their contention.

8. I have perused various decisions given by tribunals which have consistently held the issue of suo moto adjustment of excess payment of service tax as admissible. The Tribunal in the case of Dell India Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore cited at 2016 (42) STR-273 (Tri.Bang.) has held that adjustment of excess service tax paid should be allowed during later period as if it is not allowed, it would be against the provisions of Article 265 of the Constitution of India which says that "no tax shall be levied or collected except by authority of law". The Tribunal in the case of Jubilant Organosys Ltd. Vs. Commissioner of Central Excise



Bangalore cited at 2015 (38) STR-1230 (Tri.Del.) has held that such adjustments not to be denied on technical grounds. I also accordingly hold that the adjustment of excess payment of service tax is admissible. However in view of the findings in para 7 above, the matter will have to be remanded to the adjudicating authority to verify the correct excess payment of service tax and pass suitable order accordingly and the demand shall be adjusted according to the verified amount.

9. Considering the facts of the case and the fact that the appellants had paid the differential amount (according to their own calculations) with interest and penalty, that payment shall also stand modified accordingly i.e. after verification, if any short payment remains, the demand of short paid service tax along with interest and penalty shall stand confirmed accordingly.

10. The appeal is disposed off accordingly with consequent relief.

अपीलकर्ता द्वारा दर्ज की गयी अपील का निपटारा उपरोक्त तरीके से किया जाता है !

उमा शंकर

(उमा शंकर)

केंद्रीय कर आयुक्त (अपील्स)
अहमदाबाद

दिनांक: 29.12.2017

सत्यापित

धर्मेन्द्र उपाध्याय
(धर्मेन्द्र उपाध्याय)
अधीक्षक (अपील्स),
केंद्रीय कर, अहमदाबाद

By R.P.A.D.

To:

M/s Dharti Madrid County LLP,
311, Iscon Mall,
Jodhpur,
Satellite,
Ahmedabad-380015

Copy to:-

- (1) The Chief Commissioner, CGST, Ahmedabad Zone,
- (2) The Commissioner, CGST, Ahmedabad (North),
- (3) The Dy./Asth. Commissioner, CGST, Div.-VI, Ahmedabad (North),
- (4) The Dy./Asth. Commissioner (Systems), CGST, Ahmedabad (North),
- (5) Guard File,
- (6) P.A. File.



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