


 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर भवन, सातवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	 7 th Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/08/RA/A-III/2017-18
Stay Appl.No. NA/2017-18

78th to 788

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-264-2017-18
दिनांक Date : 24-01-2018 जारी करने की तारीख Date of Issue

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

7/2/2018

ग Arising out of Order-in-Original No. STC/24/KM/AC/D-III/2016-17 दिनांक: 27/02/2017 issued by Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s JMC Projects.
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 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम पर्यंत 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 :

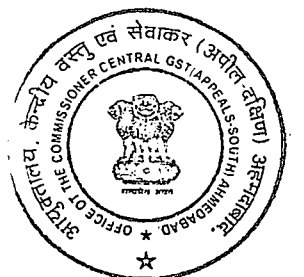
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रविष्टि के दौरान हुई हो।

(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.

(b) 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।

... 2 ...



(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।

(b) 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।

(c) 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।

(d) 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.

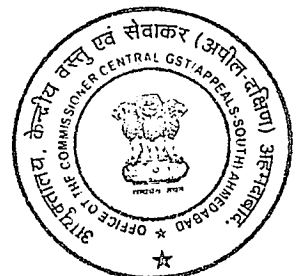
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 ओ-20, न्यू मेटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-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.

- (6) 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।

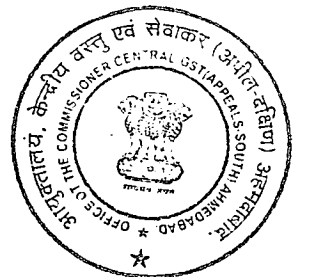
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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



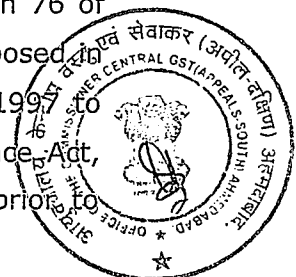
:: ORDER-IN- APPEAL ::

The Assistant Commissioner, Service Tax, Division-III, Ahmedabad (*hereinafter referred to as 'appellant'*) has filed the present appeal against the Order-in-Original number STC/24/KM/AC/D-III/16-17 dated 27.02.2017 (*hereinafter referred to as 'impugned order'*) passed against M/s. JMC Projects (India) Pvt. Ltd., A-104, Shapath-4, Opp. Karnavati Club, S. G. Road, Ahmedabad (*hereinafter referred to as 'respondents'*);

2. The facts of the case, in brief, are that the respondents were engaged in providing services under the category of 'Consulting Engineer, Erection Commissioning & Installation, Construction Services in respect of Commercial or Industrial Buildings and Civil Structures, Construction of Residential Complex, Transport of Goods by Road, Works Contract Service, Supply of Tangible Goods for use service etc.' and hold valid registration number AAACJ3814EST001. During the course of audit by the CERA team, it was pointed out that according to new Section 71A introduced by the Finance Act, 2003, the service receiver/user of transport operator, has to pay Service Tax for the period from 16.11.1997 to 01.06.1998 and to file return within six months from 14.05.2005.

3. From the books of account of the respondents, it was revealed that they had paid ₹43,50,356/- on account of freight/transportation charges. However, they had not paid Service Tax on it so far. Thus, it was concluded that the respondents had contravened the provisions of Rule 6 of the Service Tax, 1994 read with Section 68 of the Finance Act, 1994 in as much as they had failed to make the deposit of Service Tax to the government exchequer. Therefore, a show cause notice, dated 09.01.2008, was issued to them which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority, vide the impugned order, confirmed the demand of Service Tax amounting to ₹2,17,518/- under Section 73 of the Finance Act, 1994. He ordered the respondents to pay interest under Section 75 and imposed penalty under Sections 78 of the Finance Act, 1994.

4. The impugned order was reviewed by the Commissioner of Service Tax, Ahmedabad and issued review order number 06/2017-18 dated 11.05.2017 for filing appeal under section 84(1) of the Finance Act, 1994 on the ground that the adjudicating authority has not imposed penalty under Section 76 of the Finance Act, 1994 on the respondents. The said penalty was proposed in the show cause notice dated 09.01.2008 for the period from 16.11.1997 to 01.06.1998. The imposition of penalty under Section 76 of the Finance Act, 1994 was mandatory for failure to pay Service Tax for the period prior to



10.05.2008.

5. Personal hearing in both the matters was granted and held on 18.12.2017. Smt. Priyanka Kalwani, Advocate, appeared before me on behalf of the respondents and argued that the show cause notice was time barred as it was issued on 09.01.2008 and the period involved is from 16.11.1997 to 01.06.1998. She has submitted the citation of Emico Ltd. 2010(20)STR 603(Guj).
6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral and written submissions made by the respondents at the time of personal hearing.
7. I find that the appellant has claimed that the adjudicating authority has not imposed penalty under Section 76 of the Finance Act, 1994 on the respondents though it was proposed in the show cause notice dated 09.01.2008 for the period from 16.11.1997 to 01.06.1998. I further find that the section governing the issue of show cause notice, i.e. recovery Section 73 left to be amended Finance Act, 2003. In absence of Section 71A of the Finance Act, 1994 (which has retrospectively been introduced w.e.f. 16-7-1997) appearing in Section 73 of the Finance Act, 1994, no levy of any short duty or non-levy can be demanded. Show cause notices issued under Section 73 to such persons were not maintainable as those persons, though brought under the purview of Section 71A, were still not covered under the recovery Section 73. Class of persons who come under Section 71A were not brought under the net of Section 73. The section still had the language that the show cause notice can be issued if there is default in filing of return only under Section 70 and whereas the recipient of GTO services were to file the return under section 71A. This lacuna was followed by a number of judgments. In the case of L. H. Sugar Factories Ltd. vs. The Commissioner of Central Excise, Meerut-II [2004 (165) E.L.T. 161 (Tri. - Del.)], It was held that L. H. Sugar Factories Ltd. was required to submit the return under Section 71A therefore, show cause notice could not be issued under Section 73 as show cause notice can only be issued in the case of assesseees who are liable to file return under Section 70. I find that this present issue is identical to the issue in CESTAT order number A/11323/2015, dt.14.09.2015 in the case of M/s. Apar Industries Ltd. A show cause notice dated 18.08.2005, was issued to M/s. Apar Industries Ltd. to demand Service Tax on Goods Transport Operator service received by them during the period from 16.11.1997 to 01.06.1998, in terms of the amendment introduced vide Section 158 of the Finance Act, 2003. In the said decision of M/s. Apar Industries Ltd. it was held that till the point of time Section 73 of the Finance Act, 1994 came to be substituted w.e.f. 10-9-2004 provisions of the said section could not be



made applicable despite retrospective amendment in Sections 68 and 71A of the Finance Act, 1994. Further, I find that this present issue is also identical to the issue in the case of Eimco Elecon [2010 (20) STR 603 (Guj)]. In Eimco Elecon case, a show cause notice dated 11.11.2004 was issued, demanding Service Tax for the period from 16.07.1997 to 02.06.1998 of Goods Transport Operator service as per the amendment of the Finance Act, 2003. The Tribunal set aside the demand, and was upheld by Hon'ble High Court. The relevant portion of the said decision is reproduced below:-

"3.It is not in dispute that till Finance Act, 2003 introduced a Proviso under sub-section (1) of Section 68 of the Finance Act, 1994 the liability to pay Service Tax was on the person providing taxable service, and not on the recipient. Simultaneously Section 71A came to be introduced by the Finance Act, 2003 casting the liability on the service recipient to file a return within six months from the date on which the Finance Bill, 2003 receives assent of the President. However, even after this amendment, the Apex Court has noted that in absence of Section 71A of the Finance Act, 1994 (which has retrospectively been introduced w.e.f. 16-7-1997) appearing in Section 73 of the Finance Act, 1994 no levy of any short duty or non-levy could have been demanded."

In view of above I hold that recovery cannot be enforced as there was no provision of recovery in erstwhile Section 73 as stood before its amendment in Finance Act (No. 2), 2004.

Now the question remains whether or not recovery can be enforced by resorting to amended Section 73 by Finance Act (No. 2), 2004. I find that said amendment in section 73 vide Finance Act (No. 2), 2004 w.e.f. 10.09.2004 which is prospective in nature. Show cause notice, dated 09.01.2008 was issued after the said amendment in Section 73 but for previous period from 16.11.1997 to 01.06.1998 I am of considered view that recovery cannot be enforced by said amendment in Section 73 as it is not of retrospective nature. Thus, when recovery cannot be enforced on the respondents, the question of imposition of penalty (under Section 76) does not arise.

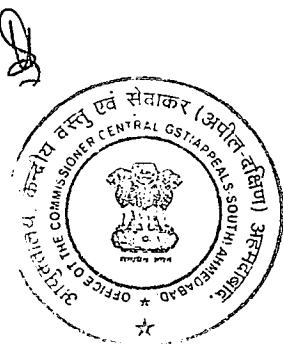
8. Further, the short issue required to be decided in the present appeal is whether show cause notice issued on 09.01.2008 is within the period of limitation under the Finance Act, 1994 wherein demand has been issued for the period 16.11.1997 to 01.06.1998 as per the retrospective amendment Rule 7A, which deals with returns of GTO service, was inserted vide Service



Tax (amendment) rules 2003 w.e.f. 14.05.2003, according to which, return was also to be furnished for the period from 16.11.1997 to 01.06.1998 within six months from 13.05.2003 (date of assent of Finance Bill 2003 by president), failing which, all the consequences like interest and penalty were to be followed. Period of six months ended on 13.11.2003. Show cause notice issued between 13.11.2003 and 12.11.2004, i.e., within one year, is valid in eyes of law. Further, till the point of time, Section 73 of the Finance Act, 1994 came to be substituted with effect from 10.09.2004, provisions of the said section could not be made applicable despite retrospective amendment in Sections 68 and 71A of the Finance Act, 1994. Thus, I am of considered view that this show cause notice was issued on 09.01.2008, therefore, it is barred by limitation.

Hon'ble High Court of Gujarat's decision in the case of CCE & Cus, Vadodara-1 vs. Eimco Elecon Limited (supra) on the same issue was that the show cause notice dated 11.11.2004 for the period 16.7.1997 to 02.6.1998 was considered to be time barred. It is observed that Hon'ble High Court of Gujarat had passed the following observation while holding that no short levy can be demanded from the Respondent in that case even after the retrospective amendment was brought into operation by the Revenue as per amendments carried out in Section 68(1) and Section 73 and addition of Section 71A of the Finance Act, 1994. Recipient of GTO services was made liable to file return by Section 71A and Section 73 was amended by Finance (No. 2) Act, 2004 to enable demand of Service Tax from persons falling under section 71A; therefore, such persons could not be asked to pay Service Tax prior to such amendment w.e.f. 10-9-2004 and show cause notice issued under amended Section 73 vide Finance (No. 2) Act, 2004 w.e.f. 10.09.2004 for recovery of period prior to 10.09.2004 was invalid. In the case of CCE, Vadodara-II V/S Welspun Gujarat Stahl Rohren Ltd. [200-TIOL-108-CESTAT-AHM], the Tribunal held regarding time limitation of issuance of show cause notice relating to filing of Return by the recipients of the said service that the show cause notice must be issued within one year from the relevant date which was the 14/11/2003 i.e. date of insertion of Section 71A in Finance Act through budget 2003. The judgment reported in 2010-TIOL-1208-CESTAT-AHM in case of CCE, Vapi vs. M/s. Mutual Industries Ltd. in which the CESTAT again dismissed the appeal of the department. The view taken by the Hon'ble Tribunal was that demand for the period from 16.07.1997 to 15.10.1998 was confirmed on the basis of retrospective amendments in FA, 1994 and Service Tax rules. In such a case, the question of suppression of facts, fraud or collusion does not arise. So, show cause notice issued after one year but within 5 years is no more sustainable. Thus, I hold that the demand issued in the present case is not maintainable as time barred.

9. In view of the facts and discussions hereinabove, I reject the appeal



filed by the Department and uphold the impugned order.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

(उमा शंकर)

CENTRAL TAX (Appeals),
AHMEDABAD.

ATTESTED

S. DUTTA

SUPERINTENDENT,
CENTRAL TAX (APPEALS),
AHMEDABAD.

To,

M/s. JMC Projects (India) Pvt. Ltd.,
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Ahmedabad- 380 015.

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner, Central Tax, Ahmedabad (South).
- 3) The Dy./Asst. Commissioner, Central Tax, Division-VII (Satellite), Ahmedabad.
- 4) The Asst. Commissioner (System), Central Tax, Hq., Ahmedabad (South).
- 5) Guard File.
- 6) P. A. File.

