



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

☎ : 079-26305065

टेलिफैक्स : 079 - 26305136



रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)171/A-II/2016-17
Stay Appl.No. NA/2016-17

4774
4778

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-031-2017-18
दिनांक 25.07.2017 जारी करने की तारीख Date of Issue

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

8/8/17

ग Joint Commissioner, केन्द्रीय कर, Service Tax द्वारा जारी मूल आदेश सं
AHM-SVTAX-000-JC-011-16-17 दिनांक: 04/08/2016, से सृजित

Arising out of Order-in-Original No AHM-SVTAX-000-JC-011-16-17 दिनांक: 04/08/2016 issued by
Joint Commissioner, Central Tax, Service Tax

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Infinium Motors Pvt. Ltd.
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 दारे 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.

(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 मान्द 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।

(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 प्रषत्र 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 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."



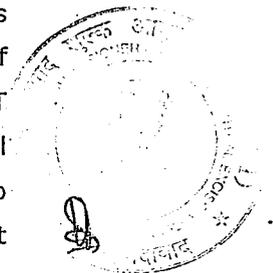
ORDER IN APPEAL

M/s. Infinium Motors Pvt. Ltd., 842, Nr. YMCA Club, S. G. Highway, Ahmedabad (*hereinafter referred to as the 'appellants'*) have filed the present appeal against the Order-in-Original number AHM-SVTAX-000-IC-011-16-17 dated 04.08.2016 (*hereinafter referred to as 'impugned order'*) passed by the Joint Commissioner, Service Tax, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that during the course of audit, it was detected that the appellants had failed to discharge their Service Tax liability correctly for the years-2010-11, 2011-12 and 2012-13 by way of suppressing the income recorded in their books of account and showing wrong figures in the ST-3 returns filed by them. On being pointed out by the audit officers, the appellants agreed to the objection and paid ₹8,71,467/- (amount short paid and detected by the audit officers) on 27.09.2014 from Cenvat credit account but did not pay interest of the said amount of Service Tax.

3. Thus, a show cause notice, dated 10.09.2015, was issued to the appellants which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority, vide the impugned order, confirmed the Service Tax demand of ₹8,71,467/- under Section 73(1) of the Finance Act, 1994 and ordered to appropriate the said amount already paid by the appellants. The adjudicating authority further confirmed the demand of interest of ₹5,00,419/- under Section 75 of the Finance Act, 1994 for delayed payment of the amount ₹8,71,467/-. He further imposed an equivalent penalty under Section 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order the appellants have preferred the present appeals. The appellants have submitted that the proceedings initiated against the appellants were unauthorized as no show cause notice was permissible to be issued under Section 73(1) of the Finance Act, 1994 when the appellants had discharged the liability of short payment of Service Tax. They however, admitted to the fact that the said amount was paid on being pointed out by the audit officers of the department. Thus, the impugned order, passed for the liabilities like interest and penalty, is equally unauthorized and impermissible. The appellants further claimed that the adjudicating authority has committed an error in demanding interest of ₹5,00,419/- though the interest liability in the case was only to the tune of ₹57,672/-. They stated that the short payment of ₹8,71,467/- arose only because the difference between the taxable value as per the books of accounts and the taxable value declared in ST-3 returns could be ascertained only when the accounts were finalized by the statutory auditors. Since the above short paid amount involved 3 financial years, the appellants had submitted details of CENVAT credit lying unutilized in the books of accounts during each financial year which clearly indicates that there was no actual short payment of Service Tax during the financial years of 2011-12 and 2012-13 as a large amount of CENVAT credit was lying in their CENVAT account during these two years. The only short payment occurred in the financial year 2010-11. Thus, interest liability would accrue only when the appellants had no balance of CENVAT or cash for being utilized towards the tax liability. The interest



liability, therefore, would not arise in the present case as the appellants debited the tax amount at a later point of time though adequate credit in CENVAT was otherwise lying available with them.

5. Personal hearing in the matter was granted and held on 19.06.2017. Smt. Shilpa P. Dave, Advocate, appeared before me on behalf of the appellants and reiterated the contents of appeal memo and requested to set aside the impugned order.

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. I find that the appellants had short paid Service Tax for the periods 2010-11, 2011-12 and 2012-13 and on being pointed out by the audit officers of the department, they paid the short paid amount from their CENVAT credit account and refrained from paying the interest arising out of the late payment. The adjudicating authority, vide the impugned order, confirmed the short paid Service Tax and demanded interest of ₹ 5,00,419/- under Section 75 of the Finance Act, 1994 for delayed payment of the amount ₹ 8,71,467/- and imposed an equivalent penalty under Section 78 of the Finance Act, 1994. The appellants, in their argument claimed that the short payment occurred unintentionally as the difference of Service Tax due and Service Tax paid could be ascertained by the statutory auditors. The appellants, in this regard, failed to clarify as to whether the statutory auditors could actually ascertain the difference or otherwise. Because, the act of short payment of duty continued for three financial years viz. 2010-11, 2011-12 and 2012-13 and could have continued for long had the departmental auditors did not conduct audit in their premises. It is a sure fact that the appellants were very much in knowledge of the act committed by them and that is the reason they paid the short paid amount immediately after being pointed out by the departmental officers. This raises a question in my mind that whether the statutory auditors did perform their task sincerely or tried to ignore the folly at the behest of the appellants.

7. Further, coming to the issue that the appellants are not supposed to pay interest as they were having sufficient balance in their CENVAT account, I quote the contents of Rule 8(3), Central Excise Rules, 2002, where it is stated that if the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest in terms of rate fixed under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount. Thus, it is quite clear that the appellants are liable to pay interest on the Service Tax amount short paid by them intentionally. The appellants also stated that the Hon'ble Karnataka High Court and Hon'ble Punjab High Court have considered the cases where CENVAT credit was wrongly taken but not utilized by the assessee. However, in the present case, the appellants have utilized the CENVAT credit wrongly i.e. late payment of tax. And where the CENVAT credit has been taken [and] utilized wrongly, the same along with interest shall be recovered from manufacturer or the provider of the output service and the provisions of sections 11A and 11AA] of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries. If the 'amount' which is payable under rule 6 of Cenvat Credit Rules

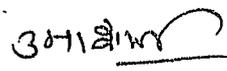


is not paid, the same can also be recovered along with interest. Section 11A of Central Excise Act and section 73 of Finance Act provide for recovery of duty and service tax respectively. Section 11AB of Central Excise Act and section 75 of Finance Act, 1994 provide for interest for delayed payment. In Pratibha Processors v. UOI it was observed - 'In fiscal statutes, the import of the words 'tax', 'interest', 'penalty' etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging section. It is a compulsory exaction of money by a law. Penalty is ordinarily levied on an assessee for the some contumacious conduct or a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has with held payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of delay in paying the tax on due date. Essentially, it is compensatory and different from penalty - which is penal in character. Thus, in view of the above discussion, I conclude that the adjudicating authority has very rightly demanded interest and imposed penalty under Section 75 and 78 respectively of the Finance Act, 1994.

8. Accordingly, as per the above discussion, I do not find any reason to interfere in the impugned order and reject the appeal filed by the appellants.

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

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

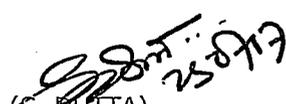

(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

25.07.2017

ATTESTED


(S. BUTTA)

SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

To,

M/s. Infinium Motors Pvt. Ltd.,

842, Nr. YMCA Club,

S. G. Highway,

Ahmedabad

Copy to:

- 1) The Chief Commissioner, ^{Tax} Central Excise, Ahmedabad.
- 2) The Commissioner, ^{Central} Service Tax, Ahmedabad (North)
- 3) The Dy./Asstt. Commissioner, ^{Central} Service Tax, Division VI, Ahmedabad (South)
- 4) The Asstt. Commissioner (System), Service Tax Hq, Ahmedabad. (South)
- 5) Guard File.
- 6) P. A. File.

Dir address:- Div-VI, 7th/1. Floor, B.D. Patel

House, Naranpura

