
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील)	
	O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर भवन, सातवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	
079-26305065		टेलिफेक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/22/Ahd-II/2017-18 & V2(ST)/11/RA/Ahd-II/2017-18 | 1706-1710
 Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-353&354-2017-18
 दिनांक Date : 26-02-2018 जारी करने की तारीख Date of Issue 22-03-18,

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

ग Arising out of Order-in-Original No. STC/26/KM/AC/D-III/16-17 दिनांक: 23/3/2017 issued by
 Asst. Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Prithvi Associates.
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 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 :

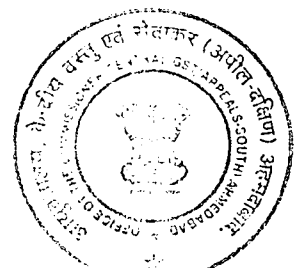
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(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 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.

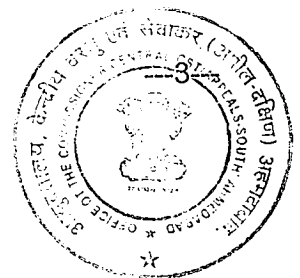
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या 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

This order arises out of an appeal filed by M/s. Prithvi Associates, 5, Shweta Park Society, Near Manekbaug Hall, Ambawadi, Ahmedabad-380015 (in short 'appellant') against Order-in-Original No.STC/26/KM/AC/D-III/16-17 dated 23.03.2017 (in short 'impugned order') passed by the then Assistant Commissioner, Service Tax Division-III, Ahmedabad (in short 'adjudicating authority'). Simultaneously, the then Asstt. Commissioner, Service Tax Division-III, Ahmedabad (in short 'respondent') has also filed an appeal in terms of Review Order No.09/2017 dated 16.06.2017 passed u/s 84(1) of the Finance Act, 1994 by the Review Authority against the impugned order.

2. Briefly stated that during the course of scrutiny of financial records of the appellant, it was observed that the appellant failed to pay service tax of Rs.1,08,228/- on Advertising services provided to the Govt. Organisation viz. Directorate of Advertising & Visual Publicity (in short 'DAVP') during the period 2006-07. Hence, SCN dated 12.06.2008 was issued for recovery of said short paid/unpaid service tax u/s 73(1), interest u/s 75 and imposition of penalties u/s 76, 77 and 78 of the Finance Act, 1994. This SCN was adjudicated by the adjudicated authority vide impugned order wherein demand of service tax of Rs.1,08,228/- was confirmed alongwith interest under section 73(1) and 75 ibid and imposed penalties under section 77, and 78ibid.

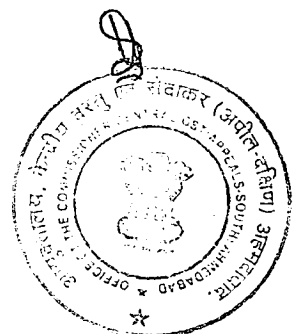
3. Aggrieved with the impugned order, the appellant has filed the present appeal wherein, *inter alia*, submitted that:

- (a) abnormal delay in adjudication is violation of principle of natural justice.
- (b) quantification of value is not correct.
- (c) demand is barred by limitation.
- (d) when the demand is barred by limitation, penalty u/s 78 cannot be imposed.

3(a). The respondent has also filed an appeal for imposition of penalty under Section 76ibid on the appellant in terms of said review order.

4. Personal hearing in the matter was held on 18.12.2017. Shri S.J. Vyas, Advocate, appeared on behalf of the appellant and submitted written submission wherein, *inter alia*, stated that-

- the notice of June-2008 is decided in March-2017;
- that this delay has the effect of rendering the proceedings void being in violation of natural justice; that demand is barred by limitation as in July-



2005, the Tribunal order in their case was available deciding the very issue against them;

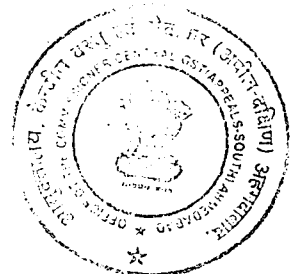
- that after Tribunal order, SCN dated October-2007 was issued for the period 2002-03 to 2005-06 and thereafter the impugned SCN is issued covering the period 2006-07;
- that no malafide can be imputed and in the face of knowledge on the part of department, extended period cannot be invoked;
- that quantification of tax is incorrect in view of said Tribunal order;
- that since demand is not tenable, interest and penalties also cannot be demanded;
- that as regards appeal filed by the department for imposing penalty u/s 76, there cannot be penalty simultaneously u/s 78 and 76 and rely upon case law viz. Raval Trading Co.-2016(42) ST-201-Guj HC.

5. I have carefully gone through the appeal memorandum, submission made at the time of personal hearing and evidences available on records. I find that the main issue to be decided is whether the demand confirmed is sustainable or otherwise for the appellant and whether penalty is to be imposed on the appellant by the adjudicating authority for appeal filed by the respondent. Accordingly, I proceed to decide the case on merits.

(A) Appellant's case:

6. Prima facie, I find that the appellant is registered in the category of 'Advertising service' u/s 69 of the Finance Act, 1994. The subject SCN dated 12.06.2008 for the period 2006-07 was issued in terms of Audit Report No.245/2007-08 dated 28.04.2008 invoking extended period and kept pending for adjudication since the Hon'ble Supreme Court had dismissed the departmental appeal filed against CESTAT Order No.A/669/WZB/2005-C-II dated 12.07.2005 wherein it was held that the Hon'ble CESTAT, Mumbai remanded the case of denovo adjudication to original adjudicating authority for re-quantification of service tax leviable in terms of clarification issued by the Board vide circular no.341/43/96-TRU dated 31.10.1996 for arriving at the correct value of taxable service provided and held that:

- (i) while applying Board's circular, the expenses incurred for making space available or rental charges paid for getting such space for advertisement are not includible in the value of taxable service, and

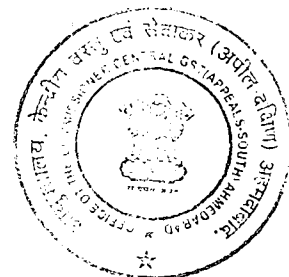


- (ii) the activity of hiring the space and providing the same to a person, who uses it for advertisement, will not meet the definition of advertisement, thus attracting no tax on the same.

6(a). In this regard, I find that the appellant has failed to provide documentary evidence and data required for re-quantification of taxable value and consequently service tax liability in terms of direction issued by the Hon'ble CESTAT to the adjudicating authority as well as to this appellate authority to substantiate their case though they were given personal hearing at both the forum. On the contrary, it is alleged that hearing notice is issued after nine years; that on account of this delay, all the positive evidences in their support would not be available; that they are robbed to defend the case; that abnormal delay in adjudication is violation of principle of natural justice. In this regard, I find that reason for delay is well known to the appellant that the department has filed an appeal before the Hon'ble Supreme Court against the said CESTAT order. It is a precedent that adjudication of similar matter/issue is kept pending in order to avoid multiple litigation. In such a situation, it is incumbent on the part of the appellant to preserve the positive evidences to substantiate their case since the issue has arose during audit of the records/documents maintained by the appellant. I find that the appellant has not submitted said evidence at any point of time in the interest of justice. Now pleading that all the positive evidences in their support would not be available and they are robbed to defend the case shows their malafide intention. In such a situation, I hereby once again direct the appellant to submit all positive evidences available with them to the original adjudicating authority to examine their case in the interest of justice in light of the direction issued by the Hon'ble CESTAT vide order dated 12.07.2005. The adjudicating authority is also directed to examine the appellant's case and pass speaking order after following the principle of natural justice within 30 days of communication of this order.

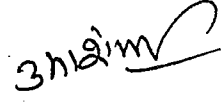
(B) Department's case:

7 I find that the respondent has filed appeal against the impugned order for imposition of penalty on the appellant under section 76 of the Finance Act, 1994. I find that the SCN was issued on 12.06.2008 for the demand of service tax for failure to pay service tax during the period 2006-07 invoking extended period under proviso to Section 73(1)ibid. I find that though the penal provision of Section 76 is invoked in the subject SCN, the adjudicating authority has failed to give findings as to why the penalty under section 76 is not imposed when it was mandatory at the material time i.e. before amendment in section 78 w.e.f.10.05.2008. I find that the review authority has correctly raised this point in



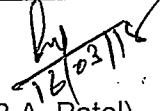
the present appeal. I find that prior to 10.05.2008, the settled position was that penalties under could be imposed under both the section provided the ingredients of both sections are present in the case. I find that period involved in the SCN is 2006-07 and therefore penal provisions of section 76 shall be squarely applicable till 10.05.2008. Since the adjudicating authority has failed to give reasoning for non imposition of penalty under section 76 though the same has been invoked in SCN dated 12.06.2008, I remand the case back to the adjudicating authority for offering reasoning for imposition/non-imposition of penalty under section 76 and issue speaking order after following the principle of natural justice.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellants stands disposed of in above terms.



(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)

Attested:


(B.A. Patel)
Supdt.(Appeals)
Central GST, Ahmedabad.

BY SPEED POST TO:

- (1) M/s. Prithvi Associates,
5, Shweta Park Society,
Near Manekbaug Hall, Ambawadi,
Ahmedabad-380015.
- (2) The Asstt. Commissioner,
CGST Division-VII(Satellite),
Ahmedabad South.

Copy to:-

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Principal Commr, CGST, Ahmedabad South (RRA Section).
- (3) The Asstt. Commr(System), CGST , Ahmedabad-South.
(for uploading OIA on website)
- (4) Guard file
- (5) P.A. file.
- (6) F.no.V2(ST)11/RA/A-II/2017-18.



