

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन, 🖳 🔠

7th Floor, GST Building, Near Polytechnic,

सातवीं मंजिल, पोलिटेकनिक के पास,

Ambavadi, Ahmedabad-380015

आम्बावाडीः अहमदाबाद-3800.15

. टेलेफैक्स: 079 - 26305136

2079-26305065

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/96/Ahd-I/2017-18 & V2(ST)/37/EA-2/Ahd-I/2017-18 / 1731 🕂 о 1735 Stay Appl.No. NA/2017-18

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

Arising out of Order-in-Original No. SD-05/09/DKJ/DC/2017-18 दिनाँक: 16/6/2017 issued by Deputy Commissioner, Central Tax, Ahmedabad-South

अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent M/s Innovative Management Services 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 a 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 linistry 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 प्रकिया 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 य' भूटान को) निर्यात किया गया माल हो।

9. file



- (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 मामलें 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 डयूटी केडिट 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 विनाँक 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 रूपये या उससे कम हो तो रूपये 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) उक्तिलिखित 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 मैन्टल हारिपटल कम्पाउण्ड, मेघाणी 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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 रू.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 in 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 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 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 paymen 10% of the duty demanded where duty or duty and penalty are in dispute, of penalty, who penalty alone is in dispute."

ORDER-IN-APPEAL

Two appeals have been filed, one by M/s. Innovative Management services, 23-A, Harigiriraj Society, Opposite Paras Nagar, Vatva Road, Isanpur, Ahmedabad-382243 (hereinafter referred to as "the appellant") and other by the Assistant Commissioner of Central GST, Division-IV, Narol, Ahmedabad South Commissionerate (hereinafter referred to as "the department") in terms of the directions given vide Review Order No. 22/2017-18 dated 19.09.2017 issued by Commissioner, CGST, Ahmedabad South Commissionerate against the OIO No. SD-05/09/DKJ/DC/2017-18 dated 16.06.2017 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, Division-V, Service Tax Commissionerate, Ahmedabad (hereinafter referred to as "the adjudicating authority").

- 2. Briefly the facts of the case are that the appellant was engaged in providing "Manpower Recruitment or Supply Agency service" and defined as taxable service under Section 65B(44) of the Finance Act, 1994 and was registered at address 23-A, Harigiriraj Society, Opposite Paras Nagar, Vatva Road, Isanpur, Ahmedabad-382243 and was operating from non registered address 301, Pawan Plaza, 19, Sardar Patel Colony, Naranpura, Ahmedabad and a search was conducted by the preventive section of the Service Tax Commissionerate, Ahmedabd on the operational address of the appellant. On scrutiny of the documents viz. Service Tax Payment Ledger, Balance Sheet, Form 26AS, and invoices raised by them for the period 2011-12 to 2014-15, it was found that:
- (i) they had not discharged their service tax liability for the period from 2011-12 to 2014-15 amounting to Rs. 32,42,370/-.
- (ii) the appellant did not file any ST-3 returns during the period from 2011-12 to 2016-17.
- (ii) the appellant is inactive from financial year 2015-16 but they neither intimated the department nor surrendered registration.
- Consequently, a show cause notice dated 17.01.2017 was issued *inter alia*, alleging that the appellant has suppressed the value of taxable service for the period 2011-12 to 2014-15 with an intention to evade payment of service tax; that they did not discharged their service tax liability and did not file ST-3 returns; that the department would never have known about the activity of the appellant, but for the search conducted by the Preventive Section, Service Tax Commissionerate, Ahmedabad. The said show cause notice therefore, proposed recovery of the service tax not paid under proviso to Section 73(1) of the Finance Act, 1994 along with interest and further proposed penalty under section 78 of the Finance Act, 1994. The said show cause notice was adjudicated by the adjudicating authority vide the aforementioned impugned order, wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty under Section 78 of the Finance Act, 1994.
- 3. Being aggrieved, the appellant has filed the present appeal on the grounds that:

⁽i) the adjudicating authority imposed a penalty of 100% of service tax on them under Section 78 (1) of the Finance Act, 1994. As per first proviso to Section 78 (1) ibid, if details of transactions are recorded in specified records then the penalty shall be reduced to 50% of the service tax, so determined and herein the

service tax was determined only on scrutiny of documents/records viz. Service tax payment ledger, Balance Sheet Form 26 AS and invoices for the period April 2011 to March 2017. Further from Para 7.4 of the show cause notice, it is clearly specified that the service tax liability has been reflected in the Balance Sheet and Income Tax returns. Hence the first proviso to Section 78 (1) *ibid* is applicable here and the penalty shall be reduced to 50% of the service tax.

(ii) the order passed by the adjudicating authority is neither legal nor proper and likely to be set aside in as much as it does not provide option to pay penalty at 25% of the service tax, so determined as per second proviso to Section 78 (1) *ibid*.

The appellant requested to reduce the penalty imposed in terms of Section 78 (1) ibid to 50% and to grant them the option to pay 25% penalty as specified in second proviso to Section 78 (1) ibid.

- 4. The department also filed an appeal on the grounds that:
- (i) the appellant failed to file ST-3 returns for the period 2011-12 to 2016-17 within stipulated time and thus contravened Section 70 *ibid* read with rule 7 of the Service Tax Rules, 1994 and hence non imposition of the late fee in the impugned order is neither proper nor legal and requested that the impugned order shall be quashed and set aside.
- 5. A personal hearing in the matter was held on 02.02.2018 and Shri Punit Prajapati, Chartered Accountant, appeared on behalf of the appellant and reiterated the grounds raised in the appeal.
- 6. I have carefully gone through the facts of the case on records, appeal memorandum filed by both the appellants and submissions made by the appellant at the time of personal hearing. I observe that the service tax liability has not been disputed by the appellant and is therefore not a part of the present proceeding. The question to be decided in the present appeal is relating to quantum of penalty, as the appellant has argued that he is eligible for the benefit of the proviso to Section 78 of the Finance Act, 1994, which has not been granted to him. Further the second question to be decided is whether late fee is to be imposed on the appellant as contended by the department.
- I find that the adjudicating authority has imposed penalty equivalent to 100% of the duty on the appellant under Section 78(1) of the Finance Act, 1994. The appellant in their grounds of appeal has stated that the penalty imposed should be reduced to 50% of the duty in terms of first proviso to section 78(1) ibid in as much as the details of transactions were recorded in specified records viz. Service Tax Payment Ledger, Balance Sheet, Form 26AS and invoices for the period April 2011 to March 2015 and the service tax liability was determined based on the aforesaid documents/records. Now, the first proviso to Sec 78(1) of Finance Act, 1994, states as follows:

First Proviso to Section 78 (1) of the Finance Act, 1994 states as follows:

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 after the 24 date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty percent of the service tax so determined.

Ideally, this being a statutory right, the benefit ought to have been granted to the appellant, subject however, to the condition that the details relating to such transactions are recorded in the specified records. Since no finding has been recorded in this regard for non granting of the benefit of the aforementioned proviso, I feel that it would be prudent to remand back the matter to the original adjudicating authority with a direction to look into the matter and give a detailed finding as to whether the appellant is eligible for the benefit sought or otherwise.

6.2 I find that the appellant has also sought the benefit of the second proviso to Section 78(1) of the Finance Act, 1994, which states as follows:

Second Proviso to Section 78(1) of the Finance Act, 1994 states as follows:

Provided further that where service tax and interest is paid within a period of thirty days of the date of service of notice under the proviso to

- (i) sub-section (1) of section 73, the penalty payable shall be fifteen percent of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;
- (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent of the service tax so determined.

Consequent to deciding the issue regarding granting the benefit of the first proviso to Section 78(1), the adjudicating authority is also directed to look into the merits of the above claim i.e. granting benefit of second proviso to Section 78(1). I further find that the department has in its appeal memorandum stated that the adjudicating authority erred in not imposing late fee despite the appellant failing to file returns for the period from 2011-12 to 2016-17. This issue may also be decided by the adjudicating authority while deciding the aforementioned matter. The adjudicating authority is further directed to adhere to the principles of natural justice while deciding these issues.

- 7. In view of the foregoing, both the appeals as mentioned in para (1) supra, are allowed by way of remand, to the adjudicating authority in terms of para, supra.
- 8. अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

8. The appeals filed by the appellants stand disposed off in above terms.

(उमा शंकर)

आयुक्त (अपील्स)

Attested

(Vinod Lukose) Superintendent,

Central Tax (Appeals), Ahmedabad



By RPAD

To,

M/s. Innovative Management services, 23-A, Harigiriraj Society, Opposite Paras Nagar, Vatva Road, Isanpur, Ahmedabad-382243

Copy to:-

- 1. The Chief Commissioner, Central Tax Zone, Ahmedabad.
- 2. The Commissioner, Central Tax, Ahmedabad South.
- 3. The Addl./Joint Commissioner, (Systems), Central Tax, Ahmedabad South.
- 4. Asst. Commissioner, Central GST, Div-IV (Narol), Ahmedabad South.
- 5. Guard file.
- 6. P.A .to Commissioner (Appeals).



