



सत्यमेव जयते

## केंद्रीय कर आयुक्त (अपील)

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

केंद्रीय कर भवन,

7<sup>th</sup> Floor, GST Building,

Near Polytechnic,

सातवीं मंजिल, पॉलिटेक्निक के पास,

Ambavadi, Ahmedabad-380015

आम्बावाडी, अहमदाबाद-380015

☎ : 079-26305065

टेलीफैक्स : 079 - 26305136



रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)33/EA-2/Ahd-I/2017-18 / 2383-2387  
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-438-2017-18  
दिनांक Date : 22-03-2018 जारी करने की तारीख Date of Issue 14/4/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. STC/04/KM/AC/D-III/17-18 दिनांक: 28/4/2017 issued by: A.H.T.,  
Commissioner, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
M/s. Sunit Sudhirbhai Choksi.  
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) केंद्रीय 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, 4<sup>th</sup> 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 दिनोंक 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.

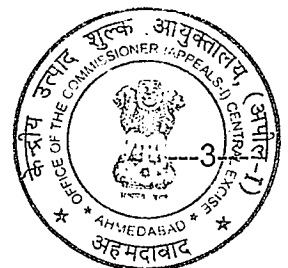
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 मैटल हास्पिटल 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. 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

This is an appeal filed by the department against Order-in-original No. **STC/04/KM/AC/D-III/17-18 dated 28/04/2017** (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax, Division-III, Ahmedabad (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated the facts of the case are that M/s Sunit Sudhirbhai Choksi, 62, Sona Rupa Apartments, Opposite Lal Bungalow, C.G. road, Ahmedabad (hereinafter referred to as 'the respondent') was engaged in providing taxable services under the category of "construction of Residential Complex". During the course of audit, it was noticed that the respondent had provided services of Construction of Commercial Complex (other than residential complex) and had received advances from customers against bookings of shops in the year 2013-14 but the respondent had neither obtained registration for "construction services other than residential complex, including commercial / industrial buildings or civil structures" as specified in section 65(105) zq nor had the respondent discharged Service Tax liability amounting to **Rs.3,35,759/-** during the year 2013-14. Therefore, a Show Cause Notice F.No.STC/609/AP-XII/RP-4/SCN/15-16 dated 06/06/2016 (hereinafter 'the SCN') was issued to the respondent demanding Service Tax amounting to Rs.3,35,759/- under Section 73(1) read with Section 68 of the Finance Act, 1994 along with interest under section 75 of the Finance Act, 1994 and proposing to impose penalty on the respondent under section 76, Section 77 and Section 78 of the Finance Act, 1994. The SCN was adjudicated vide the impugned order dropping the proceedings initiated in the SCN.

3. The department has preferred the instant appeal mainly on the following grounds:

- 1) Dropping the proceedings without imposition of penalty under section 77 of the Finance Act, 1994 appears to be not proper and legal because it is on record that the respondent had not included "construction services other than residential complex, including commercial / industrial buildings or civil structures" in the registration certificate and not filed ST-3 returns in valid manner in contravention of **Section 70 of the finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994.**

4. Personal hearing in the appeal was held on 15/03/2018, attended by Ms. Nisha Vora, C.A. The learned C.A. explained the case and pointed out paragraph 30, 31, & 32 of the impugned order and submitted that there was no loss of revenue or short payment. She also pointed out to the Board Circular quoted in paragraph 33 of the impugned order and requested to reject the appeal.

5. I have carefully gone through the facts of the case on records and the grounds of appeal filed by the department. The department is in appeal only for the failure of the



adjudicating authority to impose penalty under Section 77 of the Finance Act, 1994 on the ground that the respondent had contravened the provisions of Section 70 of the finance Act, 1994 and rule 7 of Service Tax Rules, 1994. The department has not challenged the dropping of the demand invoking extended period of limitation in the SCN and levy interest in the instant appeal. The dropping of the proposal in the SCN to impose penalty on the appellant under section 76 and section 78 of the Finance Act, 1994 is also not under challenge. Further, the conclusion drawn in paragraph 33 of the impugned order by the adjudicating authority that the respondent "*had paid Service tax under the category of "Construction of residential complex" instead of "Construction of commercial complex", the tax has been paid merely under wrong accounting code and it is not a case of nonpayment of tax at all*" is not contradicted in the instant appeal. As regards the wrong accounting code, the adjudicating authority has relied upon the clarification in C.B.E.C. Circular No. 58/7/2003-S.T., dated 20-5-2003, which clarifies that in case of payment under wrong accounting code, no demand is required, is also not contradicted in the instant appeal. The only contention in the instant appeal is that because it was on record that the "construction services other than residential complex, including commercial / industrial buildings or civil structures" was not included in the Service Tax registration and the service tax returns did not reflect the correct service on which service tax had been paid, the respondent is liable to penalty under Section 77 of the Finance Act, 1994. In paragraph 32 of the impugned order the adjudicating authority has clearly brought out that even though the respondent had shown Rs.15,00,000/- in the half yearly return for the period of April to September of 2013-14 against the head 'construction of residential complex' by mistake, the said payment had been accounted for against the payment of net collection towards the Shop and therefore, there was no short payment by availing the abatement value for construction of residential complex services. The department has not adduced any evidence or argument to challenge and nullify the findings in the impugned order that there was only clerical error on part of the respondent. Further, in the departmental appeal, the plea for imposition of penalty under Section 77 of the Finance Act, 1994 has been contended on the ground that the appellant had contravened the provisions of section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994. For ease of reference, the provisions are reproduced below:

**"Section 70. Furnishing of returns, -**

(1) Every person liable to pay the Service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed.

(2) The person or class of persons notified under sub-section (2) of Section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed."

②



**“Rule 7. Returns** – (1) Every assessee shall submit a half yearly return in Form „ST-3“ or „ST3A“, as the case may be, along with a copy of the Form TR-6, in triplicate for the months covered in the half-yearly return.

(2) Every assessee shall submit the half yearly return by the 25th of the month following the particular half-year.

Provided that the Form „ST-3“ required to be submitted by the 25th day of October, 2012 shall cover the period between 1st April to 30th June, 2012 only.

Provided further that the Form ST- 3 for the period between the 1st day of July 2012 to the 30th day of September 2012, shall be submitted by the 25th day of March, 2013”;

[ \* \* \* \* ]

(3) Every assessee shall submit the half-yearly return electronically]

(4) The Central Board of Excise and Customs may, by an order extend the period referred to in sub- rule (2) by such period as deemed necessary under circumstances of special nature to be specified in such order.] “

In the present case it is not a case where the respondent had failed to file the returns. The error in a return cannot be construed to be the contravention of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994, especially when no charge relating to suppression of facts or mis-declaration with intent to evade payment of Tax has been confirmed in the instant case or such non-confirmation challenged in the instant appeal. Therefore, the challenge to the dropping of proceedings as initiated in the SCN decided in the impugned order fails and the appeal is rejected.

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

*उमा शंकर*

(उमा शंकर)

आयुक्त (अपील्स-१)

Date: 22 / 03 / 2018

Attested

*(K. P. Jacob)*  
(K. P. Jacob)  
Superintendent (Appeals-I)  
Central Excise, Ahmedabad.

By R.P.A.D.

To  
M/s Sunit Sudhirbhai Choksi,  
62, Sona Rupa apartments,  
Near Lal Bungalow, C.G. Road,  
Ahmedabad.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (South).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad (South).
4. The A.C / D.C., C.G.S.T Division: VI, Ahmedabad (South).
5.  Guard File.
6. P.A.

