



सत्यमेव जयते

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

आम्बावाडी, अहमदाबाद-380015

☎ : 079-26305065

टेलिफैक्स : 079 - 26305136



रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/197/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

283970
2843

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-470-2017-18
दिनांक Date : 26-03-2018 जारी करने की तारीख Date of Issue

24/4/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. SD-02/01/AC/2017-18 दिनांक: 10/04/2017 issued by Assistant
Commissioner, Central Tax, Ahmedabad-South

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

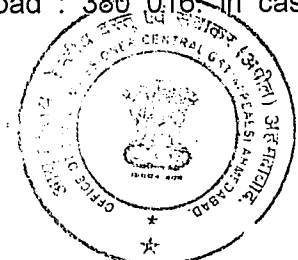
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 मैन्टल हास्पिटल 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।

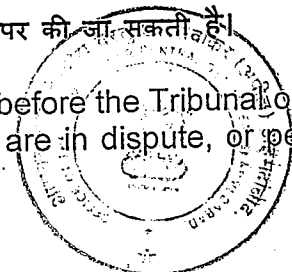
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

This appeal has been filed by M/s. Microserve Solution Pvt. Ltd., 70, Upper Level, Nalanda Complex, Premchand Nagar Road, Vastrapur, Polytechnic, Ahmedabad (hereinafter referred to as "the appellant") against the OIO No. SD-02/01/AC/2017-18 dated 10.04.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Service Tax Commissionerate, Div- II, Ahmedabad (hereinafter referred to as "the adjudicating authority").

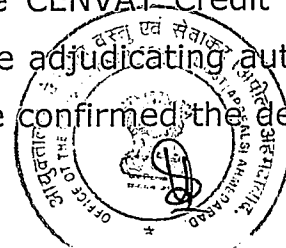
2. Briefly the facts of the case are that the appellant is registered with the Service Tax Department and engaged in providing taxable service under the category of "Management, Maintenance or Repair Service Goods, Equipments or properties" falling under Section 65(105)(zzg) of the Finance Act, 1994. During the course of audit for the period 2011-12 to 2013-14, it was found that:

(i) the appellant was engaged in providing both exempted services (trading activities) and taxable services and availed CENVAT Credit on input services and did not maintain separate accounts for exempted services and taxable services .

(ii) neither they reversed an amount equal to 5% of the exempted service provided for the FY 2011-12 and 6% for the FYs 2012-13 to 2013-14. (total amount Rs. 12,24,445/-) prescribed under Rule 6(3)(i)ibid nor did they paid amount in accordance with Rule 6(3)(ii) ibid.

(iii) did not showed the figures of exempted services in their ST-3 returns for the relevant period.

3. Consequently, a show cause notice dated 2.12.2016 was issued *inter alia*, alleging that the appellant has suppressed the fact that they were engaged in providing exempted services for the relevant period; that they neither maintained separate accounts for the exempted services and taxable services nor reversed the amount prescribed under Rule 6(3) of the CENVAT Credit Rules, 2004; that the department would never have known about the activity of the appellant, but for the audit conducted by the department. The said show cause notice therefore, proposed recovery of the of an amount of Rs. 12,24,445/- under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of the CENVAT Credit Rules, 2004 along with interest and further proposed penalties under Sections 77(2)and 78 of the Finance Act, 1994 and under Rule 15(A) of the CENVAT Credit Rules, 2004. This show cause notice was adjudicated by the adjudicating authority vide the aforementioned impugned order, wherein he confirmed the demand



along with interest and further imposed penalties under Sections 77(2) and 78 of the Finance Act, 1994 and set aside penalty proposed under Rule 15(A) of the CENVAT Credit Rules, 2004.

4. Being aggrieved, the appellant has filed the present appeal on the grounds that:

(i) they are free to choose any option under Rule 6(3) of the CENVAT Credit Rules, 2004 and the department cannot compel them to pay the amount in accordance with Rule 6(3)(i), if separate accounts for exempted and taxable services are not maintained and there is no bar in the Rule not to opt Rule 6(3)(A) *ibid* and they relied on the Board's Circular No. 868/6/2008-CX dated 09.05.2008.

(ii) there is no time limit prescribed by law for reversal of credit and the department's allegation that the credit was not reversed at relevant time is baseless.

(iii) In the absence of any evidence, the adjudicating authority stating that the Credit of Rs. 12,24,445/- availed by them against common input services is completely baseless allegation.

(iv) they have availed CENVAT Credit of Rs.69,915/- on input service like legal fees, telephone services, courier charges which were used for both trading activities and providing taxable output services and they had paid proportionate CENVAT Credit of Rs.2,595/- on common input service by applying Rule 6(3)(ii) *ibid* along with interest and penalties under Sections 77 (2) and 78 of Finance Act, 1994 and under Rule 15(A) of Cenvat Credit Rules, 2004.

The appellant requested to set aside the impugned order.

5. A personal hearing in the matter was held on 12.03.2018 and Ms. Pooja Sheth, 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 and submissions made by the appellant at the time of personal hearing.

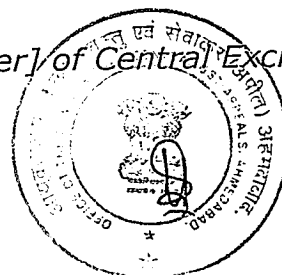
7. I have carefully gone through the facts of the case on records and grounds of appeal. I find that there has been a delay of 255 days in filing the appeal. The impugned order was received on 13.04.2017 by the appellant whereas they filed the appeal on 22.02.2018 i.e. after a delay of 255 days. Section 85 of the Finance Act, 1994 states as follows: [relevant extracts]

SECTION 85. Appeals to the [Commissioner] of Central Excise (Appeals). —

[(1)

(2)

(3)



[(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter :

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.]

The Section, clearly stated that any person aggrieved by any decision or order passed by an adjudicating authority, may prefer an appeal before the Commissioner (Appeals) **within 2 months** from the date of receipt of order from such adjudicating authority. Further, the proviso to Section 85(3A), *ibid*, grants power to the Commissioner (Appeals) to condone delay of a further period of one month over the prescribed period of two months for filing an appeal, provided there is sufficient cause for delayed filing of the appeal. In the instant case, I find that the delay in filing the appeal is of 255 days. The appellant in their letter for condonation of delay had stated that the copy of the impugned order was misplaced by their accountant which cannot be accepted. Since, the statute permits me to condone delay of only one month over the prescribed period of two months, in case of delay in filing the appeal, I am left with no choice but to reject the appeal on the ground of limitation, without going into the merits of the case. My view is also supported by a decision given in case of Flemingo (Duty Free Shop) P. Ltd. Vs The Commissioner of customs (Appeal) Mumbai Zone-I & others reported in [2015 (315) E.L.T. 321 (Bom.)].

8. In view of the above discussion and findings, I reject the appeal being time barred.

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

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

उमा शंकर

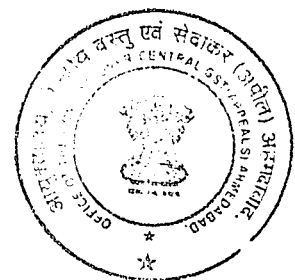
(उमा शंकर)

आयुक्त (अपील्स)

Attested

Vinod Lukose

(Vinod Lukose)
Superintendent,
Central Tax(Appeals),
Ahmedabad.



By RPAD

To,

M/s. Microserve Solution Pvt. Ltd.,
70, Upper Level, Nalanda Complex,
Premchand Nagar Road, Vastrapur,
Polytechnic, Ahmedabad

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. The Assistant Commissioner, Division-VII, Satellite, Ahmedabad South
5. Guard file.
6. P.A .to Commissioner (Appeals).

