



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

केंद्रीय कर भवन,

7th Floor, GST Building,

Near Polytechnic,

Ambavadi, Ahmedabad-380015

सातवीं मंजिल, पोलिटेकनिक के पास,

आम्बावाडी, अहमदाबाद-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)161/Ahd-South/2018-19 / 10,010 to 10,015
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-0168-2018-19
दिनांक Date : 13-03-2019 जारी करने की तारीख Date of Issue _____ 09/04/2019

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. CGST/WS08/Ref-47/BSM/18-19 दिनांक: 10.10.2018 issued
by Assistant Commissioner, Div-VIII, Central Tax, Ahmedabad-South

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

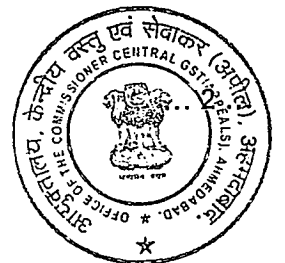
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by 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 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 या भूटान को) निर्यात किया गया माल हो।



(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.

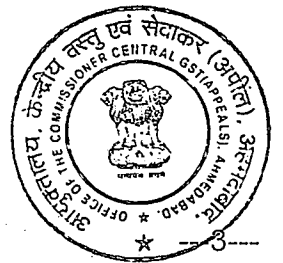
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 मैनटल 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।

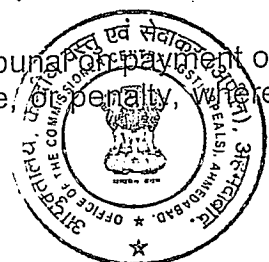
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 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 for payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



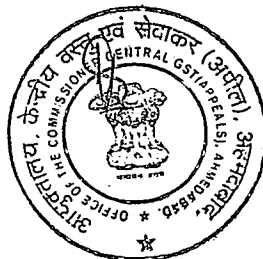
ORDER-IN-APPEAL

This appeal has been filed by M/s Vaibhav Jajoo, B-803, Dev Aurim Residency, Anandnagar Cross Road, Prahladnagar, Satellite, Ahmedabad [hereinafter referred to as 'the appellant'] against Order-in-Original No.CGST/WS08/Ref-47/BSM/2018-19 dated 10.10.2018 [hereinafter referred to as "impugned order"] passed by the Asstt. Commissioner, CGST, Div-VIII, Ahmedabad South Commissionerate [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the fact of the case is that the appellant has filed a refund claim of Rs.5,68,395/- for the service tax paid on the services of 'Construction of Residential complex' on the basis of judgement of Hon'ble High Court of Delhi in the case of Suresh Kumar Bansal & Anju Goyal and others V/s UOI [2016 (43) STR 3]. The appellant had filed the said claim on the grounds that he had purchased a residential property from the Developer M/a Safal Goyal Realty LLP; that the developer has allotted the unit No.40 on the total cost of Rs.1,26,31,000/-and charged service tax of Rs.5,68,395/- from the appellant towards the provision of service under the category of 'Construction of Residential Complex' as defined under Section 65(105)(zzzh) of the Finance Act, 1994. Since the Hon'ble Delhi High Court in its impugned order had held that there is no levy of service tax on the services of Construction of Residential Complex, the appellant has filed the instant refund claim. The adjudicating authority has rejected the said refund claim as per amended Rule 2A of the Service Tax (Determination of Value) Rules, 2006 vide Finance, 2017.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that:

- The adjudicating authority has not passed a speaking order; that he has not considered the submissions made by the appellant in reply to show cause notice.
- In the month of December 2018, the appellant has cancelled the contract for the service of construction of residential complex from the service provider; that the service provider has agreed to refund the consideration paid towards the service to be provided due to non provisions of service; that the amount of service tax of Rs.5,68,395/- recovered and deposited with the Govt. will not be repaid back to them.
- The subject refund claim of service tax paid in June 2017, therefore are no machinery provisions in the FA or Service Tax (Determination of Value) Rules for ascertaining the service element in such composite contracts involving sale of land which is an immovable property. Thus, the ratio of Hon'ble High Court of Delhi supra is aptly applicable.



- Interest is also not payable.
- The appellant has relied on various case laws in support of their arguments.

4. A personal hearing in the matter was held on 14.02.2019. Shri Vaibhav Jajoo appeared for the same and reiterated the grounds of appeal and submitted further submissions.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. The matter is relating to refund of service tax amounting to Rs.5,68,395/- paid by the appellant towards service of 'Construction of Residential Complex'.

6. I find that the appellant has filed the instant appeal on 08.01.2019 against impugned order dated 10.10.2018 (received by them on 18.10.2018). In other words, the appellant has filed the instant appeal after a delay of 22 days from the stipulated period of 60 days as prescribed under Section 35 of CEA. The appellant has filed a condonation of delay application to condone the delay, mentioning that the delay was taken place due to wrong mentioning of three months in the preamble of impugned order. In view of power entrusted under Section 35 of CEA, I condone the delay.

7. At the outset, I find that the appellant has filed the refund in question for the service tax paid on the service of Construction of Residential complex on the basis of judgment of Hon'ble High Court of Delhi in case of Suresh Kumar Bansal & Anuj Goyal & Others supra. Vide the said judgment, the Hon'ble Court has held that there is no levy of service tax on the services of Construction of Residential complex as defined under Section 65(105)(zzzh) of the FA; that in absence of any machinery provision either under the Service Tax Rules, 2006 or under the Finance Act, 1994 to ascertain the value of services involved in the composite contract for construction of complex by developer intended for sale, the Service Tax could not be levied on the value of undivided share of land acquired by the buyer of the dwelling unit or on the value of goods involved in construction of such complex on the strength of the explanation added to Section 65(105)(zzzh) of the FA. However, the adjudicating authority has rejected the claim on the basis of amended Rule 2A of Service Tax (Determination of Value) Rules, 2006.

8. Vide Section 129 of the FA, 2017, the Government of has amended Rule 2A of the said Rules which reads as under:

"129. Amendment of rule 2A of Service Tax (Determination of Value) Rules, 2006, retrospectively. — (1) In the Service Tax (Determination of Value) Rules, 2006 made by the Central Government in exercise of the powers conferred by section 94 of the Finance Act, 1994 (32 of 1994), published in the Gazette of India vide notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 228(E), dated the 19th April, 2006

(a) rule 2A as inserted by the Service Tax (Determination of Value) (Amendment) Rules, 2007 published vide number G.S.R. 375(E), dated the 22nd May, 2007; and



(b) rule 2A as substituted by the Service Tax (Determination of Value) Second Amendment Rules, 2012 published vide number G.S.R. 431(E), dated the 6th June, 2012,

shall stand amended and shall be deemed to have been amended in the manner specified in column (3) of the Sixth Schedule, on and from and up to the corresponding date specified in column (4), against each of the rule specified in column (2) thereof.

(2) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done at any time during the period specified in column (4) of the

Sixth Schedule relating to the provisions as amended by sub-section (1) shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done as if the amendment made by sub-section (1) had been in force at all material times."

9. RULE 2A. Determination of value of service portion in the execution of a works contract. — Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-

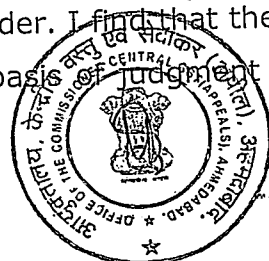
(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods [or in goods and land or undivided share of land, as the case may be] transferred in the execution of the said works contract.

As per amendment in Finance Act, 2017, following substitutes have been made.

Sl. No.	Provisions of the Service Tax (Determination of Value) Rules, 2006 to be amended	Amendment	Period of effect of amendment
(1)	(2)	(3)	(4)
1.	Rule 2A as inserted by notification number G.S.R. 375(E), dated the 22nd May, 2007 [29/2007-Service Tax, dated the 22nd May, 2007].	In the Service Tax (Determination of Value) Rules, 2006, in rule 2A,— (I) in sub-rule (1), in clause (i), after the words "value of transfer of property in goods", the words "or in goods and land or undivided share of land, as the case may be," shall be inserted;	1st day of July, 2010 to 30th day of June, 2012 (both days inclusive)

In view of above amendment, the adjudicating authority has held the payment made by the owner/appellant to the builder/service provider is proper and the builder has rightly collected the service tax on the service provided by them.

10. It is an undisputed fact on record that the appellant purchased a raw house from the builder/service provider and paid the amount as mutuality decided by the seller & purchaser. In the circumstances, the builder has taken consideration from the appellant as decided mutually. Therefore, there is no infirmity in collection of service at the point of time by the builder/service provider. I find that the appellant has solely filed the refund of service tax paid on the basis of judgment of Hon'ble




High Court of Delhi in case of Suresh Kumar Bansal & Anju Goyal supra. As per amendment made in Rule 2A of Service Tax Rule ibid in the year 2017 retrospectively, the service provided by the builder/service provider on construction of complex, building, civil structure or a part thereof, including a complex or building intended for sale to buyer is liable for service tax. Therefore, the decision prior to the amendment of Rule 2A supra is quietly not applicable. Further, the judgment on the basis of which the appellant has filed the refund claim is pertaining to the month of June 2016 and the appellant has paid service tax towards the consideration earned by the builder/service provider is on 01.06.2017. In the circumstances, the adjudicating authority has correctly made the said judgment inapplicable to the instant case.

11. Further, I find that the appellant has submitted in their submission that in the month of December 2018, they cancelled the contract for the service of construction of residential complex from the service provider and the service provider has agreed to refund the consideration paid towards the service to be provided due to non provisions of service; that he has not agreed to pay the amount of service tax of Rs.5,68,395/- recovered and deposited with the Govt. This submission does not appear sensible. First of all, I find that no verifiable documents were able to provide by the appellant in respect of the said submissions, except a self affidavit dated 13.02.2019 to the effect of non-payment of service tax paid. Further, I find that the appellant has filed the refund of service tax paid in question not due to cancellation of their contract but taking into consideration the ratio as laid down in the decision of Hon'ble Delhi High Court supra. The appellant has filed the refund in question on 25/28.05.2018 and the said refund claim was rejected vide the impugned order in the month of October 2018. Therefore, such argument/contention has no relevancy in the instant refund claim.

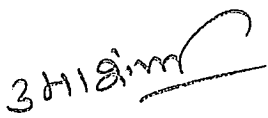
12. In view of above discussion, I reject the appeal filed by the appellant and uphold the impugned order passed by the adjudicating authority. The appeal stands disposed of in above terms.

Attested


(Mohanan V.V)
Superintendent (Appeal),
Central Tax, Ahmedabad.

By RPAD.

To,
M/s Vaibhav Jajoo,
B-803, Dev Aurim Residency,
Anandnagar Cross Road, Prahladnagar,
Satellite, Ahmedabad



(उमा शंकर)
प्रधान आयुक्त (अपील्स)
Date : .3.2019



Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central GST, Ahmedabad South.
3. The Joint Commissioner, CGSt, Ahmedabad South
4. The Assistant Commissioner, System, CGST, Ahmedabad South
5. The Assistant Commissioner, CGST, Dn.VIII, Ahmedabad South
- ✓ 6. Guard File.
7. P.A.