



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

7th Floor, GST Building,
Near Polytechnic,

सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

Ambavadi, Ahmedabad-380015

☎ : 079-26305065

टेलिफैक्स : 079 - 26305136



रजिस्टर्ड डाक ए.डी. द्वारा

5788/05792

क फाइल संख्या : File No : V2(ST)37/Ahd-South/2018-19
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-032-2018-19
दिनांक Date : 10-08-2018 जारी करने की तारीख Date of Issue

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 05/AC/SKL/REF/2018 दिनांक: 30.05.2018 issued by Assistant
Commissioner, Div-II, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Apollo Industries
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।

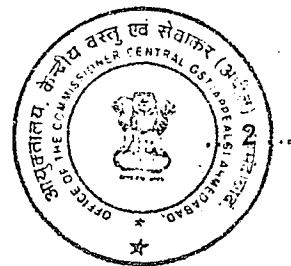
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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

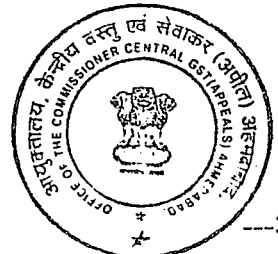
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 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।

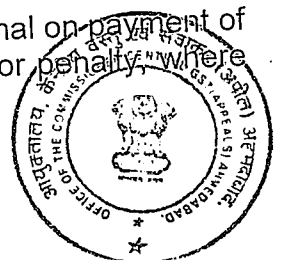
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

M/s. Apollo Industries, Plot Number 1117, Phase-III, Nr. F Road, G. I. D. C. Vatva, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeal against the Order-in-Original No. 05/AC/SKL/REF/2018 dated 30.05.2018 (*hereinafter referred to as 'impugned order'*) by the Assistant Commissioner, Central GST, Div-II, Ahmedabad-South (*hereinafter referred to as 'adjudicating authority'*).

2. The appellants were registered with the Central Excise department having registration number AAUPN0792JEM001 and engaged in the manufacture of 'Commercial Kitchen Equipments' falling under Chapter sub-heading number 73239920 of the Central Excise Tariff Act, 1985. They were also engaged in providing labour work for 'Maintenance & repair Service' and were registered with the Service Tax department having registration number AAUPN0792JSD001. In the financial year 2014-15, they had supplied kitchen equipments for modernization of mid-day meal scheme in various government schools. The agreement comprised of two parts pertaining to the scope of work. The first part was supply of modern kitchen equipments to the government schools located in various districts and the second part was supply, installation, testing and commissioning of kitchen gas pipe line and manifold system per school. Initially, the appellants were under the impression that the said work of supply of the above mentioned goods were as per work order and hence, they made Service Tax payment under Works Contract Service. Later on they realized that they were supposed to pay Central Excise duty and therefore there is no liability of payment of Service Tax on them. Thus, the appellants filed a refund claim for ₹16,25,966/-stating that as there was no Service Tax liability on them and they had mistakenly paid the Service Tax, they were liable for refund of the same. The adjudicating authority rejected the entire refund claim in terms of Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

3. Being aggrieved with the impugned order, the appellants preferred an appeal before the undersigned. The undersigned found the OIO to be a non-speaking one and accordingly remanded the case back with direction to decide the case afresh following the principle of natural justice and issuing a proper speaking order. The appellants approached the adjudicating authority once again. The adjudicating authority, vide the impugned order, sanctioned the refund amount of ₹16,25,966/- but credited the same to the Consumer Welfare Fund under the provisions of Section 73A of the Finance Act, 1994 read with Section 12© of the Central Excise Act, 1944 read with Section 142 of CGST Act, 2017.

4. Being aggrieved with the impugned order, the appellants have preferred

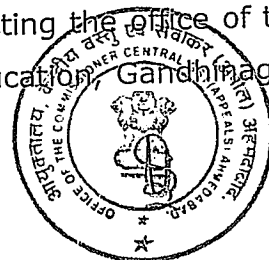


the present appeal. The appellants have submitted that the adjudicating authority has wrongly concluded that the case is suffering from unjust enrichment. They stated that they had not charged Service Tax from their clients and in support of their claim, they have submitted photocopies of invoices issued to the State project Director, Gujarat Council of Elementary Education, Gandhinagar. They have also submitted a copy of the ledger of the State project Director, Gujarat Council of Elementary Education, Gandhinagar and a certificate from P. D. Brahmkshatriya & Co., Chartered Accountants. The appellants requested to set aside the impugned order with consequential relief.

5. Personal hearing in the case was granted on 24.07.2018 wherein Shri Archit Kotwal, Consultant, appeared before me and reiterated the grounds of appeal. Shri Kotwal showed me the certificate of Chartered Accountant, the invoices and the ledger. He reiterated the fact that no Service Tax or Central Excise duty has been charged by the appellants and hence the provisions of unjust enrichment will not be applicable to the case. He further showed me the Board's circular number 58/7/2003-ST dated 20.05.2003.

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. Now, let me examine the reasons of rejection and the defense reply given by the appellants.

7. To start with, I find that the adjudicating authority has not denied the eligibility of the refund claim. In paragraph 20 of the impugned order, he concluded that the refund is allowable but the appellants have not succeeded in rebutting the bar of unjust enrichment as they have failed to produce any documentary evidence to prove that the burden of tax was not passed on to their client. In this regard, I am unable to understand as to whether the adjudicating authority actually tried to verify this by calling for necessary documents or he simply presumed that the appellants might have passed on the tax burden and accordingly concluded in favour of his assumption. Going through the invoices and the ledger, submitted by the appellants, I find that they had not even charged or collected the Service Tax from their client. Their claim is also supported by the certificate of Chartered Accountant P. D. Brahmkshatriya & Co. The adjudicating authority, in the impugned order, has failed to prove the charges placed by him. Allegations based on mere assumption-presumption will hold no base under the eyes of law. If the adjudicating authority had any doubt that the appellants might have passed on the burden of tax, then he could have investigated the matter by asking additional documents from the appellants or contacting the office of the State project Director, Gujarat Council of Elementary Education, Gandhinagar which is a state government entity.



8. In light of the above discussion, I have no hesitation to conclude that the doctrine of unjust enrichment would not be applicable to the case as the appellants have not charged Service Tax from their client and the amount of ₹16,25,966/-, credited to the Consumer Welfare Fund, needs to be recovered and credited to the account of the appellant.

9. In view of my above discussions and findings, I set aside the impugned order and allow the appeal with consequential relief.

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

10. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

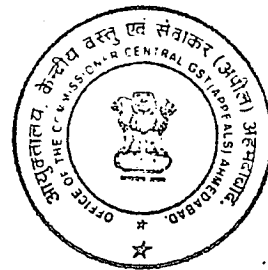
(उमा शंकर)

CENTRAL TAX (Appeals), AHMEDABAD.

ATTESTED

S. Dutta
(S. DUTTA) 160818

SUPERINTENDENT,
CENTRAL TAX (APPEALS),
AHMEDABAD.



BY R.P.A.D.

To,
M/s. Apollo Industries,
Plot Number 1117, Phase-III,
Nr. F Road, G. I. D. C. Vatva,
Ahmedabad- 382 445.

Copy To:-

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner, Central Tax, Ahmedabad-South.
- 3) The Dy./Asst. Commissioner, Central Tax, Division-II, Ahmedabad-South.
- 4) The Asst. Commissioner (System), Central Tax Hq., Ahmedabad-South.
- 5) Guard File.
- 6) P. A. File.