



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलिफैक्स 07926305136



स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)135/Ahd-South/2019-20 / 14106 T 0 / 14110

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-104-2019-20
दिनांक Date : 21-02-2020 जारी करने की तारीख Date of Issue 03/03/2020

आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No. CGST-VI/Ref-21/SKC/A'bad East/19-20 दिनांक: 28.06.2019
, issued by Assistant Commissioner, Div-VI, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Ahmedabad East Infrastructure LLP
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.



(क) 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।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) 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।

(c) 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 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. 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।

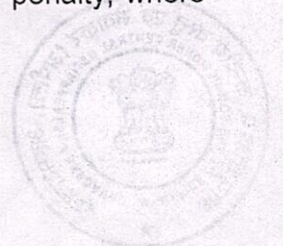
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

1. This order arises out of an appeal filed by M/s. Ahmedabad East Infrastructure LLP, having registered office at 24, Govt. Servant's Socieity, Near Municipal Market, C.G. Road, Ahmedabad-380009 (herein referred to as 'appellant') against Order in Original No. CGST/WS06/REF-01/A'bad East/2019-20 dated 28.06.2019 [hereinafter referred to as 'the impugned order'] passed by the Assistant Commissioner of Central Tax, Division VI, Ahmedabad South (hereinafter referred to as 'the adjudicating authority').

2. Facts of the case, in brief, are that the appellant is engaged in providing taxable service under the category "Construction Service" falling under erstwhile Section 65(105)(zzq) and (zzzh) of the Finance Act, 1994 and holding Service Tax Registration Number AASFA0420CSD001. The appellant has paid the Service Tax based on milestone achieved in construction on the amount received from the customers. The appellant has filed Service Tax refund claim for an amount of Rs.17,58,413/- under Section 11B of the erstwhile Central Excise Act, 1944 as made applicable in the case of Service Tax matter vide Section 83 of the Finance Act, 1994 on the ground that two customers who had made their booking before July 1,2017 and had paid amount for their booking before implementation of GST law, have cancelled their booking post July 1,2017. Since the Service Tax had been paid but the output service was cancelled, the service tax was no longer payable and accordingly they had applied for refund of service tax paid by them. The refund claim was rejected vide OIO No. CGST/WS06/REF-01/A'bad East/2019-20 by the adjudicating authority.

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds that:

- a. In the Service Tax regime, as per Rule 6(3) of the Service Tax Rules, 1994, Service Tax paid on advance amount can be adjusted or credit of such excess Service Tax paid can be taken in case of cancellation or deficient service. However, with the advent of GST law, the adjustment of amount already paid under earlier regime with the tax liability in new regime



was not feasible. As per section 142(5) of CGST Act, 2017, the refund claim of Service Tax paid earlier for which service was not provided or deficient provisions of service needs to be filed in accordance of Service Tax law.

- b. Adjudicating Authority has erred in rejecting the claim in violation of well settled principle that limitation of one year is not applicable where tax paid is not required to be paid.
- c. As per sub section 5 of Section 142 of the CGST Act, 2017 the refund claim of Service Tax paid shall be disposed off in accordance with the provisions of the existing law.

4. This appellant placed reliance on the following Judgements:

- (i) M/s Panchratna Corporation Ahmedabad Commissioner (Appeals-II), Central Excise, Ahmedabad [Order-in-Appeal No. AHM-SUTAX-000-APP-023-17-18 dated 29.06.2017];
- (ii) Hon'ble High Court of Gujarat in case of Addition Advertising v/s Union of India [1998(98)E.L.T. 14(Guj.)];
- (iii) Advance Ruling in case of Kolte Patil Developers Limited;

5. Personal Hearing in the case was held on 11.02.2020. Shri Amish Khandhar, Chartered Accountant attended hearing on behalf of the appellant and reiterated submissions made in appeal memorandum.

6. I have carefully gone through the facts of the case available on record, grounds of appeal and oral submissions made by the appellant at the time of hearing.

7. I find that the appellant is providing service under the category of Construction Service and is booking the units after receiving payments from the prospective buyers of the units. They have claimed to have discharged the service tax liability based on milestone achieved in construction on the amount received from the customers. However, some of the units were cancelled by the prospective buyers and consequently the booking amount was fully refunded to them. It has been contended that the Service Tax based was paid on milestone achieved irrespective of the amount received from the customers and no adjustment of the tax amount paid was allowed after 01.07.2017. Hence, the appellant filed a refund claim. The adjudicating authority has vide aforementioned order rejected the refund claim amounting to Rs.



17,58,413/- as time barred. The Adjudicating Authority has relied upon the case law of Vodafone Cellular Limited 2014(34) STR 890 while rejecting the refund claim.

8. I find that in case of construction service, service tax is required to be paid on the amount received from prospective buyers towards the booking of complex before the issue of completion certificate by the competent authority and this process goes on for years, as has happened in the instant case, and the bookings/dealings can be cancelled at any point of time by the buyers before taking of possession of complex by him. I find that there appears no dispute regarding admissibility of refunds on merit. The Adjudicating Authority has rejected the refund on grounds of being time-barred relying on case law of M/s Vodafone Cellular discussed above. The question arises as to whether in the instant case the appellant is eligible for refund and whether the time limit of one year from payment of duty for claiming refund can be held to be legally permissible.

8.1 I also find that there is no adverse finding on the documents submitted for refund claim and hence they are not in dispute.

9. I find that the adjudicating authority has relied upon the case law of Vodafone Cellular Limited while rejecting the refund claim. I have gone through the order of Hon'ble Tribunal, Mumbai in Vodafone Cellular Limited reported in 2014(34) STR 890 (Tri-Mumbai). It is observed that in this case the matter pertained to rebate under Notification No. 11/2005-ST in respect of export of service. I find that the facts involved in the instant case are different in as much as that this case pertains to continuous supply of Construction Service and the event of refund is triggered by cancellation of unit. Hence, there is difference in material facts of both the case and the application of said case law is accordingly distinguishable. I find that the appellant has relied upon various case laws in support of their appeal.

9.1 I find that issue involved in the instant appeal has been decided in the case of M/s Panchratna Corporation Ahmedabad, Commissioner (Appeals-II), Central Excise, Ahmedabad had in Order-in-Appeal No. AHM-SUTAX-000-APP-023-17-18 dated 29.06.2017. He had in the said order analyzed various case laws on the subject and held that once the booking is cancelled and the entire amount is returned, the appellant has not provided any service and whatever the amount paid by them is in the nature of deposits only and they are eligible for the refund.



10. I further find that Hon'ble Gujarat High Court's in the case of Addition Advertising [1998 (98) ELT 14] held that:

"Classification of commercial and non-commercial advertising is quite rational and not vague or arbitrary-It is not a tax on "sale or purchase of goods"- It is also not a tax on any profession, trade, calling or employment but is in respect of the service rendered- If there is no service, there is no tax-Finally, it is not a tax on advertisement but is on services rendered with reference to advertisement-Section 65(16) d of Finance Act, 1994."

In the said decision, the Hon'ble High Court held that if there is no service, there is no tax.

11. Further, I find that the above decision has been followed by the Hon'ble CESTAT, Ahmedabad in the case of M/s MADHVI PROCON PRIVATE LIMITED [2015(38)S.T.R.74(Tri.-Ahmd.)]- The head note of CESTAT order is reproduced below:

Refund-Limitation-Service Tax paid in advance as per terms of contract, but subsequently contract terminated and no service provided-Advance amount recovered by customer by encashment of bank guarantee-Amount paid by assessee (service provider) to be considered as 'deposit' and not as payment of duty, hence refundable as no Service Tax payable when no service provided-Provisions of Section 11B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994 not applicable.]

I find that the above case law is squarely applicable to the instant case in hand.

12. It is further observed that in case of Parijat Construction v/s Commissioner of Central Excise, Nashik (2018 (9) G.S.T.L. 8(Bom.)), the Hon'ble High Court at Bombay has held that the issue as to whether limitation prescribed under Section 11B of the Central Excise Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer *res integra*. The decisions of the Division Bench of Bombay High Court in Hindustan Cocoa 1994 (74) ELT 525 (Bom.) and Commissioner of Central Excise, Nagpur v/s SGR Infratech Ltd. are squarely applicable to the facts of the case. The Hon'ble High Court has held that the limitation prescribed under Section 11B of the Act be not applicable to refund claims for Service Tax paid under mistake of law.

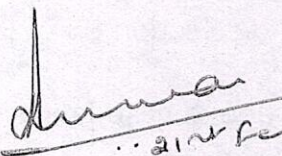


13. I further find that in case of Commissioner of Central Excise (Appeals), Bangalore v/s KVR Construction (2012 (26) S.T.R. 195(Kar.)), Hon'ble High Court of Karnataka at Bangalore has held that mere payment of amount could not authorize department to regularize/validate and retain it. Hon'ble High Court has also held that refund could not be rejected on ground of limitation under Section 11B of Central Excise Act, 1944.

14. In view of above discussion, by following above cited decision of appellate authority and other case laws, I find that the Service Tax is payable on the service provided or to be provided. However, in the instant case, once booking of units are cancelled and the entire amount is returned to the prospective buyers, no service has been provided and received; therefore the amount of Service Tax paid by the respondent is in the nature of merely deposits and not Service Tax. Hence, the refund is eligible to the respondent and the provisions of Section 11B of Central Excise Act, 1944 prescribing time limit to claim refund of duty paid as applicable to Service Tax vide Section 83 of the Finance Act, 1994 is not applicable in this matter.

15. In view of the above, impugned OIO is set aside and appeal filed by the appellants is allowed.

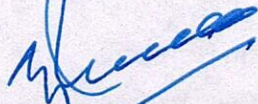
16. The appeals filed by the appellant stand disposed off in above terms.


.. 21st February, 2010 ..
(Akhilesh Kumar)

Commissioner (Appeals)



Attested



(Brijesh Sharma)

Superintendent (Appeals)

Central Excise, Ahmedabad

By Regd. Post A. D

M/s. Ahmedabad East Infrastructure LLP
24, Govt. Servant's Soceity,
Near Municipal Market, Off C.G. Road,
Ahmedabad-380009.

Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner CGST and Central Excise, Ahmedabad-South.
3. The Deputy /Asstt. Commissioner, Central Excise, Division-VI, Ahmedabad-South.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-South.
5. Guard file
6. PA File



