



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- टेलीफैक्स 07926305136



स्पीड पोस्ट

- क फाइल संख्या : File No : V2(ST)03/EA-2/Ahd-South/2019-20 / 14242 TO 14245
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-114-2019-20**
दिनांक Date : **23-01-2020** जारी करने की तारीख Date of Issue **12/03/2020**
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **CGST/WS08/Ref-52(st)BSM/18-19** दिनांक: **27.12.2018** ,
issued by Assistant Commissioner, Div-VIII, Central Tax, Ahmedabad-South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Orchid Divine developers
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.



(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 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 अनुसूचि-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

The Assistant Commissioner, Central GST, Division-VIII, Ahmedabad South (*hereinafter referred to as 'the appellant'*) has filed the present appeal against the Order-in-Original number CGST/WS08/Ref-52(ST)/BSM/2018-19 dated 27.12.2018 (*referred to as 'the adjudicating authority'*) in respect of M/s. Orchid Divine Developers, 10th Floor, Commerce House-IV, Beside Shell Petrol Pump, 100 feet Road, Prahladnagar, Ahmedabad (*hereinafter referred to as 'respondent'*).

2. The facts of the case, in brief, are that the respondent is engaged in the activity of construction of residential complex (Construction Services) and had paid Service Tax towards the advance amount received against booking of the various units during the erstwhile service tax regime. Subsequently, booking of some of the units had been cancelled during the GST regime and respondent has returned the entire amount to their prospective purchaser. Further, on rebooking of the cancelled units, the respondent had again made payment of applicable GST and filed a refund claim for ₹3,20,550/- under Section 11B of the Central Excise Act, 1944 on 30.11.2018 to the department pertaining to the tax paid during service tax regime. The adjudicating authority has sanctioned an amount of ₹3,17,050/- vide the above mentioned impugned order.

3. The impugned order was reviewed by the Commissioner of CGST, Ahmedabad South, who issued a Review Order No. 19/2018-19 dated 30.03.2019 for filing an appeal under Section 84(1) of the Finance Act, 1994. The appellant alleged that the impugned order passed by the adjudicating authority is not proper and legal in as much as ₹3,17,050/- has been sanctioned erroneously. The appellant claimed that the respondent has made the payment of service tax during the period April-June 2017-18 or before, while the refund claim was filed on 30.11.2018 which is beyond one year from the date of payment of Service Tax as prescribed under explanation 1 of Section 11B of the Central Excise Act, 1944 and respondent is not entitled for refund of the claim. It was further contended that the adjudicating authority had erred in finding that service was not provided whereas in fact the services were provided for a long period. The department has relied upon the case law of Assistant Commissioner of Service Tax, Chennai Vs. Nataraj and Venkat Associates [2015(40)S.T.R. 0031(Mad.)] and Mafatlal Industries Ltd. Vs. Union of India [1997(89)ELT 247(SC)]. The appellant claimed that refund of the amount of ₹3,17,050/- erroneously has sanctioned to the respondents, due to the above mentioned discrepancies, needs to be recovered back along with interest. So being aggrieved with the impugned order, the appellant has preferred the present appeal.

4. Personal Hearing in the matter was granted on 19.08.2019. Shri Parag Shah, Chartered Accountant, appeared on behalf of respondents and submitted



fresh cross objection dated 19.08.2019 for consideration with a request to decide the appeals on the basis of their submission.

4.1 Due to change in appellate authority, personal hearing was granted on 17.12.2019 and again on 07.01.2020 but appellant did not turn up. As sufficient opportunity for hearing has been granted, the appeal is to be decided as per available records and submission made by the respondent.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum submitted by the appellant and oral and written submissions made by the respondents at the time of hearing.

6. It is observed that the respondent has made following submission challenging the appeal dated 12.04.2019 made by the department :

i) The provision of Section 11B of the Central Excise Act, 1944 ,which were framed only for application of goods, cannot be blindly applied to the provision of a service.

ii) The relevant date under the provision of Section 11B of the Central Excise Act, 1944 should be considered from the date of cancellation of booking and not the date on which service tax was paid by them as eligibility to claim refund of tax is to be determined with respect to cancellation of the units by the prospective purchasers.

iii) The respondent had again made payment of applicable GST because there is no provision to make adjustment of service tax paid against GST liability on the same transaction. It is a settled position of law that no transaction can be taxed twice.

iv) The Respondent has never contended that the amount of service tax paid was in the nature of deposit. They have paid service tax as per the law and refund of the same is being claimed in accordance with law.

v) The fact of the case in Assistant Commissioner of Service Tax, Chennai Vs. M/s Nataraj and Venkat Associates [2015(40)S.T.R. 0031(Mad.) are completely different from the instant case.They would also rely on the decision given in Order-in Appeal no AHM-SUTAX-000-APP-023-17-18 dated 29.05.2017 passed by the Commissioner(Appeals-II),Central Excise, Ahmedabad in the case of M/s Panchratna Corporation , Ahmedabad.

7. I find that the appellant has filed the appeal on the ground that refund claim was filed on 30.11.2018, while the payment of service tax paid during April -June 2017-18 which is beyond one year and refund was time barred. I find that in the case of construction of residential project service, the service tax is to be paid on the amount received from prospective buyers towards the booking of units before the issue of completion certificate by the competent authority and this process goes



on for years together, as has happened in the instant case, and bookings can be cancelled at any point of time by the buyers before taking of possession of the unit by him. It can be concluded that once bookings were cancelled and amount have been returned to prospective buyer, no service has been provided. Therefore, I find that once it has been held that no service at all has been provided, the calculation of relevant date of one year from the date of payments as per Section 11B of Central Excise Act, 1944 cannot be made applicable in the instant case. I further find that service tax was paid against booking of residential units during the service tax regime, whereas cancellation & re-booking of the units had happened on or after 01.07.2017 i.e. GST regime. As, there is no contingency prescribed in this type of case, I find merit in the argument of the respondent that they cannot be taxed twice or cannot be put to loss for want of such contingency .

8. I find in the grounds of appeal filed by the appellant that they have relied upon the judgment of Assistant Commissioner of Service Tax, Chennai versus M/s Nataraj and Venkat Associates 2015(40)S.T.R.31(Mad.) wherein refund of Service Tax under export of service was denied when Tax was paid under a mistake of law. Whereas, the present case is of continuous supply of construction service of and event of refund is triggered by the cancellation of unit. Hence, there is difference in material facts of both the case and the application of said case is distinguished.

9. The issue involved in the instant appeal has already been decided by the Appellate Authority, Ahmedabad vide OIA dated 29.05.2017 in case of M/s Pancharatna Corporation by holding that once booking is cancelled and the entire amount is returned, no service was provided and whatever the amount paid by the service provider is in the nature of deposit only and eligible for the refund. The appellant authority as taken the said decision by following various case laws including Hon'ble Gujarat High Court's decision in the case of Addition Advertising [1998 (98) ELT 14]. The applicable portion of head note of the judgement is reproduced below:

" 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.

10. Further, I find that the above decision has been followed by the Hon'ble CESTAT, Ahmedabad in the case of M/s MADHVI PROCON PVT. 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.

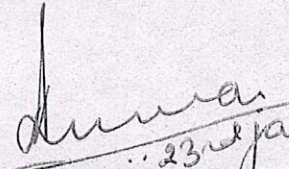
I find that the above case law is squarely applicable to the instant case in hand.

11. 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 services provided or to be provided however, in this 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.

12. In view of the facts and discussions herein above, I reject the appeal filed by the Department and uphold the impugned order.


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

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


23rd January 2020
(AKHILESH KUMAR)

आयुक्त (अपील्स)
COMMISSIONER (APPEALS)
CENTRAL GST, AHMEDABAD.

Attested


(BRIJESH SHARMA)
Superintendent (Appeals)
Central GST, Ahmedabad.

BY R.P.A.D.

To,

M/s. Orchid Divine Developers ,
10th Floor, Commerce House-IV,
Beside Shell Petrol Pump, 100 feet Road,



F.No. : V2(ST)03/EA2/Ahd-South/2019-20.

Prahladnagar, Ahmedabad

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner, Division-VIII, CGST, Ahmedabad South.
4. Guard File.
5. P.A. File.

