



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)43/Ahd-South/2019-20 / 13450 To 13454
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-082-2019-20**  
दिनांक Date : **24-12-2019** जारी करने की तारीख Date of Issue **30/12/2019**  
आयुक्त (अपील) द्वारा पारित  
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **01/AC/SKL/REF/2019** दिनांक: **05.04.2019** , issued by  
Assistant Commissioner, Div-II, Central Tax, Ahmedabad-South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
**Nisarg Enterprise 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, 4<sup>th</sup> 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 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 2<sup>nd</sup> माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> 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

This appeal has been filed by M/s Nisarg Enterprises Pvt. Limited, Plot No.3601-3602, GIDC, Phase-IV, Vatva, Ahmedabad (*hereinafter referred to as 'appellant'*) against Order-in-Original number O1/AC/SKL/Ref/2019 dated 05.04.2019 (*hereinafter referred to as 'impugned order'*) passed by the Assistant Commissioner, Central GST, Division-II, Ahmedabad South (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief, are that the appellant had filed a refund claim for an amount of Rs.2,01,178/- on 21.12.2018 before the adjudicating authority. The grounds for filing the said claim is that they had paid Service Tax amounting to Rs.1,75,734/- along with interest of Rs.60,603/- vide Challan dated 06.09.2018 on the basis of Audit Objection in respect of Service Tax due on Consultancy charges paid to the Director of the Company under Reverse Charge Mechanism (RCM) for the period of 2015-16 to 2016-17. However, on implementation of GST w.e.f 01.07.2017, they were not in a position to take credit of the said amount paid under Reverse Charge Mechanism. Since they had no other option, they filed the refund of said eligible credit under Section 11B of Central Excise Act, 1944 made applicable in terms of provisions of Section 142(3) of CGST Act, 2017. A show cause notice dated 07.03.2019 was issued to the appellant for denying the refund claim on the grounds that [i] they had paid the amount with interest in compliance of audit observation; and [ii] there was no provisions for refund of such Cenvat credit under the existing law, question of refund of the amount claimed does not arise. The adjudicating authority has rejected the entire claim of refund vide impugned order.

3. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the grounds that in normal circumstances, the Cenvat credit of service tax paid on the service under RCM would have admissible; however, since the service tax was paid after implementation of CGST, they could not take the credit in question. Therefore, they filed the refund claim in question in terms of Section 142 (3) of CGST Act. They further claimed that the service tax with interest was paid by them as per existing Service Tax law under RCM but since they were not in a position to utilize the credit of the amount so paid, they filed the refund claim under the provision of 11B of CEA, 1944 in terms of provisions of Section 142 supra. The appellant has also pleaded that the refund claim rejected by the adjudicating authority is legally not tenable and required to be quashed and set aside.

4. Personal hearing in the case was held on 17.12.2019. Shri Vikram Singh Jhala, Authorized Representative of the appellant, appeared and reiterated the submissions made in Appeal Memorandum for consideration.





5. I have carefully gone through the facts of the case on records, grounds of appeal mentioned in the Appeal Memorandum and oral submissions made by the appellant at the time of hearing. The issue to be decided in the present appeal is whether the impugned order rejecting refund claim of Rs. 2,01,178/- is correct or not.

6. I find that the adjudicating authority has denied/rejected the refund of the said amount on the grounds that [i] the amount of service tax, pertaining to the period of 2015-16 to 2016-17, paid by them with interest were in compliance of audit observation; and [ii] under the existing law, there was no provision for granting any refund in cash, in respect of payment made against service tax under RCM and not able to take credit of such payment.

7. The appellant has heavily argued that they were eligible for Cenvat credit on payment of service tax made by them and however, the payment was made after implement of CGST, they could not avail such credit and accordingly they are eligible for refund under Section 142 of CGST, 2017. Therefore, the first question comes whether the appellant is eligible for the Cenvat credit on the payment of service tax in question or not. I find that the appellant had paid the service tax along with interest, vide challan dated 06.09.2018 on the basis of audit observation regarding non-payment of service tax under reverse charge mechanism on consultancy charges paid to the Director of the company. The period in dispute for the payment made pertains to the year of 2015-16 to 2016-17. It is apparent that the non-payment of service tax was unearthed only during the time of audit done by the departmental officers and it would have escaped from payment of service tax, if the audit officer has not checked the records of the appellant.

8. Rule 9 (bb) of the Cenvat Credit Rules, 2004 stipulates that the CENVAT credit shall be taken by the provider of output service, on the basis of documents, namely "a supplementary invoice, bill or challan" issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the Rules made there under with the intent to evade payment of service tax.

8.1 In the instant case, the audit done on the records of appellant revealed that the Director of the appellant firm had received Consultancy Charges from the appellant during the year 2015-16 and 2016-17 on which they were required to pay Service Tax amounting to Rs.1,75,734/- under





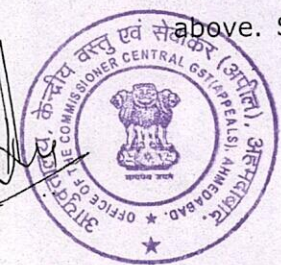
Reverse Charge Mechanism, as per provisions of the Notification No.45/2012-ST dated 07.08.2012. However, the said amount along with interest was paid by the appellant on 06.09.2018 only when the departmental officer pointed out the lapse at the time of audit of the records of the appellant. Thus, it is a case of contravention of the provisions of Section 68 of the Finance Act, 1944 by way of fraud or collusion or wilful mis-statement or suppression of facts with intent to evade payment of Service Tax. Looking into such facts of the case under which the payment made by the appellant, the said Challan is not a valid document for availing Cenvat credit, as per provisions of Rule 9(bb) of the Cenvat Credit Rules, 2004. Therefore, no Cenvat credit on such payment is admissible to the appellant even if they made payment before introduction of CGST. Since the credit is not admissible, the question of refund of payment does not arise at any stage. In the circumstances, I do not find any merit in the argument of the appellant that since they were not in a position to avail and utilize the credit, they filed refund claim under the provision of 11B of CEA, 1944 made applicable in terms of Section 142 of CGST Act. In view of above, I am of the opinion that no refund is eligible to the appellant.

9. The other argument of the appellant is that they are eligible for refund on such payment as per Section 142 (3) of CGST Act, 2017. They also argued that Section 142(6) of CGST Act clearly provides cash refund of eligible Cenvat credit. The Section 142(3) and 142(6)(a) of CGST Act, 2017 are reproduced below:-

**Section 142(3):** Every claim for refund filed by any person before ,on or after the appointed day, for refund of any amount of CENVAT Credit ,duty, tax, interest or any other amount paid under the existing law , shall be disposed of in accordance with the provision of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provision of existing law other than the provision of sub-section 2 of Section 11B of the Central Excise Act,1944.

**Section 142(6)(a):** Every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944) and the amount rejected, if any, shall not be admissible as input tax credit under this Act :

10. As per Section 142 (3) supra, the payment made under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing shall be paid in cash. As per Section 142(6) supra, any amount of credit found to be admissible to the appellant shall be refunded to him in cash. In this case, I find that the appellant is not eligible for Cenvat credit under the existing law as discussed at para 8.1 above. Since the Service Tax amount paid by the appellant under Reverse





- Charge Mechanism is not admissible as Cenvat credit to them under the existing law, the provisions of Section 142 (3) and 146(a) of CGST Act are not applicable to the appellant's case. Further, the payment of tax recovered/paid on the basis of audit observation is to be considered as arrears of tax and in that context also, the same is not admissible to them as input tax credit as provided under Section 148 (8)(a) of CGST Act. The provision under the said act reads as under:

*a) Where in pursuance of an assessment or adjudication proceedings instituted, whether before on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this act;*

11. In view of above discussion, I find that the appellant is not eligible for the refund claim in question and the adjudicating authority has correctly rejected the same. I, therefore, uphold the impugned order.

12. In view of the discussion held above, I reject the appeal filed by the appellant. The appeal stands disposed off in above terms.

(Akhillesh Kumar)  
Commissioner (Appeals)  
/12/2019

24/12/2019  
24/12/2019

ATTESTED

(Mohan V.V) 30/12/19  
Superintendent  
Central Tax (Appeals) Ahmedabad



By R.P.A.D/Speed Post.

To,  
M/s Nisarg Enterprises Pvt. Limited,  
Plot No.3601-3602, GIDC, Phase-IV, Vatva,  
Ahmedabad

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- 2) The Principal Commissioner, CGST, Ahmedabad South.
- 3) The Dy./Asst. Commissioner, CGST, Div-II5 I, Ahmedabad South
- 4) The Asst. Commissioner (System), CGST, Ahmedabad South.
- 5) Guard File.
- 6) P. A. File.



