



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)143/Ahd-South/2019-20 / 14830 70 / 14834
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-019-2020-21  
दिनांक Date : 27-05-2020 जारी करने की तारीख Date of Issue 12/06/2020  
आयुक्त (अपील) द्वारा पारित  
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. CGST/WS08/Ref-09/(ST)/BSM/19-20 दिनांक: 12.09.2019 ,  
issued by Assistant Commissioner, Div-VIII, Central Tax, Ahmedabad-South
- ध 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 अतल 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.

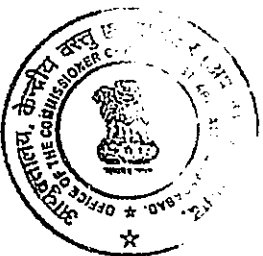
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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।

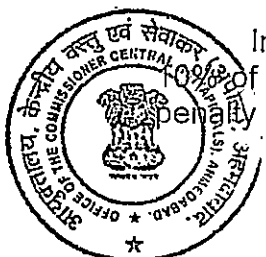
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

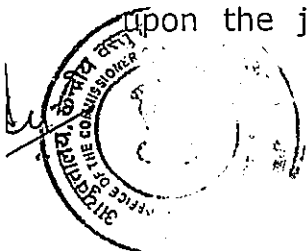


**ORDER-IN-APPEAL**

This order arises out of an appeal filed by Shri Vaibhav Jajoo residing at B/803, Dev Aurum Residency, Anandnagar Cross Roads, Prahaladnagar, Ahmedabad-380015 (hereinafter referred to as 'appellant') against Order in Original No. CGST/WS08/Ref-09/ST/BSM/19-20 dated 12.09.2019 [hereinafter referred to as 'the impugned order'] passed by the Assistant Commissioner of Central Tax, Division VIII, Ahmedabad South (hereinafter referred to as 'the adjudicating authority').

2. Facts of the case, in brief, are that the appellant is a service receiver and had booked flat in a residential property named Sky City developed by M/s Safal Goyal Realty LLP, Ahmedabad (herein referred to as 'service provider'). They had booked a unit number 40 in property named "Floris" and made payment to the service provider amounting to Rs. 1,19,97,478/- in installments against the said booking. In addition to the above mentioned amount, the appellant has paid Service Tax amount of Rs. 5,68,395/- to M/s Safal Goyal Realty LLP. Subsequently, in the month of December, 2018, they cancelled the contract from the service provider, who agreed to refund the amount of Rs. 1,19,97,478/- and repaid it vide Cheque No. 393415 but did not refund Service Tax amount of Rs. 5,68,395/- on the pretext that the same was recovered and deposited with the government.

2.1 The appellant has filed the refund claim for an amount of Rs. 5,68,395/- on the grounds that the contract for the subject services is cancelled, therefore, the provision of service has not happened. Further, they stated that since the entire consideration paid to the service provider is refunded back to them, there is no consideration, consequently no value and ultimately no provision of service. They further contended non-applicability of Section 11B of the erstwhile Central Excise Act, 1944. SCN dated 08.07.2019 was issued to them and the refund claim was rejected vide OIO No. CGST/WS08/Ref-09/ST/BSM/19-20 dated 12.09.2019 by the adjudicating authority on the grounds that it was time-barred as it was filed beyond one year period from the relevant date. The adjudicating authority has relied upon the judgement of Hon'ble High Court of Madras in case of



Assistant Commissioner of Service Tax, Chennai v/s Natraj & Venkat Associates [2015(40) STR 31(Mad)].

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

- a. The adjudicating authority has erred in interpreting section 142(5) of the Central Goods and Services Tax Act, 2017.
- b. The adjudicating authority did not contradict or provide any reasoning for non-applicability of the submissions and judicial precedents.
- c. The adjudicating authority has made a reference to the ruling of Natraj and Venkat associates. However, the refund is not rejected based on the above mentioned ruling. Hence, it is against the principle of natural justice.
- d. The ruling in Natraj and Venkat Associates are distinguished on fact as it is not based on refund claim in case of cancellation /non-provision of service.

4. The appellant has also submitted written submissions dated February 11, 2020 and dated March 19, 2020 elaborating the grounds of appeal and cited certain case laws.

5. Personal Hearing in the case was held on 11.02.2020. The appellant himself attended the hearing. He reiterated the submissions made in appeal memorandum. He also relied upon order of M/s Panchratna Corporation passed by Commissioner (Appeals), Ahmedabad as well as of CESTAT; Allahabad in case of Commissioner of Central Excise v/s Indian Farmers Co-operative Limited.

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

6.1 It is observed that the issue to be decided in this case is whether the applicant is eligible for refund claim and whether the claim is hit by limitation prescribed under Section 11B of the Central Excise Act, 1944.

7. It is observed that the appellant is a service recipient and had booked a flat in residential project developed by the developer. He had paid the amount of consideration in installment, as well as the Service Tax applicable. He had cancelled the booking in December 2018 and the developer had refunded him the booking amount but not refunded the



Service Tax. The appellant has filed refund of this Service Tax amount of Rs. 5,68,395/- claiming that since there was no service, the amount of Service Tax was in nature of deposit which is required to be refunded.

8. I find that this is a case of construction of residential complex service where the Service Tax is required to be paid on the amount received from prospective buyers towards the booking of flat before the issue of completion certificate by the competent authority and this process goes on for years, as has happened in the instant case. Once the buyer cancels the booking at any time before taking possession of the flat, this means that no service has been provided. It has been contended that the Service Tax was already paid against the advances received and since cancellation of unit was done after 01.07.2017 i.e. after introduction of GST regime, no adjustment of the tax amount paid was allowed. It is further observed that since there is no contingency prescribed in this type of case, such tax payers cannot be put to loss for want of such contingency.

9. I find that the Service Tax is payable on the services provided or to be provided. As it happened in this case, once the booking is cancelled and the entire amount is returned to the proposed buyer, no service has been provided and received, therefore the amount of Service Tax paid by the developer is in the nature of mere deposits and not Service Tax. It is the case of the appellant that the developer has returned him the booking amount excluding Service Tax, which he has claimed it from department by way of refund.

10. I find that the adjudicating authority has not discussed the eligibility of refund on merits and has rejected it only on account of being time-barred. Hence, there is no finding by the adjudicating authority regarding eligibility of the applicant as service recipient towards refund claim.

11. I find that in the judgment of Assistant Commissioner of Service Tax, Chennai versus M/s Nataraj and Venkat Associates [2015(40)S.T.R.31(Mad.)] 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.

There is difference in material facts of both the case and the



case is distinguished.

12. On the issue of time-bar in case of refund of Service Tax, I find that in 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, after considering various judicial pronouncements, held that if tax is paid on advances and contracts are cancelled subsequently, and no services are provided, tax paid on advances are not in the nature of duty but in the nature of deposit and hence limitation as provided under sub-section (1) of the Section 11B of Central Excise Act, 1944 shall not apply.

13. Further, I find that on similar issue, Hon'ble CESTAT, Ahmedabad in the case of M/s MADHVI PROCON PRIVATE LIMITED [2015(38)S.T.R.74(Tri.-Ahmd.)] has given similar order. 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.]

14. 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.

15. It is further observed that the appellant has also referred to case laws of Joshi Technologies International Inc. India Projects V/S Union of



India [2016(6)TMI 773 Gujarat High Court] and other case laws in support of their appeal.

16. In view of the above discussion, it is held that the provisions of Section 11B of the 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 the facts of the case. The order passed by the adjudicating authority is accordingly not legally sustainable and is liable to be set aside.

17. Further, as the adjudicating authority has not discussed the eligibility of refund filed by the applicant, the matter needs to be remanded back to him to decide the case afresh on merits.

18. Accordingly, the matter is remanded back to the adjudicating authority for deciding the case afresh. The appellant is also directed to put all the evidences before the Adjudicating Authority in support of their contention as well as any other details/documents etc. that may be asked for by the Adjudicating Authority during the adjudication proceedings.

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

*Akhil Kumar*  
.. 27<sup>th</sup> May, 2020..  
(Akhil Kumar)

Commissioner ( Appeals)



Attested

*Anilkumar P.*

(Anilkumar P.)

Superintendent (Appeals)

Central Excise, Ahmedabad

By Regd. Post A. D.

Shri Vaibhav Jajoo,



B/803, Dev Aurum Residency,  
Anandnagar Cross Roads, Prahaladnagar,  
Ahmedabad-380015

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



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