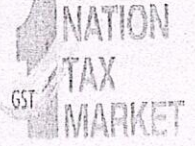




सत्यमेव जयते

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)65 /Ahd-South/2019-20/15322 To 15331
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-31-2020-21  
दिनांक Date : 21-07-2020 जारी करने की तारीख Date of Issue 10/08/2020  
आयुक्त (अपील) द्वारा पारित  
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. CGST-VI/Ref-03/SKC/Gandhi/2019-20 दिनांक:  
30.04.2019 , issued by Assistant Commissioner, Div-VI, Central Tax, Ahmedabad-South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
**M/s. Gandhi Corporation**  
5, Ratnam Building,  
C.G.Road, Ahmedabad.

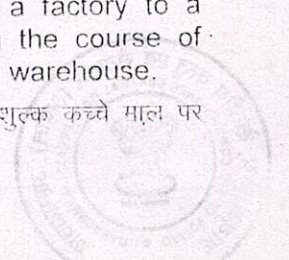
कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिती नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

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 :**

- (i) 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 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.
- 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.

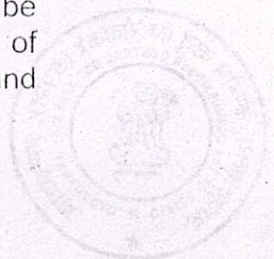
(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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 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 पढ़ी 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 Appellant 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.

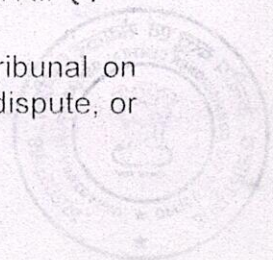
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

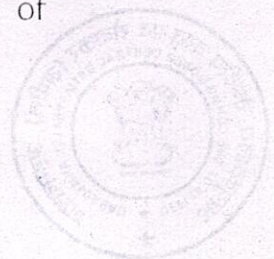


**ORDER-IN-APPEAL**

1. This order arises out of an appeal filed by M/s. Gandhi Corporation, having registered address at 5, Ratnam Building, C.G.Road, Ahmedabad (hereinafter referred to as '*appellant*') against Order in Original No. CGST-VI/Ref-03/SKC/Gandhi/2019-20 dated 30.04.2019 [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 services under the category of "Sponsorship Service", "Renting of Immovable Property Service", "Mandap Keeper Service", "Outdoor Catering Service", "Pandal and Shamiana Service" and "Works Contract Service" defined under erstwhile Section 65(105)(zzzn), 65(105)(zzzz), 65(105)(m), 65(105)(zzt), 65(105)(zzw) and 65(105)(zzzza) of the Finance Act, 1994 respectively and holding Service Tax Registration Number AAHFG4321KST001. The appellant has filed refund claim on 30.01.2019 for Rs. 47,34,382/- on the ground that they have made excess payment of Service Tax during May-2017 and June-2017. They have submitted that they have provided "Pandal and Shamiana Service" to Ahmedabad Municipal Corporation for Book Fair organized between May 1, 2017 to May 7, 2017. They had raised Invoice dated 07.05.2017 for Rs. 2,25,00,000/- including Service Tax amount of Rs. 29,34,782/- and claimed that the Service Tax liability was discharged for the period of May, 2017. They have further submitted that they had also provided "Pandal and Shamiana Service" to Gujarat University for organizing Education Fair between June 14, 2017 to June 16, 2017. They had raised Invoice dated 16.06.2017 for Rs. 1,38,00,000/- including Service Tax amount of Rs. 18,00,000/-. They have claimed that the Service Tax liability for the period June, 2017 was discharged by them.

2.1 The appellant has further submitted that they have not received the payment in respect of both the invoices mentioned in the above para due to deficiency in quality of services provided and hence they have issued Credit Note in respect of both the invoices. It was contended that due to non-receipt of payment due to defective services, and resultant issuance of



Credit Notes to the service recipient, it has resulted in excess payment of Service Tax and therefore they filed the present refund claim.

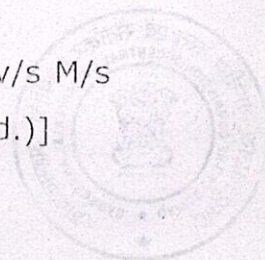
2.2 The appellant has filed refund claim dated January 31, 2019. They were issued Query Memo dated 25.03.2019 wherein several queries were noticed. The appellant submitted the reply to above mentioned Query Memo vide their letter dated 25.04.2019. The refund claim was rejected vide the impugned order by the adjudicating authority.

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

- a. In their case, it was difficult to decipher whether service was completed or not. It was contended that as per Board's Circular No. 144/13/2011-ST dated 19.07.2011, service shall be deemed to be completed not just of performance of its physical part but also the completion of all other auxiliary activities like the acts of measurement and quality testing etc are also over. Also, their clients have neither measured nor quality tested service. Further, they have submitted that their invoices have not been honoured on the above grounds.
- b. Their application for refund is well within the timeline as prescribed under Section 11B of the Central Excise Act, 1944. They have submitted that irrespective of the fact that the invoices were issued in May, 2017 and June, 2017, they came to know about the rejection of their services in November, 2018 and they have issued Credit Note to that effect only. Hence, their filing of refund claim on January 31, 2019 is within prescribed time-limit.
- c. They have paid the Service Tax even though Point of Taxation in respect of the invoices did not arise therefore tax was wrongly paid on an uncertified invoice. In such a case, it is well settled principle that the Government cannot unjustly enrich itself by keeping wrongly paid taxes with it.

3.1. This appellant placed reliance on the following Judgements:

- (i) M/s Pratibha Construction Engineers and C(I) Private Limited v/s Commissioner of Central Excise, Kolhapur [2016 (42) S.T.R. 856 (Tri. Mumbai) ];
- (ii) Commissioner of Central Excise & Service Tax, Bhavnagar v/s M/s Madhvi Procon Private Limited [2015(38)S.T.R.74(Tri.-Ahmd.)]



4. Personal Hearing in the case was held on 06.07.2020. Shri Nitesh Jain, Chartered Accountant, attended hearing on behalf of the appellant and reiterated submissions made in appeal memorandum.

5. 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. The issue to be decided in this case is whether the appellant is eligible for refund of Service Tax on services provided by them for which no consideration was received. The taxes in question were paid in May, 2017 and June, 2017 and reflected in returns of June, 2017.

6. It is the case of the appellant that they provided service under the category of "Pandal and Shamiana Service" to Ahmedabad Municipal Corporation and Gujarat University for organizing Book Fair and Education Fair respectively. They had discharged the Service Tax liability upon issuance of the invoices. However, they did not receive payments against the invoices issued and therefore they have issued the Credit Note in respect of the invoices. Consequently, they filed a refund claim on account of non-receipt of payment from the service recipient due to defective services. The adjudicating authority has vide aforementioned order rejected the refund claim amounting to Rs. 47,34,382/- under Section 11B of the Central Excise Act, 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994 read with sub-section (3) and (5) of the Section 141 of the Central GST Act, 2017.

7. The relevant Rule 3 of the Point of Taxation Rules, 2011 existing at the relevant time is reproduced below:

*Determination of point of taxation.- For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,-*

*(a) the time when the invoice for the service provided or agreed to be provided is issued:*

*Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.*

*(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment.*

*Provided that for the purposes of clauses (a) and (b),-*

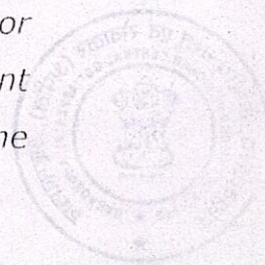


- (i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;
- (ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).
- Explanation .- For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance.

In the case at hand, the invoices were issued on May 07, 2017 and June 16, 2017. Hence, the appellant has correctly discharged Service Tax liability on issuance of invoice as per Section 3(a) of the Point of Taxation Rules, 2011. I have gone through the Board's Circular No. 144/13/2011-ST dated 18.07.2011 relied upon by the appellant to claim that the services were not complete. I find that the Board has issued clarification in context of proviso to Rule 3(a) of the Point of Taxation Rules, 2011 when invoices are not issued within the time period prescribed under Rule 4A of the Rules. However, in the instant case invoices have already been issued and hence reliance on the aforesaid Circular by the appellant is not relevant to the case in hand. I find that the incidence of taxation has arisen on issuance of invoices as per Rule 3(a) of the Point of Taxation Rules, 2011 and that taxes have been paid accordingly.

8. As regards the appellant's contention regarding deficient service resulting in issuance of Credit Notes, the relevant Rule 6(3) of the Service Tax Rules, 1994 are reproduced below:

- (3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, [or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract], the



*assessee may take the credit of such excess service tax paid by him, if the assessee.- (a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or] (b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.*

It is the contention of the appellant that the services provided by them were deficient for which no payment was received and hence they issued Credit Notes. I find that there is no documentary or other evidences to corroborate their version that the services were deficient. The adjudicating authority has in Para 11, 12, 13 and 14 of the impugned order discussed the issue in length and found that the services were provided to both the parties, which is also admitted by the appellant. It has been further observed that practically it is not possible that whole service provided was deficient and if there was any deficiency in provision of service there should be renegotiation of value but in present case the appellant without obtaining any confirmation from the service recipient regarding deficiency of service, issued credit note only for single reason of non receipt of payment. He has come to conclusion that the services have been fully provided and completed and no deficiency has been noticed from the photographs available on their website viz. [www.gandhincorporation.com](http://www.gandhincorporation.com). Also, the appellant has on his own will issued the Credit Notes without any concern of the service recipient. Hence, the Service Tax was paid correctly and filed refund claim is not legitimate.

8.1 I further find that in case of deficient provision of services, there should be renegotiation of amount of invoices. In the present case, there is no such renegotiation between the appellant and service recipients on record. Also, the service recipients did neither declare nor certify that there was deficiency in provision of services. However, the appellant without obtaining any confirmation from the service recipients has issued credit note claiming non-receipt of payment from them. Hence, the claim of appellant for non-provision or deficient provision of service is not established by evidences on record. Further, their case is not covered under Rule 6(3) of the Service Tax Rules, 1994.

9. I find that the appellant has relied upon the case law of M/s Pratibha Construction Engineers and C(I) Private Limited. I have gone through the





order of Hon'ble Tribunal, Mumbai reported in 2016 (42) S.T.R. 856 (Tri. Mumbai) wherein Hon'ble Tribunal has stated that

*" the issue is no res integra as the Larger Bench of this Tribunal in the case of Bhayana Builders (P) Ltd. v/s CCE- 2013 (32) S.T.R. 49 (Tri.-LB) is directly on the point."*

It is further observed that in the case of M/s Bhayana Builders and M/s Pratibha Construction Engineers and C(I) Private Limited the service provided is in the nature of Construction Service and the issue dealt was related to levy of Service Tax on free supplies of materials by service recipient to Construction service provider. Whereas, the present case is of Pandal and Shamiana Service and claim of refund is made by the appellant by issuing Credit Note in respect of the invoices. Hence, there is difference in material facts of the case relied upon by the appellant and the application of said case is distinguished.

10. I further find that the appellant has relied upon the judgement of Hon'ble Tribunal in case of M/s Madhvi Procon Private Limited. 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.

The said case law is not applicable to the present case as in the instant case, service tax was paid on the invoices raised and there is no evidence on record to suggest termination of contract between parties. There is no correspondence from the service recipient side. Hence, payment of Service Tax cannot take the colour of 'deposit' and aspect of Section 11B of the Central Excise Act, 1944 would be applicable to the instant case.



11. In view of the above, I find that there is no merit in the contention of the appellant that the services provided by them were deficient. I uphold the impugned order-in-original and the appeal is accordingly rejected.

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

*Akhilesh Kumar*  
21st July, 2020  
(Akhilesh Kumar)

Commissioner ( Appeals)



Attested

*Anilkumar P.*

(Anilkumar P.)

Superintendent (Appeals)  
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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

