



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



रजिस्टर्ड डाक ए.डी. द्वारा

D/N - 20201064 SW 0000401F58

क फाइल संख्या : File No : V2(ST)151/Ahd-South/2018-19/15902 TO 15906

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP- 48/2020-21

दिनांक Date : 30-09-2020 जारी करने की तारीख Date of Issue 13/10/2020

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No CGST-VI/Ref-86/SKC/Niraj/18-19 dated 28.09.2018 issued by Assistant Commissioner, Div-VI, Central Tax, Ahmedabad-South.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Niraj Bagri, 1703, C Wing, Western Heights, Four Bungalows, Andheri (West),  
Mumbai-400058.

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 issued under the Central Excise Act 1944, 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।

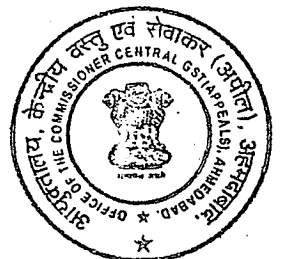
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, 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.

(b) 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.

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



(ख) 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।

(b) 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.

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

(c) 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।

(d) 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.

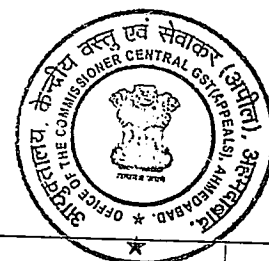
(1) केंद्रीय जीएसटी अधिनियम, 2017 की धारा 112 के अंतर्गत:-

Under Section 112 of CGST act 2017 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)

- (7) 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)

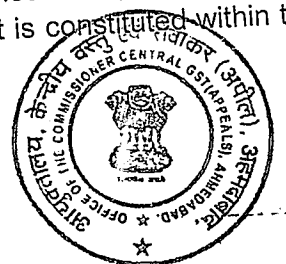
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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।

6(1) 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."

II. Any person aggrieved by an Order-In-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/ Goods and Services Tax (Compensation to states) Act, 2017, may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.



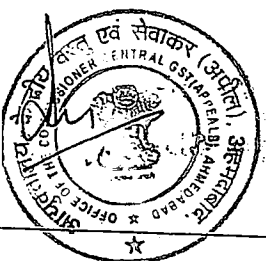
ORDER IN APPEAL

The present appeal has been filed by Shri Niraj Bagri & Rachana Bagri, [hereinafter referred to as the 'appellant'], situated at 1703, C Wing, Western Heights, Four Bungalows, Andheri(West), Mumbai-400058 against Order-in-Original No. CGST-VI/Ref-86/SKC/Niraj/18-19 dated 28.9.2018 (hereinafter referred as "impugned order") passed by the Assistant Commissioner, CGST, Division-VI, Ahmedabad (South) (hereinafter referred to as the "adjudicating authority").

2. The facts of the case, in brief, is that the appellant had purchased/booked a Flat in a residential Property under construction situated at 1703, C Wing, Western Heights, Four Bungalows, Andheri(West), Mumbai-400058 from service provider and developer M/s. Adani Estates Private Limited, Navranpura, Ahmedabad [hereinafter referred to as the developer] and had paid service tax amounting to Rs. 4,12,309/- as charged by the developer. Consequent to the decision of the Hon'ble High Court of Delhi in the case of Suresh Kumar Bansal and Anuj Goyal [2016(6) TMI 192 Delhi High Court], the appellants filed refund claim amounting to Rs. 4,12,309/- under Section 11B of the Central Excise Act, 1944 made applicable to the Service Tax vide Section 83 of the Finance Act, 1994 in respect of service tax paid, borne by them and collected by the developer on such under construction residential flat along-with receipts and copy of agreement for sale.

3. The adjudicating authority vide Order-in-Original NO. CGST-VI/Ref-86/SKC/ Niraj/18-19 dated 28.9.2018 rejected the refund on the grounds that;

- it is not evident from the documents that the developer is having the separate registration or centralized registration;
- there is no evidence for payment of service tax separately given by the developer;
- it is not possible to ascertain that the said appellant has paid the amount towards the service tax portion to the developer for which they sought refund;
- that it is not possible to understand what the appellant has paid towards the service; that no documentary evidence is given either by the appellant or by the developer;
- that in the absence of proper documentary evidence to establish the refund claim is liable for rejection.



4. Being aggrieved by the impugned order dated 28.09.2018, the appellant has filed appeal on the grounds that;

- that no opportunity was given to produce evidence/documents;
- that principles of natural justice was not followed; that no personal hearing was offered;
- that the adjudicating authority has accepted the judgment of the Delhi High Court and has not disputed its applicability;
- that the certificate provided by the developer showing the amount of consideration charged, service tax collected and deposited with the government treasury is attached with the appeal papers.

5.1. The appellant submitted written submission vide letter dated 30.01.2019 contending that the adjudicating authority failed to provide the relevant provisions under the applicable legislation which mandates them to produce any challan or any other documentary evidence of deposit of tax; that the service provider is registered within the jurisdiction of the adjudicating authority and he should have called the challan or any other relevant documentary evidence proving deposit of tax by the service provider. The appellant also relied upon the order of the Hon'ble Tribunal in the case of Vaibav Jajoo[2018(1) TMI 58-CESTAT Abad] wherein the Tribunal held that it is the duty of the refund sanctioning authority to verify the fact that the service provider had paid the service tax or not.

5.2. It was noticed that Department has filed an appeal before Hon'ble Supreme Court of India against order of the Hon'ble Delhi High Court in the case of Suresh Kumar Bansal and Anuj Goual [2016(6) TMI 192 Delhi High Court] and accordingly these appeals were kept in Call-Book pending the decision from the Hon'ble Supreme Court. Subsequently, the appellant has vide letter dated 15.07.2020 approached this office and referred Hon'ble CESTAT, Ahmedabad's Order No. A/10874-10876/2019 dated 10.05.2019 in their own case of another portion of refund claim wherein the Hon'ble Tribunal has remanded the matter back to the adjudicating authority for *de-novo* adjudication, and thus these case was taken up for adjudication.

5.3. The appellant also submitted further written submission vide letter dated 15.07.2020 wherein they stated that they had filed two refund claims separately because the payment of the consideration was made in two installments amounting to Rs. 11,97,871/- and Rs.4,12,309/-; that the refund claim amounting to Rs. 11,97,871/- which was rejected by the adjudicating authority vide Order-in-Original No. SD-



02/Ref-211/VIP/2016-17 dated 30.10.2016; that they have filed an appeal with Commissioner (Appeals) who in-turn uphold the OIO and rejected the appeal filed by appellant vide OIA No. AHM-EXCUS-001-APP-224 & 225-17-18 dated 29.12.2017; against the said OIA appellant had filed an appeal with Hon'ble CESTAT, Ahmedabad who decided the appeal vide Order No. A/10874-10876/2019 dated 10.05.2019 wherein the Tribunal has set aside the impugned orders and remanded it to the adjudicating authority; that the adjudicating authority in *de-novo* adjudication proceedings, decided the refund claim amounting to Rs.11,97,871/- in view of CESTAT above referred order and sanctioned the refund claim along with interest vide Order-in-Original No. CGST-VI/Ref-46/Niraj Bagri/MK/AC/19-20 dated 28.11.2019. Accordingly, the appellant requested to decide the appeal.

6. Personal hearing in the matter was held on 22.09.2020. Shri Niraj Bagri, C.A, appeared for hearing. He re-iterated the submissions made in Appeal Memorandum. He further stated that for previous period, the department has already sanctioned the refund based on Hon'ble Tribunal's judgement in their case.

7. I have carefully gone through the facts of the case, submissions made by the appellant in their Appeal and submissions made vide their letters dated 30.01.2019 & 15.07.2020 and submissions made during the personal hearing. It is observed that the only issue needs to be decided in the case is whether the adjudicating authority was correct in rejecting the refund claim of the appellant who are buyers of flat, or otherwise.

8.1. I observed that the adjudicating authority while rejecting the refund claim has observed that the appellant has not produced evidence as to whether service tax is paid to the Government by the service provider i.e. developer. In this regard I find that the matter has been decided by the Hon'ble Tribunal, Ahmedabad in their own case of another portion of refund claim amounting to Rs. 11,97,871/-. A copy of the order was produced by the appellant vide their letter dated 15.07.2020. The Hon'ble Tribunal has in para 4 of its order observed that " I fail to understand that why the department is insisting for all those documents which are not in possession and control of the appellant which belongs to the service provider. The refund can be processed on the documents submitted by the appellant." It cannot be disputed that the appellant is having no control over the developer, instead the department could have verified the details of tax payment by the developer who is having the registration /centralized registration in the jurisdiction of the adjudicating authority which is not disputed. It is



also observed that the department has sanctioned refund to the appellant based on the Tribunal's order.

8.2. I further find that the claim was rejected without giving the opportunity of being heard to the appellant which is clear violation of principle of natural justice. I am of the considered view that quasi-judicial authority has to carry adjudication proceedings in very fair manner by observing principles of natural justice as adherence to it is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice. The first and foremost principle is what is commonly known as audialterampartem rule. It says that no one should be condemned unheard. The Show Cause Notice is the first limb of this principle. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. However, from the impugned order I find that the adjudicating authority has violated the Principal of Natural justice. Such an order can not be treated as being legal and correct and is required to be set aside and appeal is allowable.

8.3 I have also gone through the Hon'ble CESTAT Order No. A/10874-10876/2019 dated 10.05.2019 referred by the appellant in their own case wherein identical situation, the Hon'ble CESTAT after hearing both the side while allowing appeal have observed that;

*Heard both the sides and perused the records. I find that the appellants are buyers of the flats. As per the documents submitted by them it clearly establish that for purchase of the flat the appellant have borne the service e tax liability which was paid and collected by the service provider i.e. builder. In this position the appellant are prima facie entitled for the refund. I fail to understand that why the department is insisting for all those documents which are not in possession and control of the appellant which belongs to the service provider. The refund can be processed on the documents submitted by the appellant. At the most appellant's bank account statement can be verified whether the payments as claimed by them were made to the seller. As regards, the payment of service tax, the same can be verified through department channel that the service provider is also a service provider. It is also observed that the refund was rejected also on the ground that the service provider might have taken the cenvat credit and in such case whether service provider has followed the Rule 6 if Cenvat Credit Rules 2004 in respect of exempted services provided by him. This observation of the lower authority is absolutely irrelevant for the reason that as regards assessment of the service provider it is jurisdictional officer who should take care of any such non-compliance on the part of service provider, therefore, on that ground appellants refund, who are not concerned about the availment of cenvat credit and compliance of the Rule 6, therefore, on this ground refund could not have been rejected. As per my above discussion, I am of the view that the matter needs to be reconsidered by the original authority. Accordingly, I set aside the impugned orders*



*and remand the matter to the adjudicating authority to reprocess the refund claim keeping in mind the above observation and pass a fresh order. Appeals are allowed by way of remand to the adjudicating authority.*

8.4 Following the direction of the Hon'ble Appellate Tribunal, the adjudicating authority has sanctioned one of the refund claim of the appellant on the same issue of earlier period vide Order-in-Original No.CGST-VI/Ref-46/Niraj Bagri/MK/AC/19-20 dated 28.11.2019. Thus, I am left with no alternative but to remand the matter back to the adjudicating authority for *de-novo* adjudication. The appellant is directed to produce all the documents provided with the appeal papers, especially the certificate of the developer, and other supporting documents to the adjudicating authority.

9. In view of above discussion, I set aside the impugned order and remand the case to the adjudicating authority for considering the refund filed by the appellant afresh following the principles of natural justice and judgement of Hon'ble Tribunal discussed above.

10. The appeals filed by the appellant stands disposed of in above terms.

*Akhilesh Kumar*  
 (Akhilesh Kumar)  
 Commissioner (Appeals)  
 Ahmedabad  
 30<sup>th</sup> September 2020



Attested

*Atul B Amin*  
 (Atul B Amin)  
 Superintendent (Appeals)  
 CGST, Ahmedabad

By RPAD.

To,  
 Shri Niraj Bagri and Rachana Bagri,  
 1703, C Wing, Western Heights,  
 Four Bungalows, Andheri(West),  
 Mumbai-400058

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Assistant Commissioner, Central Tax Division- VI, Ahmedabad South Commissionerate.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
- ✓ 5. Guard File.
6. P.A.