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- टेलेफैक्स07926305136

DIN :20201164SW0000777AB3 दिनांक: 09/11/2020

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)36/EA-2/Ahd-South/19-20/1624 To 1628

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-053/20-21**
दिनाँक Date : **26-10-2020** जारी करने की तारीख Date of Issue 06-11-2020

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **CGST-VI/Ref-24/Khyati/MK/19-20** दिनाँक: **16.09.2019** , issued by Assistant Commissioner, Central GST, Division-VI, Ahmedabad-South

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

M/s Khyati Realities Ltd.,
99, Chinubhai Tower,
Opp. Handloom House,
Ashram Road, 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 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 मामलें 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 डयूटी केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 in 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 अपीलो 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 .

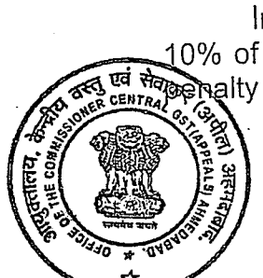
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 Deputy Commissioner of Central GST, Division-VI, Ahmedabad-South Commissionerate (hereinafter referred to as the 'Department'), in pursuance of the Review Order No.31/2019-20 dated 28.02.2020 passed by the Principal Commissioner of Central GST, Ahmedabad-South has filed this appeal against the Order-in-Original No. CGST-VI/Ref-24/Khyati/MK/19-20 dated 16.09.2019 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner of Central GST, Division-VI, Ahmedabad-South Commissionerate (hereinafter referred to as the "adjudicating authority") in case of M/s. Khyati Realities Ltd., 99, Chinubhai Tower, Opp. Handloom House, Ashram Road, Ahmedabad holding Service Tax Registration No. AAACK8006BST001 (hereinafter referred to as the "respondent").

2. The facts of the case, in brief, are that the respondent is registered with the Service Tax department under the category of "Construction Service" and holding Service Tax Registration No. AAACK8006BST001. They have filed a refund claim on 19.06.2019 for an amount of Rs. 3,40,195/- towards the Service Tax paid by them in respect of the amount received from prospective purchaser for booking before 1st July, 2017 and who has cancelled such booking after 1st July, 2017. The respondent has filed the refund of such Service Tax as the cancellation of the booking of residential/commercial complex by the purchaser is made on or after 01.07.2017 i.e. after implementation of GST, and they could not be able to adjust such amount of Service Tax already paid [in respect of such cancelled booking] towards the Service Tax liability of another buyer, by way of Cenvat Credit in terms of the provisions of Rule 6(3) of erstwhile Service Tax Rules. Hence, the respondent preferred the claim of Service Tax paid in case of advances amounting to Rs. 80,83,500/- received from Shri Mehul Damodardas Zaveri at different points of time during the period June'2015 to February'2016 towards booking of Shop/Office No. 404/405 in the Scheme named as "Magnifico" constructed by the respondent which was later on cancelled by the said buyer after 1st July, 2017 by the said buyer.

3. The adjudicating authority found that the respondent has correctly filed the refund claim as per the legal provisions of the Finance Act, 1994 and CGST Act, 2017 and grounds as reproduced herebelow and accordingly sanctioned the refund claim amounting to Rs. 3,40,195/- to the respondent vide issuance of the impugned order. The findings of the adjudicating authority are as under:

(i) As per the provisions of Section 141 of CGST Act, 2017, "every claim filed by a person after the appointed day for refund of tax paid under the existing law in respect of services not provided shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of Section 11 B of the Central Excise Act, 1944."

(ii) The levy of the Service Tax is on the services provided or to be provided as defined under Section 66A of the Finance Act, 1994.

(iii) The point of taxation is the date of invoice or receipt of payment for the service provided or agreed to be provided and wherever any advance by whatever name known, is received by the service provider towards the provisions of taxable service, the point of taxation shall be the date of receipt of each such advance as per the provision of Rule 3 of the Point of Taxation Rule, 2011.

(iv) In the event of the cancellation of the services provided or to be provided the amount of Service Tax paid can be re-credited and can be utilized for provision of service in future as per the provision of Rule 6 (3) of the Service Tax Rules, 1994 and the clarification given in the CBEC Circular No. 151/2/2012-ST dated 10.02.2012.

(v) In terms of the judicial pronouncement given by the Hon'ble High Court of Gujarat in the case of Addition Advertising Vs. Union of India as reported in 1998 (98) ELT 14 (Guj), "*there is no services there should be no tax*".

(vi) In terms of the decision of the appellate authority in the similar issue that once booking is cancelled and the entire amount is returned, the service provider has not provided any services and whatever the amount paid by them is in the nature of deposit and

the service provider are eligible for refund. Accordingly, it can be considered that the said claimant has filed the refund claim within the time limit as prescribed under Section 11B of the Central Excise Act, 1944 made applicable to the Service Tax vide Section 83 of the Finance Act, 1994.

(vii) The entire amount received from the buyer has been returned to the buyer who has cancelled the booking and any amount towards service tax has been received or collected from the said buyer.

4. Being aggrieved with the impugned order, the Department preferred the appeal on the following grounds:

(i) The respondent has made the payment of Service Tax during the period from April-2015 to March-2016 or before, while the refund claim was filed on 19.06.2019 which is beyond one year from the date of payment of Service Tax. Whereas, as per explanation 1 of Section 11B of Central Excise Act, 1944, relevant date for filing refund is within one year from the date of payment of duty.

(ii) The Adjudicating authority found that no service at all has been provided and accordingly amount of service tax paid by the respondent is in the nature of merely deposit and not service tax. Therefore, the relevant date of one year from the date of payment as per Section 11B of Central Excise Act, 1944 cannot be made applicable in the instant case. The adjudicating authority erred in findings that in this case no service is provided because services were already provided for a long period. Accordingly, the judgment of Hon'ble High Court of Gujarat in the case of Addition Advertising Vs. Union of India as reported in 1998 (98) ELT 14 (Guj) is not squarely applicable in this case.

(iii) Further, in the similar issue, Hon'ble High Court of Madras in case of Assistant Commissioner of S.T. Chennai Vs. Nataraj and Venkat Associates [2015(40) STR 31(Mad)] held that "the amount were credited to the Revenue under the Head of Account "0044-Service Tax" through TR-6 challans, which are purported for payment of Service Tax only and as such, the claim of the respondent that the payment was only deposit and not Service Tax, cannot be sustained."

(iv) Further, in the similar issue, Hon'ble Supreme Court of India, in case of M/s. Mafatlal Industries Ltd. Vs. Union of India [1997 (89) ELT 247 (SC)] observed that *"There is no departure from that position under the amended Section 11B. All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so."*

(v) From the findings of the adjudicating authority, it is noticed that the service against which the service tax was paid in process through all this time, it was not a mere land where no service would have been provided. The tax was paid as Service Tax due and not as deposit. Also, nowhere any protest was lodged against the payment of said service tax and said tax was not paid as mistake of law.

5. The respondent in their cross-objection dated 29.06.2020 in appeal, has submitted the copies of the relevant documents viz. Service Tax Registration, ST-3 returns for the period in which booking amount has been received and service tax on this has been paid, ledger of the buyer to whom office has been allotted etc.

6. Personal Hearing in the case was held on 22.09.2020 through video conferencing. Shri Punit Prajapati, Chartered Accountant, appeared on behalf of the respondent. He submitted that the matter related to the time limit which has already been decided in their favour.

6.1 Subsequently, on 24.09.2020, the respondent also made further submission which is reproduced below:

(i) In terms of subsection (3) of Section 142 every refund claim filed after the appointed day, shall be disposed of in accordance with the provision of existing law and any amount eventually accruing shall be paid in cash, notwithstanding anything contrary contained under the provisions of existing law other than the provision of

sub-section (2) of Section 11B of the Central Excise Act, 1944. It is worth noting that limitation is provided under sub-section (1) of Section 11B of CEA, 1944 only is applicable to refund claims and other provisions including sub-section (1) of Section 11B of CEA, 1944, are not applicable at all. Hence, the time limit as provided under Section 11B(1) of CEA, 1944 is not applicable to the current case.

(ii) In the case of M/s. Amba Township Pvt. Ltd. passed by Commissioner (Appeals), Ahmedabad, it was held that once the booking is cancelled and the entire amount is returned, the appellant has not provide any service and whatever the service tax amount is paid by them is in the nature of deposits only and they are eligible for the refund. Recently, similar stand was also taken in the case of Mr Harsh V Kagrana (HUF) passed by Commissioner (Appeals-III) Mumbai.

(iii) This matter is also covered in the judgement of CCE (Appeals) Bangalore Vs. KVR Construction [2012 (26) STR 195 (Kar.)].

7. I have carefully gone through the facts of the case, grounds of appeal, submission in cross-objection made by the Respondent and also the oral submissions made at the time of personal hearing as well as additional submission given by the respondent vide letter dated 24.09.2020. It is observed that the issue to be decided in this case is whether the respondent is eligible for refund of service tax in respect of booking of flats which were subsequently cancelled by prospective buyer under Section 11B of the Central Excise Act, 1944 made applicable to service tax matters by Section 83 of the Finance Act, 1994.

7.1 I find that the appellant is providing service under the category of Construction Service and booking the units after receiving payments from the prospective buyers of the units. They have claimed to have discharged the service tax liability properly and timely and this is undisputed. However, some of the units were cancelled by the prospective buyers and consequently the booking amount was fully refunded to them. It has been contended that the service tax was already paid against the advances received therein and no adjustment

of the tax amount paid was allowed after 01.07.2017. Hence, the respondent filed a refund claim which has been considered and sanctioned by the adjudicating authority vide the impugned order.

7.2 I find that in case of construction service, service tax is required to be paid on the amount received from prospective buyers towards the booking of complex before the issue of completion certificate by the competent authority and this process goes on for years, as has happened in the instant case, and the bookings/dealings can be cancelled at any point of time by the buyers before taking of possession of complex by him and therefore, I find that no service at all has been provided and the relevant date of one year and date of payment as per Section 11B of the Central Excise Act, 1944 cannot be made applicable in the instant case. I further find that since there is no contingency prescribed in this type of cases, the appellant cannot be put to loss for want of such contingency.

7.3 I also find that there is no adverse finding on the documents submitted for refund claim and hence they are not in dispute. Further as regards to the bar of unjust enrichment under Section 11B (2) of the Central Excise Act, 1944 made applicable to the Service Tax under Section 83 of the Finance Act, 1994, the adjudicating authority has also verified and confirmed in the impugned order that the incidence of duty has not been passed to any other person and the same has been borne by the respondent.

7.4 I find that the Service Tax is payable on the service provided or to be provided and in this case, once the booking is cancelled the entire amount is returned to the proposed buyers, thus no service has been provided and received, therefore, the amount of service tax paid by the appellant is in the nature of merely deposit and not service tax.

8. Further, I find that in case of M/s Panchratna Corporation Ahmedabad Commissioner (Appeals-II), Central Excise, Ahmedabad had in Order-in-Appeal No. AHM-SVTAX-000-APP-023-17-18 dated 20.06.2017 analyzed various case laws on the subject and held that once the booking is cancelled and the entire amount is returned, the

appellant has not provided any service and whatever the amount paid by them is in the nature of deposits only and they are eligible for the refund following the case laws discussed in the order. The facts of the case are similar in nature to this case in hand. Hence, it is well settled principle 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.

9. I further find that Hon'ble Tribunal, Ahmedabad in case of CCE & ST, Bhavnagar Vs. Madhvi Procon Pvt. Limited, as reported in 2015 (38) STR 74 (Tri.Ahmd) has rejected the appeal of Department and held that:

> *"Taxability- Service Tax not payable when no service provided- Advance amount received under the contract for providing service- Service Tax paid on such advance contract- Contract terminated and no service provided- Customer recovered back the amount from service provider by encashing bank guarantee- Assessee entitled to refund of advance Service Tax paid as no services provided and payment is to be treated as a deposit and not payment of tax- Provisions of Section 11B of Central Excise Act, 1944 as extended to Service Tax inapplicable. [para 4]"*

10. I further find that the Hon'ble High Court of Karnataka in their decision in the case of Commissioner of C.Ex.(Appeals), Bangalore Vs. KVR Construction [2012 (26) STR 195 (Kar.)] has held that:

> ***"23.*** *Now we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, Section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 1,23,96,948/- paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Therefore, once it is not payable in law there was no authority for the department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract Section 11B. Therefore, it is outside the purview of Section 11B of the Act."*

11. I also find that similar view has been taken by the Hon'ble High Court of Madras in their decision in the case of 3E Infotech Vs. CESTAT, Chennnai [2018 (18) GSTL 410 (Mad.)]. In the said case, the Hon'ble High Court, after referring to the decision of Hon'ble Supreme Court in the case of Union of India Vs. ITC Ltd. [1993 (67) E.L.T. 3 (S.C.)] and of the Hon'ble Gujarat High Court decision in the case of Oil and Natural Gas Corporation Ltd., Vs. Union of India, reported in 2017 (354) E.L.T. 577 (Guj.), has held that:

> *"12. Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.*
>
> *13. On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs. 4,39,683/- cannot be barred by limitation, and ought to be refunded.*
>
> *14. There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India."*

11.1 The above judgment of Hon'ble High Court of Madras in the case of 3E Infotech Vs. CESTAT, Chennnai has also relied on in similar views expressed by Hon'ble Gujarat High Court in the case of Joshi Technologies International, INC-India Projects Vs. Union of India [2016 (339) E.L.T. 21 (Guj.)] and Hon'ble Bombay High Court in the case of Parijat Construction Vs. Commissioner Excise, Nashik [2018 (359) E.L.T. 113 (Bom.)].

12. As regards the Hon'ble Madras High Court judgment in the case of Assistant Commissioner of S.T., Chennai Vs. Nataraj and Venkat Associates [2015 (40) STR 31 (Mad.)] relied upon by the department in the appeal and which holds a contrary view in the subject matter, it is observed that the said judgment was pronounced on 23.04.2013 and the Hon'ble Madras High Court in their judgment pronounced subsequently on 28.06.2018 in the case of 3E Infotech Vs. CESTAT,

Chennai held a different view as discussed in para 11 above. The judgments of Hon'ble Gujarat High Court in the case of Joshi Technologies International, INC-India Projects Vs. Union of India [2016 (339) E.L.T. 21 (Guj.)] and ONGC Vs. Union of India [2017 (354) ELT 577 and that of Hon'ble Bombay High Court in the case of Parijat Construction Vs. Commissioner Excise, Nashik, reported in 2018 (359) E.L.T. 113 (Bom.) on similar issue are of subsequent date. Being later judgments on the issue, the said judgments take precedence over the earlier one. Further, I find that the view expressed by the jurisdictional Gujarat High Court in the case of Joshi Technologies International, INC-India Projects Vs. Union of India [2016 (339) E.L.T. 21 (Guj.)] is binding on the principles of judicial discipline.

12.1 As regards the Supreme Court judgment in the case of M/s Mafatlal Industries Ltd. Vs. Union of India [1997 (89) ELT 247 (SC)] referred in the appeal, I find that the applicability of the said judgment for the issue under dispute had been examined by the High Court of Karnataka in their judgment in the case of Commissioner of C.Ex.(Appeals), Bangalore Vs. KVR Construction [2012 (26) STR 195 (Kar.)] after which they had held that the limitation under Section 11B of the Central Excise Act, 1944 would not be applicable for the issue under dispute. I further find that the Special Leave Petition filed by the department against the above said judgment of High Court of Karnataka has been dismissed by the Supreme Court.

13. Therefore, I find that once the booking is cancelled and the entire amount is returned the respondent has not provided any service and whatever the amount paid by them is in the nature of deposits only. Therefore, following the ratio of the above referred judgments of various high courts, it is to be held that limitation prescribed under Section 11B(1) of the Central Excise Act, 1944 would not be applicable to the respondent's claim of refund in the instant case.

14. On careful consideration of the relevant legal provisions and the judicial pronouncements of the Hon'ble High Court as discussed above, I find that the appeal filed by the department is not legally maintainable on merits and is liable to be rejected.

15. In view of the above, I do not find any merit in the contention of the department so as to interfere in the order issued by the adjudicating authority. Accordingly, I uphold the impugned Order-in-Original and the appeal is accordingly rejected.

16. The appeal filed by the department stands disposed off in above terms.

24 October, 2019

(Akhilesh Kumar)
Commissioner
(Appeals)

Attested

(M.P.Sisodiya)
Superintendent (Appeals)
Central Excise, Ahmedabad

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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