



सत्यमेव जयते

आयुक्त(अपील)का कार्यालय, Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५,
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलिफैक्स 07926305136



DIN : 20230164SW0000444DA4

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1783/2022 / 7451-55
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-134/2022-23
दिनांक Date : 19-01-2023 जारी करने की तारीख Date of Issue 19.01.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. CGST-VI/Dem-16/Bhadresh Mistry/AC/DAP/21-22 दिनांक: 21.03.2022
passed by Assistant Commissioner, CGST, Division VI, Ahmedabad South
- ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Bhadresh Gaurishankar Mistry
308-309, Pratibha,
Opposite Gandhigram Railway Station,
Nehru Bridge, Off. Ashram Road,
Ahmedabad - 380009

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 हानिकार खाने 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।

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 भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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.

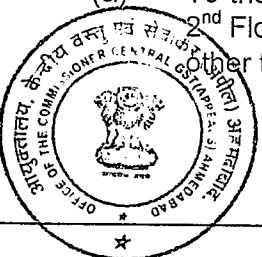
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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. 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु.6.50 पैसे कान्यायालय 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.

177 सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

- a. (Section) खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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.

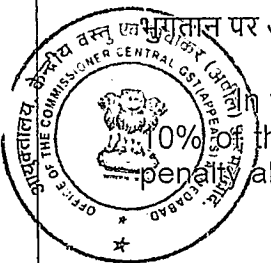
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

- (ccxcv) amount determined under Section 11 D;
(ccxcvi) amount of erroneous Cenvat Credit taken;
(ccxcvii) amount payable under Rule 6 of the Cenvat Credit Rules.

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 present appeal has been filed by M/s. Bhadresh Gaurishankar Mistry, 308-309, Pratibha Complex, Opposite Gandhigram Railway Station, Nehru Bridge, Off. Ashram Road, Ahmedabad – 380 009 (hereinafter referred to as the “appellant”) against Order in Original No. CGST-VI/Dem-16/Bhadresh Mistry/AC/DAP/21-22 dated 21.03.2022 [hereinafter referred to as “*impugned order*”] passed by the Assistant Commissioner, Division – VI, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as “*adjudicating authority*”].

2. Briefly stated, the facts of the case are that the appellant was not registered with the Service Tax department. As per the information received from the Income Tax Department, the appellant had earned substantial income from services amounting to Rs.24,34,353/- during F.Y. 2015-16 and Rs.23,93,450/- during F.Y. 2016-17 . However, the appellant did not obtain service tax registration and did not pay service tax on such service income. Therefore, the appellant was issued Show Cause Notice bearing No. V/WS06/O&A/SCN-51/2020-21 dated 23.12.2020 wherein it was proposed to :

A. Demand and recover the service tax amounting to Rs.7,24,170/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.

B. Impose penalty under Sections 77(1) and 78 of the Finance Act, 1994.

C. Recover late fee in terms of Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994.

3. The SCN was adjudicated vide the impugned order wherein :

a) The demand of service tax amounting to Rs.4,13,519/- was confirmed and the service tax amounting to Rs.4,13,519/- paid by the appellant on 21.01.2021 was appropriated.

b) Interest was ordered to be recovered under Section 75 of the Finance Act, 1994. The interest amounting to Rs.3,78,869/- paid by the appellant on 21.01.2021 was appropriated.



- 5
- c) Penalty amounting to Rs.62,028/- was imposed under Section 78 (1) (i) of the Finance Act, 1994. The penalty amounting to Rs.62,028/- paid by the appellant on 21.01.2021 was appropriated.
- d) Penalty amounting to Rs.10,000/- was imposed under Section 77 (1) (a) of the Finance Act, 1994.
- e) Penalty amounting to Rs.80,000/- was imposed under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.
4. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :
- The adjudicating authority has not appreciated the facts and circumstances of the case and, therefore, the impugned order imposing penalty under Section 70 and 77 is improper and illegal.
 - They had paid service tax and penalty under Section 78 as well as interest under Section 75 of the Finance Act, 1994 within 30 days from the date of receipt of SCN. The penalty under Section 70 and 77 is not imposable in view of the proviso to Section 78 of the Finance Act, 1994.
 - Therefore, the penalty of Rs.80,000/- under Section 70 and Rs.10,000/- under Section 77 of the Finance Act, 1994 be waived off.
5. Personal Hearing in the case was held on 12.01.2023. Shri Naimesh K. Oza, Advocate, appeared on behalf of appellant for the hearing. He submitted a written submission during the hearing and reiterated the submissions made herein.
6. In the additional written submissions filed on 12.01.2023, the appellant contended, inter alia, that :
- The limited issue involved in the appeal is the penalty imposed under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994 and penalty imposed under Section 77(1) of the Finance Act, 1994.



- They have paid the duty, penalty and interest within 30 days from the date of issue of SCN. Therefore, penalty is not imposable in view of proviso (i) of Section 78 (1) of the Finance Act, 1994.

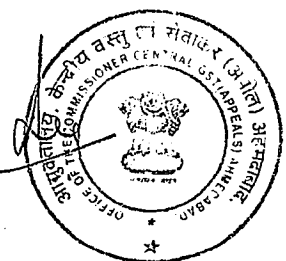
7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the additional written submissions as well as submissions made at the time of personal hearing and the materials available on records. The issue before me for decision is as whether the impugned order passed by the adjudicating authority imposing penalty under Section 77 (1) and Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994 on the appellant, in the facts and circumstances of the case, is legal and proper or otherwise. The dispute pertains to the period F.Y. 2015-16 and F.Y. 2016-17.

8. It is observed from the materials available on record that the appellant were issued SCN on 23.12.2020 demanding service tax and proposing penal action under Section 70, 77(1) and 78 of the Finance Act, 1994. The appellant had paid the service tax amounting to Rs.4,13,519/- along with 15% penalty and applicable interest on 21.01.2021 i.e. within a period of 30 days from the date of issue of SCN. This fact has also been recorded at Para 15 of the impugned order and the amounts paid by the appellant have been appropriated in the SCN.

8.1 The appellant have contended that in terms of clause (i) of the second proviso to Section 78 (1) of the Finance Act, 1994, penalty under Section 70 and 77 (1) of the Finance Act, 1994 are not imposable as the proceeding are deemed to be concluded. It, therefore, is pertinent to refer to clause (i) of the second proviso to Section 78 (1) of the Finance Act, 1994, which is reproduced below :

“Provided further that where service tax and interest is paid within a period of thirty days of—

- (i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;”



8.2 From a plain reading of the above provision, it is obvious that if the service tax and interest is paid within 30 day, the penalty payable would be 15% of the service tax and the proceedings in respect of only such service tax, interest and penalty are deemed to be concluded. It is clear from the wordings of the clause (i) of the second proviso to Section 78 (1) of the Finance Act, 1994 that it does not provide for conclusion of the entire proceeding initiated under the notice issued to the appellant. In the instant case, the SCN issued to the appellant also contained proposals for imposition of penalty under Section 70 of the Finance Act, 1994 read with Rule 7C of the Finance Act, 1994 as well as proposal for imposition of penalty under Section 77(1) of the Finance Act, 1994. There is no provision in Section 78 (1) of the Finance Act, 1994 which provides for conclusion of the proceedings under Section 70 and 77 (1) of the Finance Act, 1994 upon payment of service tax along with interest and reduced penalty. Further, the penalty under Section 70 of the Finance Act, 1994 read with Rule 7C of the Finance Act, 1994 and penalty under Section 77(1) of the Finance Act, 1994 are independent of the demand of duty in terms of Section 73 of the Finance Act, 1994 and also independent of the penal provisions of Section 78 of the Finance Act, 1994. Therefore, conclusion of the proceedings in respect of service tax, interest and penalty under Section 78 in terms of clause (i) of the second proviso to Section 78 does not impose any bar on the penal action under Section 70 and Section 77 (1) of the Finance Act, 1994.

8.3 The appellant have relied upon the judgment in the case of Jossy Edwin Pinto V. Commissioner of C.Ex. & Central Tax, Mangalore – 2019 (27) GSTL 575 (Tri.-Bang.). In this regard, it is observed that the said judgment is not applicable in the instant appeal where the appellant has challenged the imposition of penalty under Section 70 of the Finance Act, 1994 read with Rule 7C of the Finance Act, 1994 as well as penalty under Section 77(1) of the Finance Act, 1994 only on the ground that the penalty is not imposable in terms of clause (i) of the second proviso to Section 78 of the Finance Act, 1994.



8.4 In view thereof, I do not find any merit in the contention of the appellant as regards imposition of penalty under Section 70 of the Finance Act, 1994 read with Rule 7C of the Finance Act, 1994 and Section 77(1) of the Finance Act, 1994. Accordingly, I am of the considered view that there is no infirmity in the impugned order which calls for any interference.

9. In view of the above, I uphold the impugned order and reject the appeal filed by the appellant.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

Akhilesh Kumar
 (Akhilesh Kumar) 2023..
 Commissioner (Appeals)
 Date: 01-2023.

Attested:

(N.Suryanarayanan. Iyer)
 Assistant Commissioner (In situ) (Appeals),
 CGST, Ahmedabad.



BY RPAD / SPEED POST

To

M/s. Bhadresh Gaurishankar Mistry,
 308-309, Pratibha,
 Opposite Gandhigram Railway Station,
 Nehru Bridge, Off. Ashram Road,
 Ahmedabad – 380 009

Appellant

The Assistant Commissioner,
 CGST, Division- VI,
 Commissionerate : Ahmedabad South.

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South.
 (for uploading the OIA)
4. Guard File.
5. P.A. File.