



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 : 20230164SW000000CC0F

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/770/2022 / 7702-96
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-136/2022-23
दिनांक Date : 19-01-2023 जारी करने की तारीख Date of Issue 20.01.2023
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of OIO No. **WS07/O&A/OIO-77/AC-RAG/2021-22** दिनांक: 14.02.2022 passed by
Assistant Commissioner, CGST, Division VII, Ahmedabad South
- ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s DSS Projects Management
804, Harikrupa Tower,
Old Sharda Mandir Road,
Opp. Gujarat College Compound,
Ahmedabad - 380015

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) केंद्रीय 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 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.



(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 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 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 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 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.

18ण 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.

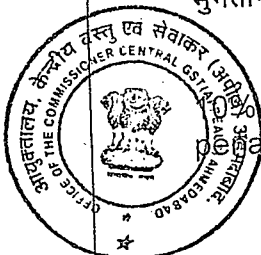
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

- (cccvii) amount determined under Section 11 D;
(cccviii) amount of erroneous Cenvat Credit taken;
(cccix) 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।

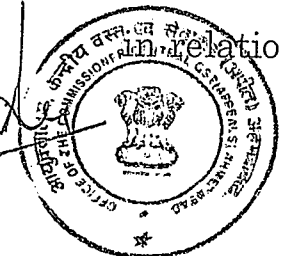
In view of above, an appeal against this order shall lie before the Tribunal on payment of the duty demanded where duty or duty and penalty are in dispute, or penalty, where duty alone is in dispute."



ORDER-IN-APPEAL

The present appeal has been filed by M/s. DSS Project Management, 804, Harikurpa Tower, Old Sharda Mandir Road, Opposite Gujarat College Ground, Ahmedabad (hereinafter referred to as the "appellant") against Order in Original No. WS07/O&A/OIO-77/AC-RAG/2021-22 dated 14.02.2022 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, Division – VII, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case are that the appellant were holding Service Tax Registration No. ANSPS3259CST003 and engaged in providing Works Contract Services and Construction services, other than Residential Complex, including Commercial/Industrial Buildings or Civil Structures. During the course of Audit of the records of the appellant for the period from April, 2013 to March, 2017 conducted by the Officers of Central Tax Audit Commissionerate, Ahmedabad, it was observed that the appellant had wrongly availed cenvat credit amounting to Rs.35,561/- on input services, invoices of which were neither in their name nor had they used the input service in providing output services provided by them. The appellant submitted vide their letter dated 05.05.2018 that they were having common ownership and PAN and, hence, they should be allowed cenvat as same had happened dues to supplier's oversight. On examining the invoices, it was observed that the same were in the name of M/s. De's Design and M/s.De's Architectural & Interior Design and were in respect of Interior 3D rendering view service, Advance Electrical Consultancy service and Consulting Engineer service. It was further observed that these services were provided at sites and to persons where the appellant had not provided any output service. Since it appeared that the invoices were not in the name of the appellant and the input services of these invoices were not in relation to the output services provided by the appellant, the cenvat

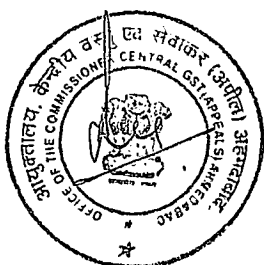


credit amounting to Rs.35,561/- appeared to have been taken in contravention of Rule 3 read with Rule 2(1) of the Cenvat Credit Rule, 2004 (hereinafter referred to as the CCR, 2004).

2.1 It was also observed during the verification of the financial records and copies of work orders of M/s.Bai Jivkor Lallubhai Trust, Jivkorbhai Lalluhai Higher Secondary School Complex, Maninagar, Ahmedabad that the appellant had provided Works Contract service valued at Rs.87,97,328/-. It was observed that Cement and Steel valued at Rs.21,00,000/- was provided by the service recipient and the appellant had considered the gross value amounting to Rs.66,97,328/- for the purpose of payment of service tax i.e. by excluding the value of the Cement and Steel supplied by the service recipient. In this regard, the appellant submitted vide their letter dated 05.05.2018 that they did not agree with the observation of the Audit in view of the case law of M/s.Bhayana Builders – 2018 (10) GSTL 118 (SC). It, however, appeared that the said decision was not applicable to the facts of the case and the appellant was required to pay service tax amounting to Rs.1,26,000/- on the differential value of Rs.21,00,000/-.

3. The appellant was, subsequently, issued a Show Cause Notice bearing No. VI/1(b)-62/C-IV/AP-26/Audit/Ahmd/17-18 dated 03.07.2018 wherein it was proposed to :

- a) Demand and recover the cenvat credit amounting to Rs.35,561/- under the proviso to Section 73 (1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the CCR, 2004.
- b) Demand and recover service tax totally amounting to Rs.1,26,000/- under the proviso to Section 73 (1) of the Finance Act, 1994.
- c) Recover interest under Section 75 of the Finance Act, 1994.
- d) Impose penalty under Sections 76 and 78(1) of the Finance Act, 1994 read with Rules 15 (1) and 15 (3) of the CCR, 2004.



4. The SCN was adjudicated vide the impugned order wherein the demand of cenvat credit amounting to Rs.35,561/- was confirmed along with interest. Penalty equivalent to the cenvat credit confirmed was imposed under Section 78 of the Finance Act, 1994. The demand of service tax amounting to Rs.1,26,000/- was dropped.

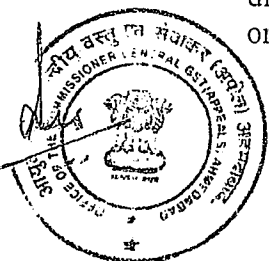
5. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal. On scrutiny of the appeal papers filed by the appellant on 11.03.2022, it was noticed that they had submitted Form DRC-03 showing payment of Rs.2,670/- towards pre-deposit in terms of Section 35F of the Central Excise Act, 1944.

6. Board had consequent to the rollout of the Integrated CBIC-GST Portal, vide Circular No.1070/3/2019-CX dated 24.06.2019, directed that from 1st July, 2019 onwards, a new revised procedure has to be followed by the taxpayers for making arrears of Central Excise & Service Tax payments through portal "CBIC (ICEGATE) E-payment". Subsequently, the CBIC issued Instruction dated 28.10.2022, from F.No.CBIC-240137/14/2022-Service Tax Section-CBEC wherein it was instructed that the payments made through DRC-03 under CGST regime is not a valid mode of payment for making pre-deposits under Section 35F of the CEA 1944 and Section 83 of the Finance Act, 1994.

7. In terms of Section 35F of the Central Excise Act, 1944, an appeal shall not be entertained unless the appellant deposits 7.5% of the duty in case where duty and penalty are in dispute or 7.5% of penalty where such penalty is in dispute. Relevant legal provisions are reproduced below:-

"SECTION 35F: Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. — The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal —

(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the



[Principal Commissioner of Central Excise or Commissioner of Central Excise];”

7.1 The appellant was, therefore, called upon vide letter F.No. GAPPL/COM/STP/770/2022 dated 11.11.2022 to make the pre-deposit in terms of Board's Circular No.1070/3/2019-CX dated 24.06.2019 and submit the document evidencing payment within 10 days of the receipt of this letter. They were also informed that failure to submit proof of pre-deposit would result in dismissal of the appeal for non-compliance in terms of Section 35F of the Central Excise Act, 1944. As no communication was received from the appellant, they were again requested vide letter dated 19.12.2022 to make the pre-deposit in terms of Board's Circular No.1070/3/2019-CX dated 24.06.2019 and submit the document evidencing payment within 07 days of the receipt of this letter. However, the appellant have neither responded to the said communications nor have they submitted evidence of pre-deposit in terms of Board's Circular No.1070/3/2019-CX dated 24.06.2019.

8. It is observed that though sufficient time was granted to the appellant to make the payment of pre-deposit in terms of Circular No.1070/3/2019-CX dated 24.06.2019, they have failed to furnish proof of revised payment of pre-deposit of 7.5% of the duty made.

8.1 It is also pertinent to note that the Instruction dated 28.10.2022 was issued by the CBIC consequent to the directions of the Hon'ble Bombay High Court in the case of Sodexo India Services Pvt. Ltd. Vs. UOI and Ors. in Writ Petition No. 6220 of 2022, which is reproduced below :

“8 Therefore, it does appear that the confusion seems to be due to there being no proper legal provision to accept payment of pre-deposit under Section 35F of the Central Excise Act, 1944 through DRC-03. Some appellants are filing appeals after making pre-deposit payments through DRC-30/GSTR-3B. In our view, this has very wide ramifications and certainly requires the CBI & C to step in and issue suitable clarifications/guidelines/ answers to the FAQs. We would expect CBI & C to take immediate action since the issue has been escalated by Mr. Lal over eight months ago.”



9. In terms of CBIC's Instruction dated 28.10.2022, I find that the payment made vide DRC-03 cannot be considered as valid payment of pre-deposit. This authority is bound by the provisions of the Act and has no powers or jurisdiction to interpret the mandate of Section 35F in any other manner. As such, I hold that for entertaining the appeal, the appellant is required to deposit the amounts in terms of Section 35F, which was not done. I, therefore, dismiss the appeal filed by the appellant for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944.

10. In view of the above, the appeal filed by the appellant is dismissed for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944.

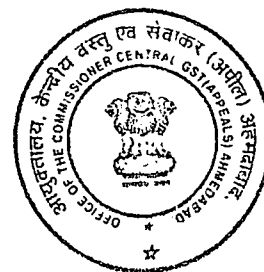
अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

Akhilesh Kumar
19 January, 2023
(Akhilesh Kumar)
Commissioner (Appeals)
Date: 19.01.2023

Attested:

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



BY RPAD / SPEED POST

To

M/s. DSS Project Management,
804, Harikurpa Tower,
Old Sharda Mandir Road,
Opposite Gujarat College Ground,
Ahmedabad

Appellant

The Assistant Commissioner,
CGST, Division- VII,
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.

