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

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065 – टेलेफैक्स07926305136

DIN : **20230264SW0000408055**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1420/2022 /8588-92

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-162/2022-23**
दिनाँक Date : **16-02-2023** जारी करने की तारीख Date of Issue 20.02.2023

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

ग Arising out of OIO No. **WS07/O&A/OIO-43/AC/RAG/2021-22** दिनाँक: **12.01.2022** passed by Assistant Commissioner, CGST, Division VII, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Central Warehousing Corporation
Regional Office, Opp. Unnati Vidhayalay,
Laxmi Char Rasta, Paldi,
Ahmedabad - 380007

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 पूवोक्त 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 मे 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 materjal 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 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 रूपये या उससे कम होतो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.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.

2ण 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;
इ॰ लिया गलत सेनवैट क्रेडिट की राशि;
ब॰ 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:

(iv) amount determined under Section 11 D;
(v) amount of erroneous Cenvat Credit taken;
(vi) 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. Central Warehousing Corporation, Regional Office, Opposite Unnati Vidhyalaya, Laxmi Char Rasta, Paldi, Ahmedabad – 380 007 (hereinafter referred to as the "appellant") against Order in Original No. WS07/O&A/OIO-43/AC/RAG/ 2021-22 dated 12.01.2022 [hereinafter referred to as the "*impugned order*"] passed by the Assistant Commissioner, CGST, Division- VII, 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. AAAC1206DST007 and engaged in providing Storage and Warehousing Service, Cargo Handling Service etc. During the course of EA-2000 audit of the records of the appellant, by the officers of CGST Audit Commissionerate, Ahmedabad, for the period from F.Y. 2013-14 to F.Y. 2017-18 (up to June, 2017), it was observed that the appellant had wrongly utilized cenvat credit of 2% Education Cess (EC) and 1% Secondary and Higher Education Cess (SHEC) for payment of service tax. As per Rule 3 of the Cenvat Credit Rules, 2004 (hereinafter referred to as the CCR, 2004), the credit of EC and SHEC can be used only for payment of EC and SHEC. However, it appeared that the appellant had wrongly utilized the EC amounting to Rs.1,93,031/- and SHEC amounting to Rs.79,041/- for payment of service tax amounting to Rs.2,72,432/-. It further appeared that in terms of Notification No. 22/2015-CE dated 29.10.2015, cenvat credit in respect of EC and SHEC relating to inputs or capital goods received on or after 01.06.2015 can be utilized for payment of service tax on any output service. On being pointed out by the Audit, the appellant did not agree with the audit observation.

2.1 Therefore, the appellant was issued Show Cause Notice bearing No. 61/2018-19 dated 01.03.2019 from F.No. VI/1(b)-126/C-IV/AP-25/Ahmd/2018-19 wherein it was proposed to :

A. Demand and recover the service tax amounting to Rs.2,72,432/- under the proviso to Section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.

B. Impose penalty under Section 78 of the Finance Act, 1994.

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

a) The demand of service tax amounting to Rs.2,72,432/- was confirmed.

b) Interest was ordered to be recovered under Section 75 of the Finance Act, 1994.

c) Penalty amounting to Rs.2,72,432/- was imposed under Section 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

i. The adjudicating authority erred in law in contending that credit of Cess can be utilized for payment of Cess as per Rule 3 and failed to appreciate that there was no bar or prohibition in Rule 3 so as to restrict utilization of Cess for payment of service tax.

ii. The adjudicating authority erred in relying upon the amendment made by way of Notification No. 22/2015-CE dated 29.10.2015, which is an enabling amendment and not prohibitory amendment. Nowhere in the Notification, it was prohibited to allow utilization of credit of Cess for payment of service tax.

iii. The adjudicating authority erred in law in relying upon the decision of the Hon'ble High Court in the context of the present case.

iv. Depriving them from utilizing the balance credit of Cess is in violation of the Constitution of India, more particularly Article 300A.

v. They had rightly utilized the balance of credit available in service tax for payment of service tax. The adjudicating authority failed to appreciate that the cause of action involved in the Notice was not the transfer of credit from Cess to Service Tax but the utilization of credit available in service tax which was transferred from Cess. Hence, the adjudicating authority travelled beyond his jurisdiction in demanding recovery of service tax under Section 73 (1).

vi. The Notice was barred by limitation of normal period in terms of Section 73 (1) of the Act and the extended period was neither invoked in the Notice nor was it invokable.

5. Personal Hearing in the case was held on 10.02.2023. Shri Rahul Patel, Chartered Accountant, appeared on behalf of appellant for the hearing. He

reiterated the submissions made in the appeal memorandum. He submitted a written submission during hearing and stated that they had not utilized the credit as they had sufficient balance in their ST-3/Cenvat Account. He stated that he would submit a recent judgment of Hon'ble Tribunal as additional written submission.

6. In the additional written submission filed on 10.02.2023, the appellant contended, inter alia, that :

- If the returns filed by them for the period from April, 2015 to September, 2015 are verified, it indicates that the balance of credit of Cess was transferred by them to the balance of service tax credit in the month of July, 2015. Copies of the returns are submitted.
- Moreover, it can be seen that they had sufficient balance of cenvat credit of service tax, exceeding Rs.2,72,432/-, at all times subsequent to the transfer of the balance of Cess. This implies that the credit of Cess, so transferred to service tax credit, was never utilized for payment of service tax and as a *fortiori* there was no short payment of service tax during the period involved.
- The Notice ought to have been issued under Rule 14 of the CCR, 2004 read with Section 73 (1) of the Finance Act, 1994. Therefore, the Notice and the impugned order are illegal and fails to survive the powers conferred under Section 73 (1) of the Act.
- Transfer of balance credit of Cess to service tax credit for utilization against payment of service tax is not contrary to the provisions of Rule 3 of the CCR, 2004. Sub-rule (1) of Rule 3 defines Cenvat Credit to included EC and SHEC. Sub-rule 4 of Rule 3 allows utilization of what is defined as cenvat credit for payment of service tax.
- Notification No. 22/2015-CE (NT) as well as amended sub-rule (7) of Rule 3 does not curtail the scheme of cenvat credit contemplated in sub-rule (1).
- The Notice was issued invoking the extended period of limitation which is not available. All the facts of having transferred the balance credit of Cess to service tax credit was duly reported in the ST-3 for the period involved.

- They are a Public Sector Undertaking and it is settled position of law that the charges contemplated in proviso to sub-section (1) of Section 73 and Section 78 are not available unless strongly and vehemently provide otherwise by the Revenue. In the instant case the larger period of limitation has been invoked without any plausible reason and corroborative evidences.
- Reliance is placed upon the judgment in the case of Vishakapattnam Port Trust Vs. CCE – 2019 (27) GSTL 244 (Tri.-Hyd.); UP State Food and Essential Commodities Corpn. Ltd. Vs. CCE – 2019 (31) GSTL 97 (Tri.-All.) and Commissioner of CGST Vs. Commandant – 2019 (24) GSTL 232 (Tri.-Del.).
- As the demands confirmed by the impugned order are not tenable, the demand of interest also fails.
- As the transferred credit of Cess was not utilized for payment of service tax, there was no short payment of service tax. Therefore, the question of demanding interest and penalty does not arise.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the submissions made at the time of personal hearing, the additional written submissions and the materials available on records. The issue before me for decision is whether the impugned order passed by the adjudicating authority confirming the demand of service tax amounting to Rs.2,72,432/-, in the facts and circumstances of the case, is legal and proper or otherwise. The dispute pertains to the period F.Y. 2015-16.

8. It is observed from the materials available on record that the appellant had transferred the cenvat credit balance of EC and SHEC to the cenvat credit balance of service tax. It is the allegation of the department that the appellant had utilized the cenvat credit of EC and SHEC so transferred for payment of service tax, which is not permissible. The utilization of EC and SHEC is governed by the First and Second proviso to Rule 3 (7) (b) of the CCR, 2004, which are reproduced below :

> "PROVIDED that the credit of the education cess on excisable goods and the education cess on taxable services can be utilised for payment of the education cess on excisable goods or for the payment of the education cess on taxable services:"

> "PROVIDED FURTHER that the credit of Secondary and Higher Education cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilised, either for payment of the Secondary and Higher Education cess on excisable goods or for the payment of the Secondary and Higher Education cess on taxable services;"

8.1 From a plain reading of the above provisions of law, it is clear that cenvat credit of EC and SHEC availed in respect of taxable services can be utilized only for payment of EC and SHEC on output services. However, by virtue of Notification No. 22/2015-CE (NT) dated 29.10.2015, sixth proviso was inserted in Rule 3 (7) (b) of the CCR, 2004, which reads as :

> "PROVIDED ALSO that the credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the premises of the provider of output service on or after the 1st day of June, 2015 can be utilised for payment of service tax on any output service:"

8.2 Consequent to the insertion of the sixth proviso to Rule 3 (7) (b) of the CCR, 2004, cenvat credit of EC and SHEC in respect of the inputs and capital goods recived after 01.06.2015 was allowed to be utilized for payment of service tax on output services. The implication of this amendment is that the cenvat credit in respect of the inputs and capital goods received prior to 01.06.2015 is not allowed to be utilized for payment of service tax on output service.

8.3 In view of the above provisions of law, the appellant had wrongly transferred the cenvat credit of EC and SHEC to the credit balance of service tax and wrongly utilized the same for payment of service tax on output services.

9. The appellant have also contended that the cenvat credit of EC and SHEC transferred to cenvat credit of service tax was not utilized for payment of service tax on output services as is evidenced from the fact that they were having sufficient balance of cenvat credit for service tax, in excess of Rs.2,72,432/-. In support of their contention, the appellant have submitted copies of their ST-3 returns for the relevant period. I have perused the ST-3 returns filed by the appellant for the period from April to September, 2015 and October, 2015 to March, 2016 and find that the appellant had shown that the closing balance of cenvat credit of EC and SHEC was transferred to basic service tax credit during July, 2015. At the end of September, 2015, the appellant was having balance of cenvat credit of service amounting to

Rs.1,01,82,182/- which is more than the demand of Rs.2,72,432/- relating to the cenvat credit of EC and SHEC transferred to cenvat credit of service tax and alleged to have been utilized for payment of service tax on output services. Accordingly, the allegation that the appellant had transferred and utilized the cenvat credit of EC and SHEC for payment of service tax on output services is not tenable.

10. The appellant have also raised the issue of limitation and contended that the extended period of limitation is not invokable. In this regard, I find that the appellant had declared in their ST-3 returns for the period from April, 2015 to September, 2015 that the cenvat credit of EC and SHEC lying in balance is transferred to basic service tax credit. Therefore, once the appellant had declared this fact in the ST-3 returns, it is no more open for the department to allege that the appellant had suppressed the facts and consequently, the extended period of limitation cannot be invoked for raising demand.

11. In view of the above facts, I set aside the impugned order and allow the appeal filed by the appellant.

12. 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)
Commissioner (Appeals)
Date: 16.02.2023.

Attested:

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

BY RPAD / SPEED POST

To

M/s. Central Warehousing Corporation, Appellant
Regional Office,
Opposite Unnati Vidhyalaya,
Laxmi Char Rasta,
Paldi, Ahmedabad – 380 007

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.