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 : **20220964SW0000222A47**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2317/2021 /3449 - 53

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-001-APP-50/2022-23**
दिनाँक Date : **16-09-2022** जारी करने की तारीख Date of Issue 27.09.2022

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

ग Arising out of OIO No. **CGST/WS07/O&A/OIO No. 01/MK/DC/2021-22** दिनाँक: **09.04.2021** passed by Deputy Commissioner, CGST& Central Excise, Division-VII, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Ojas Haribhai Hirani**
   C-405/406, Titanium Square,
   Thaltej Cross Roads, S.G. Highway,
   Ahmedabad - 380054

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 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 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।

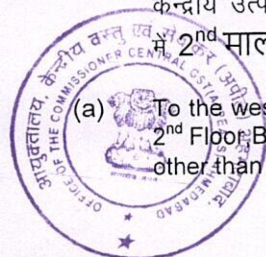
The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

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 in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(29) 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)-

(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.

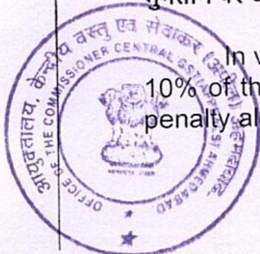
⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है.**

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:

(lxx) amount determined under Section 11 D;
(lxxi) amount of erroneous Cenvat Credit taken;
(lxxii) 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. Ojas Haribhai Hirani, C-405/406, Titanium Square, Thaltej Cross Roads, S.G. Highway, Ahmedabad – 380054 [previously at 01, Ashirvad Apartment, Satellite Road, Ahmedabad – 380015] (hereinafter referred to as the appellant) against Order in Original No. CGST/WS07/O&A/OIO No.01/MK/DC/2021-22 dated 09.04.2021 [hereinafter referred to as "*impugned order*"] passed by the Deputy Commissioner, Division – VII, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. AABH7692CST001 and engaged in providing Works Contract Service. and Architect Service. During the course of audit of the financial records of the appellant for the period April, 2015 to June, 2017 conducted by the officers of Central Tax Audit, Ahmedabad, it was observed on reconciliation that there was a difference in the income shown in their financial statements and those shown in the ST-3 returns. Accordingly, there appeared to be non-payment of service tax on the differential income. The audit objection was communicated to the appellant on 26.08.2019. However, the appellant did not agree with the objection. The differential income amounted to Rs.22,22,226/- for the period from April, 2014 to June, 2017 on which service tax amounting to Rs.3,20,798/- was allegedly not paid by the appellant.

3. The appellant was, therefore, issued a Show Cause Notice bearing No. VI/1(b)-330/C-IV/Audit/AP-27/Ahmd/2018-19 dated 14.10.2019 wherein it was proposed to :

a) Recover service tax amounting to Rs.3,20,798/- under the proviso to Section 73 (1) of the Finance Act, 1994.
b) Recover Interest under Section 75 of the Finance Act, 1994.
c) Impose penalty under Section 78 (1) of the Finance Act, 1994.

4. The SCN was adjudicated vide the impugned order wherein the demand for service tax was confirmed along with interest. Penalty equivalent to the service tax confirmed was imposed under Section 78 of the Finance Act, 1994.

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

i. The impugned order is passed mechanically without application of mind. In Para 20.4, there is mention about their relying upon the certain judgments, but there is no discussion or findings on these decisions.

ii. The adjudicating authority has at Para 20.5 presumed that the duty calculation in their reply appeared to be wrong despite the fact that correct applicable rates were given and they were supported by Certificate dated 20.01.2020 of Chartered Accountant.

iii. At Para 20.6, the service tax liability of Rs.3,00,003/- has been worked out in sheer disregard of the clear working given in their reply which was supported by certificate of Chartered Accountant. Despite this, demand of service tax amounting to Rs.3,20,798/- has been confirmed by even ignoring the amount of Rs.3,00,003/- as per the own calculation of the adjudicating authority.

iv. It has been stated that they had not produced copies of sales ledger, invoices etc. and hence, their argument was not accepted. Resorting to presumptions without seeking such documents is clear violation of the principles of natural justice when they had categorically requested in their reply requested to be informed if any further information, document or certification were required.

v. Despite the fact that service tax was shown on the debit side of Profit and Loss account, which is proof in support of their contention that the income shown is inclusive of service tax, the adjudicating authority has at Para 21 presumed mismatch without taking any pain to ascertain or call for the reasons for mismatch.

vi. At Para 26, it is stated that they have not informed that they were providing a taxable service as envisaged under Section 65B (44) of the Act. This is factually incorrect as the records show that they have filed their service tax returns.

vii. There is no discussion or finding on their submissions as also on the case laws relied upon by them for not imposing penalty and for not invoking extended period of limitation.

viii. It is requested that all their submissions made by way of reply dated 20.01.2020 and 25.03.2021 be considered. It was submitted that the differential service tax payable for the normal period of limitation amounted to Rs.61,779/- for the period from 01.10.2016. Even though there is no evidence of intention to evade payment of service tax, the differential service tax payable for period from April, 2014 to June, 2017 amounted to Rs.90,577/-. Hence, the service tax demand of Rs.3,20,798/- is patently wrong and has been mechanically confirmed.

ix. The demand is not sustainable on the grounds that according to Section 173 of the CGST Act, 2017 Chapter V of the Finance Act, 1994 shall be omitted. Considering the law laid down by the Hon'ble Supreme Court in the case of Rayla Corporation Vs. Directorate of Enforcement, the initiation of proceedings are without jurisdiction and unconstitutional.

x. Interest cannot be recovered when the demand itself is not sustainable.

xi. Penalty under Section 78(1) of the Finance Act, 1994 is not imposable as there is no evidence of their intention to evade payment of service tax. It was submitted before the adjudicating authority that the appellant was an individual providing service as Architect and Engineer and not an expert in accounting and tax matters and the due liability was discharged on the basis of actual receipts. Minor reconciliation differences may be arisen only due to reimbursement of expensed and TDS, which is accounted for later on.

xii. There was no fraud, collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules with intent to evade payment of service tax on their part.

xiii. They are of the bona fide belied that they were required to pay service tax on the consideration received by them and the due service tax was paid by treating the amount received as inclusive of service tax. The details thereof were reflected in their periodical returns.

xiv. The issue of minor difference on account of TDS or reimbursement of expenses has travelled upto the Tribunal and Courts, which shows that the issue is of interpretation. It is settled law that when question of interpretation is involved, extended period of limitation cannot be invoked and penalty cannot be imposed.

xv. The information based on which the audit objection was raised and SCN issued are all taken from their records and which clearly shows that there was no suppression of any facts.

xvi. There was a reasonable cause on their part and in view of this, the question of levy of penalty does not arise.

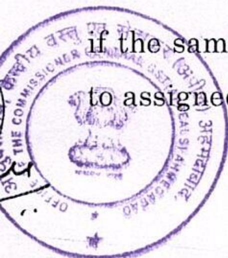
xvii. They rely upon the judgments in the case of Pahwa Chemicals P. Ltd. Vs. CCE, Delhi – 2005 (189) ELT 257 (SC); Orient Packaging Ltd. Vs. CCE – 2011 (2) STR 167 (Tri.-Del.); Cement Marketing Co. - 1980 (6) ELT 295 (SC) and CC Vs. Seth Enterprises – 1990 (49) ELT 619 (Tri.-Del.).

6. Personal Hearing in the case was held on 29.08.2022. Dr. Nilesh V. Suchak, Chartered Accountant, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the material available on records. The dispute involved in the present appeal relates to the confirmation of demand for service tax amounting to Rs.3,20,798/- on account of reconciliation of income shown in financial records vis-a-vis their ST-3 returns. The demand pertains to the period F.Y. 2014-15 to F.Y. 2017-18 (up to June).

8. It is observed from the case records that the demand of service tax has been raised based on the difference found in the taxable value of the appellant reflected in their financial records as compared to those shown in the ST-3 returns filed by them. The appellant have contested the calculations of the Audit based on which the differential income has been arrived at. They have contended before the adjudicating authority that the gross amount, including the service tax, has been taken by the audit as the taxable value. In support of their contention, the appellant submitted copies of the P&L Account as well as Trial Balance and a Certificate dated 20.01.2020 of a Chartered Accountant. The appellant have contended that the actual differential income was only Rs.6,24,726/- and the differential service tax payable by them was Rs.90,578/-. The appellant had also contended that during F.Y. 2014-15, an amount of Rs.61,758/- pertained to reimbursement of travelling expenses on which service tax was not payable. Therefore, the service tax payable by them would further reduce by Rs.6,793/-.

9. I find that though the elaborate submissions made by the appellant before the adjudicating authority have been reproduced at Para 18 of the impugned order, there is no discussions on the contentions raised in these submissions. It is further observed that the calculations submitted by the appellant have been rejected on the grounds that the rate of duty has not been shown by the appellant in their ST-3 returns. It I further observed that the calculations submitted by the appellant are certified by a Chartered Accountant. However, the certificate has not been considered by the adjudicating authority and it has been stated at Para 20.6 that the '*differential value taken by Chartered Accountant is appeared to be not correct as it can be seen from the table below*'. However, no reasons are forthcoming from the impugned order for concluding that the calculations contained in the certificate of the Chartered Accountant are not correct. A financial statement certified by a Chartered Accountant, who is qualified in such matters, has significant validity in the eyes of the law. Therefore, if the same is not being accepted, the justifiable reasons for the same has to assigned. However, no reasons has been recorded in the impugned order



for not accepting the Chartered Accountant certified reconciliation statement submitted by the appellant.

9.1 I also find merit in the contention of the appellant that there has been no proper appreciation of the facts and the impugned order has been passed in a mechanically manner without application of mind. The adjudicating authority has himself, at Para 20.6 of the impugned order, determined the amount of service tax payable by the appellant as amounting to Rs.3,00,003/-. Despite this, the adjudicating authority has confirmed the demand of service tax amounting to Rs.3,20,798/-. This is clearly indicative of the fact that the impugned order has been passed in a mechanical manner without application of mind.

10. In view of the facts discussed herein above, I am of the considered view that the matter is required to be remanded back to the adjudicating authority for adjudication afresh after considering the submissions of the appellant. The appellant are directed to produce before the adjudicating authority all the necessary documents in support of their contentions within 15 days of the receipt of this order. Accordingly, the impugned order is set aside and remanded back to the adjudicating authority. The appeal filed by the appellant is allowed by way of remand.

11. 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.

16th September, 2022.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 16.09.2022.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Ojas Haribhai Hirani, Appellant

C-405/406, Titanium Square,
Thaltej Cross Roads,
S.G. Highway,
Ahmedabad – 380054

The Deputy Commissioner, Respondent
CGST, Division- VII,
Commissionerate : Ahmedabad South.

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.