



आयुक्त (अपील) का कार्यालय
Office of the Commissioner (Appeals)
केंद्रीय जीएसटी अपील आयुक्तालय - अहमदाबाद
Central GST Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015



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स्पीड पोस्ट

- क फाइल संख्या : File No :GAPPL/COM/STP/1451/2021 *11741 701245*
- ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-006/2022-23**
दिनांक Date : 29.04.2022 जारी करने की तारीख Date of Issue : 16.06.2022.
- आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No.CGST-VI/Ref-46/Pankaj Bagri/DC/NS/2020-21
dt. 17.02.2021 passed by the Joint Commissioner (In-situ), Central GST Division-VI,
Ahmedabad South Commissionerate.
- ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant

Shri Pankaj Bagri/Neha Bagri,
1702, C Wing, Western Heights,
Four Bungalows, Andheri (West),
Mumbai.

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 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 ईए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनोंक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता ई. 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 रुपये या उससे कम हो तो 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 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 एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत के अंतर्गत:-

Under Section 35B/ 35E of Central Excise Act, 1944 or Under Section 86 of the Finance Act, 1994 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.



- (2) The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of 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 पढ़ी 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 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 रु.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 adjudicating authority shall bear 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 contained in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील 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) -

- (Section) खंड 11D के तहत निर्धारित राशि;
- लिया गलत सेनवैट क्रेडिट की राशि;
- 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:

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- 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

This appeal has been filed by Shri Pankaj Bagri / Neha Bagri, 1702, C Wing, Western Heights, Four Bungalows, Andheri (West), Mumbai (hereinafter referred to as the 'appellants') against the Order-in-Original No.CGST-VI/REF-46/Neeraj Bagri/DC/NS/2020-21 dated 17.02.2021 (hereinafter referred to as the 'impugned order') passed by the Deputy Commissioner, CGST, Division-VI, Ahmedabad South (hereinafter referred to as the 'adjudicating authority').

2. The facts of the case, in brief, are that the appellants had purchased/booked a Flat bearing No.1702 in C-Wing of the residential property under construction named Western Heights, Four Bungalows, Andheri (W), Mumbai from the service provider and developer M/s Adani Estates Pvt. Ltd., Ahmedabad for which the latter had charged and recovered service tax from them. The appellants filed a refund claim in respect of the service tax amounting to Rs.4,10,782/- paid by them on the ground that as per the decision of Hon'ble Delhi High Court's decision in the case of Suresh Kumar Bansal & Anuj Goyal & Others Vs. Union of India [2016 (6) TMI 192 Delhi High Court], there is no levy of service tax on the services of Construction of Residential complex as defined under the Finance Act, 1994 and hence the service tax paid by them to the builder/developer is liable to be refunded to them. They have filed the refund claim under Section 11B of the Central Excise Act, 1944 which has been made applicable to service tax matter vide Section 83 of the Finance Act, 1994 (hereinafter referred to as the 'Act') as a person who had borne the incidence of tax.

2.1. The refund claim submitted by the respondents was rejected by the refund sanctioning authority vide Order-in-Original (in short 'OIO') No. CGST-VI/Ref-87/SKC/Niraj/18-19 dated 28.09.2018 for want of various documents. Being aggrieved, the appellant filed an appeal before the Commissioner (Appeals), Ahmedabad who vide Order-in-Appeal (in short 'OIA') No. AHM-EXCUS-001-APP-49/2020-21 dated 30.09.2020 remanded the matter back to the adjudicating authority to decide afresh for not following principles of natural justice and in the backdrop of another refund claim of the appellants on the same issue, which was also rejected on similar grounds earlier, being later sanctioned to the appellant in terms of directions of the Hon'ble CESTAT vide their Order No.A/10874-10876/2019 dated 10.05.2019 in their own case, vide OIO No.CGST-VI/Ref-45/Pankaj Bagri/MK/AC/19-20 dated 28.11.2019.

2.2 In pursuance to the appellate authority's directions vide OIA dated 30.09.2020, the refund claimed by the appellants in the case was decided afresh by the adjudicating authority in remand proceedings vide the impugned order wherein she has rejected the refund of service tax of Rs.4,10,782/- claimed by the appellant under Section 11B of the



Central Excise Act, 1944 made applicable to service tax vide Section 83 of the Finance Act, 1994.

3. Being aggrieved, the appellants have filed the present appeal contending, *inter alia*, that:

- The department has already allowed refund claim applying the ratio of the decision of the Tribunal. Thus, the adjudicating authority was only required to verify payment of tax. The same has been duly verified by the adjudicating authority and they are satisfied with the same. Rejecting the refund claim on altogether new grounds is beyond the earlier OIA;
- The learned adjudicating authority has sought to reject the refund claim on a ground which was not even raised in the deficiency letter. Hence, denial of refund claim is clearly erroneous;
- The earlier OIO had allowed refund claim based on the decision of the Tribunal. The department has not filed any appeal against the aforesaid decision of the Tribunal. Therefore, the decision of the Tribunal has attained finality. Filing an appeal against the earlier OIO which has been passed following the decision of the Tribunal which has attained finality, is erroneous and will not succeed;
- There is no stay of the earlier OIO. Hence, the rejection of refund claim on the ground that the department has filed an appeal against earlier OIA is perverse and bad in law;
- The retrospective amendment to Rule 2A of the Valuation Rules is not applicable to construction service since the said Rule prescribes mechanism for valuation specifically for 'Works Contract Service';
- Section 66E of the Act differentiates, identifies and classifies works contract services and construction services as two different services;
- Rule 2A of the Valuation Rules prescribes mechanism for valuation specifically for service portion in the execution of a works contract. Rule 2A of Valuation Rules is not applicable to construction of residential complex service. Accordingly, taking recourse to subject rule to reject refund claim for service tax paid towards construction of residential complex service is null and void, further against the principles of natural justice. The above is further substantiated by Para 6.7 of the Education Guide;
- Before and after introduction of negative list, both the services viz. construction of complex service and works contract service, are treated separately in the Act and therefore Rule 2A of Valuation Rules cannot be made applicable to construction of residential complex service;



- As per Section 66E(b) of the Act, service tax is levied on construction of complex service only if any amount of consideration is received before receipt of completion certificate. However, in case of works contract, the consideration is exigible to service tax irrespective of the fact that whether completion certificate is received or not. Hence, the charging provision itself differentiates between the taxability of works contract service and construction of complex service and therefore, the legislature could not have intended to afford same treatment to both the services and use them interchangeably. Hence, the rejection of refund could not be justified;
 - Also, Section 128(2) of the Finance Act, 2017 which provides an over-riding effect to any judgement, order, etc. is for an action which has been done/taken relating to the provisions amended viz. Rule 2A of the Valuation Rules. In the present case, service tax has not been collected taking recourse to Rule 2A in the first place since the same is applicable only for works contract service. Hence, the same ought not to have any bearing in the present matter; and
 - The Learned adjudicating authority has sought to reject the refund claim on a fresh ground. The said ground was not raised even when the first show cause notice was issued. The department had accepted the applicability of the ratio of the High Court decision and the same has also been mentioned in the Tribunal Order. Hence, denial of refund claim is clearly erroneous and liable to be set aside.
4. Personal hearing in the matter was held on 18.11.2021 through virtual mode. Shri Niraj Bagri, CA, the appellant, attended the hearing and re-iterated submissions made in appeal memorandum.
5. I have carefully gone through the facts of the case, appeal memorandum and submissions made at the time of personal hearing. The issue to be decided in the case is whether in the facts and circumstances of the case, the impugned order passed by the adjudicating authority rejecting the refund of service tax claimed by the appellant, is legally sustainable or not.
6. It is observed that in the earlier round of litigation, the matter was remanded by this authority to the adjudicating authority vide OIA dated 30.09.2020 for considering the refund claim filed by the appellant afresh in view of violation of principles of natural justice noticed and in the backdrop of the fact that another similar refund claim of the appellant on the very same issue, which was also initially rejected on similar grounds, had been sanctioned to the appellant in terms of directions of the Hon'ble CESTAT vide their Order No.A/10874-10876/2019 dated 10.05.2019 in their own case. On going through the impugned order, it is observed that the refund of service tax claimed by the appellant in the case is rejected by the adjudicating authority altogether on fresh grounds which were never raised before in the matter while processing the claim filed. The refund in question was originally rejected on the ground that sufficient documents were not



produced. Whereas, in the impugned order, it was rejected on the grounds that: (i) the decision of Hon'ble High Court of Delhi in the case of Shri Suresh Kumar Bansal & Anuj Goyal & Others Vs. Union of India [2016 (6) TMI 192 Delhi High Court], based on which the refund claim under dispute has been filed, is not applicable in the present case; (ii) the department has filed SLP against the said judgement of High Court of Delhi and the same is pending for finality; and (iii) the builder has taken consideration from the appellants as decided mutually and therefore, there is no infirmity in collection of service tax at the point of time by the builder/service provider. As per records, the above grounds were not raised in the earlier round of processing of the refund claim. Being a remand proceeding, it was not permissible for the adjudicating authority to go beyond the grounds of dispute originally raised in the matter. It has been consistently held by Hon'ble Tribunals that on remand the original authority cannot widen the scope of the original Show Cause Notice and has to work within the frame work of the directions of the remand [1996 (84) ELT 209, 1992 (58) ELT 236 and 1992 (63) ELT 751]. The above legal position was again reiterated in the case of Commissioner of Central Excise, Nagpur Vs. Hindustan Lever Ltd. [2007 (217) ELT 303 (Tri.-Mumbai)]. In the present case, as per the remand order, the adjudicating authority was mandated to examine the merits of the refund in the context of existing earlier facts and in the light of similar refund claim already sanctioned to the appellant on the very same issue following the directions of Hon'ble Tribunal, by following the principles of natural justice. However, the adjudicating authority instead of complying with the directions of the remand order, has chosen to decide the merit of the refund on fresh grounds by travelling beyond the scope of remand proceedings ordered. This act of the adjudicating authority is against the principles of law and for that reason the order passed by her in the case fails to survive before law. The impugned order in the case is, therefore, liable to be set aside forthwith.

6.1 It is further observed that the issue of the applicability of the decision of Hon'ble High Court of Delhi in the case of Shri Suresh Kumar Bansal & Anuj Goyal & Others Vs. Union of India to the present case was not open for examination to the adjudicating authority as the department has not challenged the applicability of the said decision at that time of processing of the refund claim initially. The Hon'ble Tribunal in their order dated 10.05.2019 had clearly brought this fact on records. Further, though there is a departmental appeal/SLP against the above decision of the Hon'ble High Court of Delhi in the Hon'ble Supreme Court, there is no stay on the operation of the said decision and hence, the refund claimed cannot be denied or withheld on the ground of department having challenged the said decision. Also, the lower adjudicating authorities are bound to follow the said decision of the higher court unreservedly in terms of principles of judicial discipline. Further, the reliance placed by the adjudicating authority on the amended provisions of Rule 2A of the Service Tax (Determination of Value) Rules, 2006



also appears to be out of context as the said Rule does not have any application on the facts of the present case. The said Rule 2A of the Rules ibid is applicable only for determination of value of service portion in the execution of a Works Contract, which is not the case here. The service received by the appellants in the present case is indisputably construction of complex service covered under Section 66E(b) of the Act and is not Works Contract Service covered under Section 66E(i) of the Act.

6.2 In view of the above discussions, I set aside the impugned order passed by the adjudicating authority for being not legal and proper. Since the directions contained in the remand order are not properly complied with, I remand the matter again to the adjudicating authority to decide the matter in the light of directions given in the earlier OIA dated 30.09.2020. Accordingly, the appeal filed by the appellant is allowed by way of remand.

7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

(Signature)
(Akhilesh Kumar)
Commissioner (Appeals)
Date: 29.04.2022

Attested

(Signature)

(Anilkumar P.)
Superintendent (Appeals),
CGST(Appeals), Ahmedabad.



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Ahmedabad South.
4. The Assistant Commissioner (System), CGST HQ, Ahmedabad South.
(for uploading the OIA)
- ✓ 5. Guard file
6. P.A. File