



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 : 20221164SW0000989146

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/456/2022 / 5006 - 10
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-074/2022-23
दिनांक Date : 18-11-2022 जारी करने की तारीख Date of Issue 22.11.2022
- आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. MP/4/AC/Div-III/2021-22 दिनांक: 01.12.2021 passed by Assistant Commissioner, CGST, Division III, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

- M/s NKP Infrastructure Pvt Ltd
C/1-B, 4402, GIDC,
Phase IV, Vatva, Ahmedabad - 382445

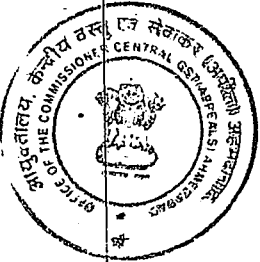
कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

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:

- 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।
- 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 :
 - 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 इका 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 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.

- (51) 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.

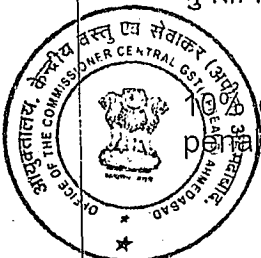
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

- (cxxxvi) amount determined under Section 11 D;
- (cxxxvii) amount of erroneous Cenvat Credit taken;
- (cxxxviii) 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 of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



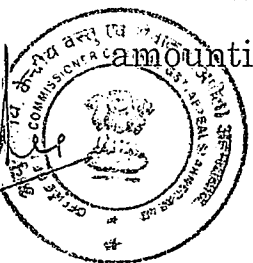
ORDER-IN-APPEAL

The present appeal has been filed by M/s. NKP Infrastructure Pvt. Ltd., C/1-B, 4402, GIDC Estate, Phase-IV, Vatva, Ahmedabad – 382 445 (hereinafter referred to as the appellant) against Order in Original No. MP/4/AC/Div-III/2021-22 dated 01.12.2021 [hereinafter referred to as “*impugned order*”] passed by the Assistant Commissioner, CGST, Division-III, Commissionerate : Ahmedabad South [hereinafter referred to as “*adjudicating authority*”].

2. Briefly stated, the facts of the case is that the appellant was registered under Service Tax and engaged in providing Construction service other than residential complex, including commercial/industrial buildings or civil structure, Works Contract service and GTA service. During the course of audit of the record of the appellant for the period from October, 2014 to June, 2017 conducted by the officers of Central Tax, Audit Commissionerate, Ahmedabad, the following observations were raised and communicated to the appellant vide Query Memo dated 17.03.2020 and FAR No.1556/2020-21 dated 12.06.2020.

2.1 Revenue Para 1 : It was found that during F.Y. 2015-16, the appellant had vide Journal Voucher No. JVC/00175/1516 dated 01.04.2015 debited the account of M/s. Poggen-Amp-Nagarsheth Powertronics Pvt. Ltd. with an amount of Rs.46,70,000/- (Service amount of Rs.44,13,989/- + Service tax amount of Rs.2,56,011/-) for the services provided to the said firm. However, the appellant did not discharge the service tax liability against the said service receipts.

2.2 Revenue Para 2 : Reconciliation of the income shown in the financial statements of the appellant with their ST-3 returns indicated that there was a difference of Rs.6,07,424/- on which the service tax amounting to Rs.30,031/- was not paid by the appellant.



2.3 Revenue Para 3 : It was observed that the appellant had during the period F.Y.2014-15 to F.Y.2016-17 shown miscellaneous income amounting to Rs.9,24,870/- on which service tax amounting to Rs.1,36,404/- was not paid by them.

2.4 Revenue Para 4 : It was observed that the appellant had late filed the returns for October, 2014 to March, 2015; October, 2015 to March, 2016 and April, 2016 to September, 2016 but had not paid the late fee totally amounting to Rs.16,100/-.

3. The appellant was, subsequently, issued a Show Cause Notice bearing No. 313/2019-20 dated 12.06.2020 by the Central Tax (Audit), Ahmedabad wherein it was proposed to :

- a) Recover service tax amounting to Rs.2,56,011/- + Rs.30,031/- + Rs.1,36,404/- 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.
- d) Recover the Late Fee amounting to Rs.16,100/- in terms of Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 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. The Late Fee was also confirmed and ordered to be recovered.

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

- i. The SCN was issued without jurisdiction and is void. The orders issued by the Department is wholly devoid of jurisdiction and



contrary to the spirit and intent of the Finance Act, 1994 and the order passed by the Hon'ble Supreme Court.

- ii. The Central Excise Officer empowered to issue SCN under Section 73 of the Finance Act, 1994 is only the jurisdictional officer and Audit office of separate Commissionerate Officers are not 'Central Excise Officer' empowered to issue SCN. Thus the present SCN is without jurisdiction.
- iii. In the case of ITC Ltd. Vs. Commissioner of Central Excise – 2019 (368) ELT 216 (SC), the Hon'ble Supreme Court had in the context of similar definition of the term 'assessment' under the Customs Act, 1962 held that assessment includes self-assessment.
- iv. It is well known that where the statute confers the power to perform an act on different officers, especially when they belong to different departments, they cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department.
- v. They rely upon the decision of the Supreme Court in the case of Commissioner of Customs Vs. Sayed Ali – 2011 (265) ELT 17 (SC) which was approved by the Hon'ble Supreme Court in the case of Canon India (P) Ltd Vs. Commissioner of Customs – 2021-VIL-34-SC.
- vi. Section 73 of the Finance Act, 1994 is also based on the above principle. Applying the ratio of the above decision in the context of the Finance Act, 1994, "the" Central Excise officer is the officer within whose jurisdiction the assessee obtains registration, pays taxes, files returns and comply with all other formalities and compliances under the Act.
- vii. Thus, apart from providing for a particular officer who can issue SCN, it also contemplates that the adjudication of the SCN shall be done by 'the' same Central Excise Officer who has issued the

SCN.



- xii. Penalties are not payable because duties are not payable. The extended period is also not available to the department and, hence, no penalty is imposable. When the demand is under Section 73A, penalty under Section 78 is not applicable.
- xiii. The extended period is not available to the Department. The demand is as per books of accounts regularly maintained and the same was available to the department and there is no suppression.
- xiv. Mere non-disclosure is not sufficient to allege suppression. There must be belief that the tax was payable and there must be intention not to pay tax. Then only demand can be confirmed invoking extended period. The onus is on the department to show suppression with intent to not pay tax. Having not done so, the demand and penalty is not maintainable.

6. Personal Hearing in the case was held on 31.10.2022. Shri S.J. Vyas, Advocate, appeared on behalf of appellant for the hearing. He submitted additional written submissions during the hearing. He reiterated the submissions made in appeal memorandum and in additional written submission.

7. In the additional written submission filed on 31.10.2022, the appellant contended, inter alia, that :

- The impugned order failed to consider that the SCN invoked the wrong provision of the Finance Act, 1994 to demand service tax. The demand should have been proposed under Section 73A of the Finance Act, 1994 and not under Section 73. There can be no demand of service tax as the impugned order is passed without jurisdiction. They rely upon the decision in the case of Checkmate Industries Services Vs. CCE, Pune-III – 2016 (44) STR 290 (Tri-Mumbai) and Fusion India Inc. Vs. CCE & ST, Lucknow – 2018

(11) TMI 358-CESTAT Allahabad.



- 9
- As regards demand of service tax on the amount of difference between book figures and return figures, it is submitted that no tax on such difference can be demanded unless the reason for the difference is examined and shown to be taxable. They rely upon the decision in the case of Kush Constructions Vs. CGST NACIN, ZTI, Kanpur – 2019 (5) TMI 1248 – CESTAT Allahabad.
 - The SCN alleges that they have rendered taxable services. However, the SCN does not analyse the activities allegedly carried out by them and whether the same would fall within the definition of taxable services. It is settled principle of law that unless and until clear analysis of the activity done by the assess is carried out, demand of service tax cannot be confirmed.
 - They rely upon the decision in the case of United Telecom – 2011 (22) STR 571 (Tri.-Bang); Swapnil Asnodkar – 2018 (10) GSTL 479 (Tri.-Mumbai); Balaji Enterprises – 2020 (33) GSTL 97 (Tri.-Del.); ITC Ltd.- 2014 (33) STR 67 (Tri.-Del.) and Kafle Hospitality & Travels Pvt. Ltd. Vs. Commissioner, Service Tax, Delhi – 2021 (3) TMI 773 – CESTAT New Delhi (LB).

8. 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.2,56,011/-, which was charged and collected from the service recipient by the appellant but not paid to the government; confirmation of demand of service tax amounting to Rs.30,031/- on account of reconciliation of income shown in financial records vis-a-vis their ST-3 returns and confirmation of demand of service tax amounting to Rs.1,36,404/- on miscellaneous income received. The impugned order has also ordered recover of the late fee amounting to Rs.16,100/-. However, in the appeal memorandum, the appellant have not contested the late fee ordered to be recovered from them vide the impugned order. Therefore, the same is not being dealt in



the present appeal. The demand pertains to the period F.Y. 2014-15 to F.Y. 2016-17.

9. I find that the appellant have in their written submission dated 20.10.2021 filed before the adjudicating authority, which is recorded at Para 35 of the impugned order, admitted their liability and agreed to pay the service tax amounting Rs.2,56,011/- and Rs.30,031/-. The appellant had also admitted their liability and agreed to pay the late fee amounting to Rs.16,100/-. Further, in respect of the demand of service tax amounting to Rs.1,36,404/-, the appellant had submitted that the miscellaneous income was accrued by crediting salary/wages expense and it is deducted from the employee's salary towards late coming or early going. Therefore, it was contended, they have not provided any service and hence, service tax is not attracted.

10. However, the appellant has in their appeal memorandum made submissions on various ground contesting the demands raised in the SCN. However, these submissions were not made before the adjudicating authority. Accordingly, the adjudicating authority did not have the opportunity of considering the submissions of the appellant before passing the impugned order. Therefore, I am of the considered view that it would be in the fitness of things that the matter is remanded back to the adjudicating authority to consider the submissions of the appellant, made in the course of the present appeal, and, thereafter, adjudicate the matter.

11. It is also observed that the appellant have contested the confirmation of demand of service tax amounting to R.2,56,011/- on the grounds that the demand should have been raised under Section 73A and not under Section 73 of the Finance Act, 1994. The provisions of Section 73A are applicable only in the situations specified therein.

However, I find that the appellant have not substantiated their contention regarding applicability of Section 73A of the Finance Act,



1994 and neither have made any submissions as to which of the situations specified in Section 73A of the Finance Act, 1994 is applicable to the instant case. Since the matter is being remanded back to the adjudicating authority, the appellant are at a liberty to make their submissions on the issue of the specific sub-section, which is applicable to their case.

12. In view of the above, the impugned order is set aside only to the extent it pertains to the confirmation of demand of service tax amounting to Rs.2,56,011/-, Rs.30,031/- and Rs.1,36,404/-, along with interest and penalty and the matter remanded back to the adjudicating authority for adjudication afresh, following the principles of natural justice. The appellant is directed to submit their written submission to the adjudicating authority within 15 days of the receipt of this order. The appeal filed by the appellant is allowed by way of remand.

13. 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.

Attested:

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

BY RPAD / SPEED POST

To

M/s. NKP Infrastructure Pvt. Ltd.,
C/1-B, 4402, GIDC Estate,
Phase-IV, Vatva,
Ahmedabad – 382 445

Akhilesh Kumar
18th November, 2022

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 18.11.2022.



Appellant

The Assistant Commissioner,
CGST, Division- III,
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.

