



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 : 20221264SW0000423582

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/172/2022 / 593H-38
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-087/2022-23
दिनांक Date : 21-11-2022 जारी करने की तारीख Date of Issue 14.12.2022
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. CGST-VI/Ref-06/DAP/Adani Estate/2021-22 दिनांक: 14.09.2021 passed by Assistant Commissioner, CGST, Division VI, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Adani Estate Pvt Ltd
Adani House, Near Mithakhali Circle,
Navrangpura, Ahmedabad - 380009

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 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।

(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 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 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.

- (67) 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.

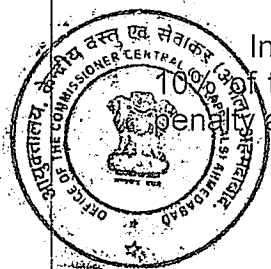
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

- (ccii) amount determined under Section 11 D;
- (cciii) amount of erroneous Cenvat Credit taken;
- (cciv) 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 penalty alone is in dispute."



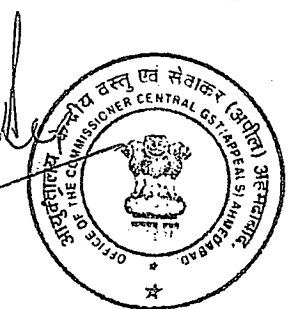
ORDER-IN-APPEAL

The present appeal has been filed by M/s. Adani Estate Pvt. Ltd., Adani House, Near Mithakali Circle, Navrangpura, Ahmedabad (hereinafter referred to as the appellant) against Order in Original No. CGST-VI/Ref-06/DAP/Adani Estate/2021-22 dated 14.09.2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division – VI, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

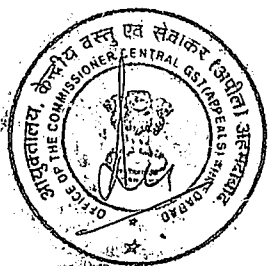
2. Briefly stated, the facts of the case is that the appellant had filed a refund claim on 10.06.2021 for an amount of Rs.78,85,280/- under Section 11B of the Central Excise Act, 1944 read with sub-section (5) of Section 142 of the CGST Act, 2017. The refund claim was filed in respect of the service tax paid on account of cancellation of booking in a residential/commercial complex 'Western Heights'. On verification of the refund claim certain discrepancies were observed. Therefore, the appellant was issued a Show Cause Notice bearing No.CGST/WS06/REF-04/AEPL/2021-22 dated 14.08.2021 wherein it was proposed to reject the claim for refund. The SCN was adjudicated vide the impugned order wherein the claim for refund was rejected on the grounds of limitation.

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

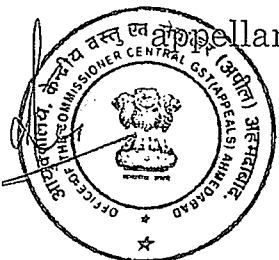
- i. The adjudicating authority has mis-interpreted and mis-conceived the provision of Section 11B of the Central Excise Act, 1944 in rejecting the claim on the grounds of limitation. It was not appreciated that the claim was relating to the amount deposited by them which did not result into tax as per the Act and, thus, the provision of Section 11B of the Central Excise Act, 1944 are not applicable.



- ii. It is no more *res integra* that the time limit under Section 11B is not applicable when the tax was paid under a mistake of law or where tax was not liable to be paid.
- iii. Clause (b) of Section 66E of the Finance Act, 1994 had declared the construction service in relation to sale of a building, complex or civil structure or part thereof as 'Declared Service', if the consideration was received partly or wholly prior to receipt of completion certificate. If the transaction did not consummate into sale of building by the service provider to the buyer, it shall not be regarded as transaction falling within Section 66E (b).
- iv. In the case of cancellation of agreement/contract/letter of intent, the property in goods or services cannot be said to have ultimately transferred in favour of the buyer. In such circumstances, it cannot be said that the service provider had provided services of construction to the buyer and, hence, Section 66E(b) cannot be held to have application. Amount paid in relation to such transaction, prior to termination of the agreement of sale shall not be construed as service tax and hence, liable for refund. Once it is established that the amount claimed was not service tax, Section 11B of the Central Excise Act, 1944 shall not apply.
- v. The amount collected by the exchequer which fails to partake the character of service tax shall be deemed to have been collected without authority of law. They rely upon the various judicial pronouncements in this regard.
- vi. The application made by them was adjudicated in terms of Section 142 of the CGST Act, 2017. However, the provisions of sub-section (5) of Section 142 are *non obstante* and having overriding effect over Section 11B of the Central Excise Act, 1944.
- vii. In terms of Section 142(5) of the CGST Act, 2017, refund of tax paid under the existing law in respect of services not provided shall be allowed. The refund shall be allowed notwithstanding anything contrary contained in Section 11B except sub-section (2) which deals with transfer of refund to Consumer fund. Therefore, the limitation of Section 11B shall not apply.



- viii. The notice was issued on 14.08.2021 and served to them on 18.08.2021 by email. The personal hearing was fixed on 17.08.2021 but the letter was served to them on 18.08.2021 along with the notice. Therefore, it is required to be deemed that no opportunity of personal hearing was effectively granted to them. These facts were communicated to the office of the adjudicating authority. However, no further opportunity of personal hearing was granted.
- ix. It has been observed at Para 3 and 4 of the impugned order that they had not filed reply to the notice nor they appeared for the hearing fixed on 17.08.2021. However, they were never given any opportunity of personal hearing.
- x. The notice was issued after two months from the date of refund claim and the hearing was fixed only three days from the date of intimation and that too was not served on them. Failure to afford opportunity of personal hearing is required to be treated as violation of the doctrine of *audi alteram partem* resulting into complete miscarriage of justice. They rely upon the decision in the case of UOI Vs. Hanil Era Textiles Ltd. – 2017 (349) ELT 384 (SC) and BA Continuum India Private Limited Vs. UOI – 2021 (49) GSTL 370 (Bom.).
- xi. In light of the fact that DIN was not generated and indicated on the SCN as well as personal hearing letter, the same is required to be treated as invalid in terms of Circular No.122/41/2019-GST dated 05.11.2019.
- xii. The adjudicating authority has erred in relying upon the decision in the case of Vodafone Cellular Ltd. Vs. CCE – 2014 (34) STR 890.
4. Personal Hearing in the case was held on 31.10.2022. Shri Rahul Patel, Chartered Accountant, and Shri Pravin Shetty, Manager Taxation, appeared on behalf of appellant for the hearing. They reiterated the submissions made in appeal memorandum. They submitted a compilation of the judgments relied upon by them during the hearing and stated that additional written submissions would be filed by them. However, the appellant have not submitted their additional written submissions.



5. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the materials available on records. The dispute involved in the present appeal relates to rejection of the claim for refund of the service tax paid in respect of cancellation of bookings in the residential/commercial complex on the grounds of limitation.

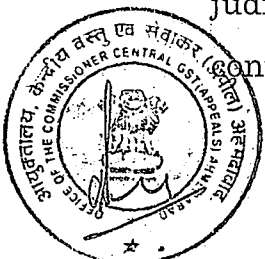
6. It is observed that the adjudicating authority has without going into the merits of the refund claim filed by the appellant, rejected the refund claim on grounds that the claim for refund filed by the appellant was barred by limitation in terms of Section 11B of the Central Excise Act, 1944. In this regard, I find that the issue of refund of the service tax paid on booking of immovable property which were subsequently cancelled resulting in non-provision of service has already been decided by this authority in the case of Panchratna Corporation vide OIA No. AHM-SVTAX-000-APP-023-17-18 dated 29.06.2017. The relevant Paragraphs of the said OIA are reproduced below :

“10. I find that in case of construction of commercial complex service, service tax is required to be paid on the amount received from prospective buyers towards the booking of complex before the issue of completion certificate by the competent authority and this process goes on for years, as has happened in the instant case, and the bookings/dealings can be cancelled at any point of time by the buyers before taking of possession of complex by him and therefore, I find that no service at all has been provided the relevant date of one year and date of payment as per Section 11B of Central Excise Act 1944 cannot be made applicable in the instant case. I further find that since there is no contingency prescribed in this type of case, the appellant cannot be put to loss for want of such contingency.

18. Therefore, I find that once the booking is cancelled and the entire amount is returned, the appellant has not provided any service and whatever amount paid by them is in the nature of deposits only and they are eligible for refund, following the various case laws cited above.”

6.1 It is further observed that there is no material on record which indicates that the OIA supra, has been set aside by any higher appellate. Therefore, the adjudicating authority was required, in terms of the principles of judicial discipline, to follow the decision of the OIA supra, passed by the higher appellate authority.

6.2 However, it is observed that rather than following the principles of judicial discipline, the adjudicating authority has passed the impugned order contrary to his own order issued vide OIO No. CGST-VI/Ref-03/Addis



Infra/AC/DAP/2021-22 dated 07.09.2021. In the said case involving identical issue the adjudicating authority, by following the OIA No. AHM-SVTAX-000-APP-023-17-18 dated 29.06.2017 in the case of Panchratna Corporation passed by the Commissioner (Appeals), Ahmedabad had allowed refund by holding that limitation under Section 11B of the Central Excise Act, 1944 is not applicable. However, in the present case he has taken a totally contrary stand and rejected the refund claim of the appellant on the grounds of limitation in terms of Section 11B of the Central Excise Act, 1944. This is against the tenets of equity in dispensation of justice as well as the principles of judicial discipline.

7. I find that the appellant have apart from contesting the issue on merits, have also raised the grounds of violation of natural justice inasmuch as they were not afforded the opportunity to either file their written reply nor were they granted the opportunity of personal hearing. It is observed that the appellant were issued SCN for rejection of the refund claim on 14.08.2021 and were granted the opportunity of personal hearing on 17.08.2021. The appellant have contended that both the SCN as well as the letter for personal hearing was received by them on 18.08.2021. It is evident that the appellant were not given any reasonable time to even file their defense reply to the SCN and were called for a personal hearing within three days from the date of the SCN. Further, without giving any further opportunity of personal hearing, the adjudicating authority has adjudicated the case.

7.1 In terms of Section 33A (1) of the Central Excise Act, 1944 the adjudicating authority shall give an opportunity of being heard. In terms of sub-section (2) of Section 33A, the adjudicating authority may adjourn the case, if sufficient cause is shown. In terms of the proviso to Section 33A (2), no adjournment shall be granted more than three times. In the instant case, I find that three adjournments as contemplated in Section 33A of the Central Excise Act, 1944 have also not been granted to the appellant. Therefore, the impugned order has been passed in violation of the principles of natural justice and is required to be set aside on this very ground.

8. In view of the facts discussed herein above, I am of the considered that the matter is required to be remanded back to the adjudicating

