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

सत्यमेव जयते

NATION TAX MARKET

DIN: 20230964SW000000C154

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/4001/2023 /6366 – 70

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-132/2023-24**
दिनाँक Date : 22-09-2023 जारी करने की तारीख Date of Issue 25.09.2023

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Shiv Pratap Singh**, Commissioner (Appeals)

ग Arising out of OIO No. 48/AC/Div-I/HKB/2023-24/ दिनाँक: 21.04.2023 passed by The Assistant Commissioner, CGST, Division-I, Ahmedabad South.

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s. Jayeshbhai Kanjibhai Prajapati,
20, Labhghar Society,
Near Karnavati Megha, Vastral,
Ahmedabad-382418.

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 ड्यूटी 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.

1ण 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;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) 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.Jayeshbhai Kanjibhai Prajapati, 20, Labhghar Society, Near Karanvati Megha, Vastral, Ahmedabad – 382418 (hereinafter referred to as "the appellant") against Order-in-Original No. 48/AC/Div-I/HKB/2023-24 dated 21.04.2023 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division-I, Ahmedabad South (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant are holding PAN No. BOKPP8217D. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the FY 2015-16, it was noticed that the appellant had earned an income of Rs. 34,05,576/- during the FY 2015-16, which was reflected under the heads "Sales / Gross Receipts from Services (Value from ITR)" filed with the Income Tax department. Accordingly, it appeared that the appellant had earned the said substantial income by way of providing taxable services but has neither obtained Service Tax registration nor paid the applicable service tax thereon. The appellant were called upon to submit copies of relevant documents for assessment for the said period. However, the appellant had not responded to the letters issued by the department.

2.1 Subsequently, the appellant wereissued Show Cause Notice No. V/15-105/Jayeshbhai Kanjibhai Prajapati/2021-22 dated 17.04.2021 demanding Service Tax amounting to Rs. 4,93,808/- for the period FY 2015-16, under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; and imposition of penalties under Section 77(1) and Section 78 of the Finance Act, 1994.

2.2 The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority wherein the demand of Service Tax amounting to Rs. 3,45,665/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period from FY 2015-16 after allowing benefit of abatement as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006. The adjudicating authority has dropped the remaining demand of service tax. Further (i) Penalty of Rs. 3,45,665/- was imposed on the appellant under Section 78 of the Finance Act, 1994; and (ii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(1) of the Finance Act, 1994.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, inter alia, on the following grounds:

- The appellant is engaged in providing labour work services of civil contractor and also engaged in sales and purchase of construction materials during the FY 2015-16.

- The total turnover for the FY 2015-16 is bifurcated as under:

Sr. No.	Particulars	Amount (in Rs.)
1	Income from Sale of Service	8,69,324/-
2	Income from Sale of goods	25,36,252/-
	Total	**34,05,576/-**

- For the income against the sale of service, the appellant submitted that they have provided services related to labour work of Civil contract and not provided any work contract services. Any TDS also not reflected in Form 26AS of the respective year. They have submitted copies of service invoices and Form 26AS for the FY 2015-16 along with appeal memorandum. The appellant submitted that the income from sale of service is remain within threshold limit of exemption as per Notification No. 33/2012-ST dated 20.06.2012, and therefore, the appellant not liable for payment of service tax on the same.

- In FY 2015-16, while filing ITR all the income for Rs. 34,05,576/- had been recorded under head sale of service but, in fact, Rs. 25,36,252/- pertains to sale of goods and also recorded as sale of goods in the books of account of the appellant. They submitted copies of sale of materials along with their appeal memorandum.

- As per Section 66D(e) of the Finance Act, 1994, the trading of goods is considered as negative list of services. Therefore, the appellant were not liable for payment of service tax on income of Rs. 25,36,252/- for the FY 2015-16.

- Further, in the impugned order the adjudicating authority alleged that the appellant had not produced any VAT paid invoices for the income of trading of goods. In this

regard, the appellant submitted that the requirement of VAT registration is mandatory only if taxable turnover for the preceding twelve months exceeds Rs. 40 lakhs. In view of the above, their income is below the VAT registration limit.

- The appellant was regularly filed the income tax return, TDS was also deducted on his income for the aforesaid period, therefore, no stretch of imagination it can be said that the appellant had not declared his income to the government authorities. Thus, there is no suppression of the facts in the present case, hence, extended period cannot be invoked in the present case.

- As discussed above, as there was no suppression or wilful misstatement on part of the appellant with regards to non-payment of service tax, therefore, penalties cannot be imposed in the present case.

4. Personal hearing in the case was held on 04.09.2023. Shri Arjun Akruwala, Chartered Accountant, appeared on behalf of the appellant for personal hearing and reiterated the submissions made in appeal memorandum. He submitted that apart from rendering services, the appellant was also in the business of sale of goods. After excluding the income from sale of goods, the remaining income from services is less than Rs. 10 lakhs as per Notification No. 33/2012-ST dated 20.06.2012. Therefore, the applicant is eligible for threshold exemption, keeping in view the taxable income in the previous year being less than Rs. 10 lakhs. Copy of invoices and Form 26AS, Profit & Loss Account etc. are attached with the appeal. He requested to set aside the impugned order.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum, during the course of personal hearing anddocuments available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of service tax against the appellant along with interest and penalty, in the facts and circumstance of the case, is legal and proper or otherwise. The demand pertains to the period FY 2015-16.

6. I find that in the SCN in question, the demand has been raised for the period FY 2015-16 based on the Income Tax Returns filed by the appellant. Except for the value of "Sales of Services under Sales / Gross Receipts from Services" provided by the Income Tax Department, no other cogent reason or justification is forthcoming from the SCN for raising the demand against the appellant. It is also not specified as to under which category of service the non-levy of service tax is alleged against the appellant. Merely because the appellant had

reported receipts from services, the same cannot form the basis for arriving at the conclusion that the respondent was liable to pay service tax, which was not paid by them. In this regard, I find that CBIC had, vide Instruction dated 26.10.2021, directed that:

> *"It was further reiterated that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns.*
>
> *3. It is once again reiterated that instructions of the Board to issue show cause notices based on the difference in ITR-TDS data and service tax returns only after proper verification of facts, may be followed diligently. Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate show cause notices. Needless to mention that in all such cases where the notices have already been issued, adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee."*

6.1 In the present case, I find that letters were issued to the appellant seeking details and documents, which were allegedly not submitted by them. However, without any further inquiry or investigation, the SCN has been issued only on the basis of details received from the Income Tax department, without even specifying the category of service in respect of which service tax is sought to be levied and collected. This, in my considered view, is not a valid ground for raising of demand of service tax.

7. It is observed that the main contentions of the appellant in the appeal memorandum is that (i) they were engaged in the providing of service as well as also engaged in sale of goods, during the FY 2015-16, their income from sale of goods was Rs. 25,36,252/- out of total income of Rs. 34,05,576/- and the sale of goods not liable for service tax as per Section 66D(e) of the Finance Act, 1994; and (ii) the remaining service income of Rs. 8,69,324/- is below the threshold limit of exemption as per Notification No. 33/2012-ST dated 20.06.2012 and they are eligible for benefit of Notification No. 33/2012-ST as their total service income for FY 2014-15 was Rs. 7,85,240/-.

7.1 It is also observed that the adjudicating authority has passed the impugned order confirming the demand of service tax after extending benefit of abatement of as per Rule 2A of the Service Tax (Determination of value) Rules, 2006.

8. On verification of the invoices and Profit & Loss account for the FY 2015-16 submitted by the appellant, I find that the appellant not engaged in providing work contract service as held by the adjudicating authority, in fact, the appellant were engaged in the providing labour service related to construction work as well as they were sold Cement, Bricks, Sands, etc. during the FY 2015-16 and received an amount of Rs. 25,36,252/- from sale of goods. I also find that the appellant contended that they have not paid VAT on the sale of goods as their income is below the mandatory VAT registration limit of Rs. 40 lakhs. The sale of goods / trading of goods falls in Negative List as per Section 66D(e) of the Finance Act, 1994. Hence, the appellant are not liable to pay service tax on the said amount. Section 66D(e) of the Finance Act, 1994 reads as under:

*"**SECTION 66D. Negative list of services.—***

The negative list shall comprise of the following services, namely :-

(a) ....

(e) trading of goods;"

9. As regards the service tax on the remaining income of Rs. 8,69,324/- and that whether the benefit of threshold limit of exemption as per the Notification No. 33/2012-ST dated 20.06.2012 is admissible to the appellant or not, I find that the total value of service provided during the Financial Year 2014-15 was Rs. 7,85,240/- i.e. below Rs. 10 lakh as per the Profit & Loss Account for the FY 2014-15 submitted by the appellant, which is relevant for the value based exemption under Notification No. 33/2012-ST dated 20.06.2012 for the FY 2014-15. I also find that the remaining taxable income received by the appellant was Rs. 8,69,324/- during the Financial Year 2015-16. Therefore, the appellant are eligible for benefit of exemption upto a value of taxable service amounting to Rs. 10,00,000/- during the FY 2015-16 and they are also not liable to pay Service Tax on remaining amount of Rs. 8,69,324/- for the FY 2015-16.

10. In view of above, I hold that the impugned order passed by the adjudicating authority, confirming demand of service tax on income received by the appellant during the FY 2015-16, is not legal and proper and deserves to be set aside. Since the demand of service tax is not sustainable on merits, there does not arise any question of charging interest or imposing penalties in the case.

11. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

12. अपील कर्ता 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.

22-9-23

(Shiv Pratap Singh)
Commissioner (Appeals)

Attested

(Superintendent(Appeals),
CGST, Ahmedabad

Date : 22-9-23

By RPAD / SPEED POST

To,
M/s. JayeshbhaiKanjibhai Prajapati,
20, Labhghar Society,
Near Karanvati Megha, Vastral,
Ahmedabad – 382418

Appellant

The Assistant Commissioner,
CGST, Division-I,
Ahmedabad South

Respondent

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad South
3) The Assistant Commissioner, CGST, Division I, Ahmedabad South
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad South (for uploading the OIA)
5) Guard File
6) PA file