



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 - टेलीफैक्स 07926305136



DIN: 20231164SW0000318643

स्प्रीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/4562/2023 / 2620-24
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-179/2023-24
दिनांक Date: 29-11-2023 जारी करने की तारीख Date of Issue 30.11.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Gyan Chand Jain, Commissioner (Appeals)
- ग Arising out of OIO No. CGST-VI/Dem-284/Rao Forex/AC/DAP/2022-23 दिनांक: 10.02.2023
passed by The Assistant Commissioner, CGST, Division-VI, Ahmedabad South.
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant
M/s. Rao Forex,
2nd Floor, Acumen Building,
University Road, University,
Ahmedabad-380009.

वैयं व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो यह 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:

(i) 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।

(ii) 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 रिशेट 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 हों।

- (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 विभिन्न 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। इसके 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/- कीस 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(शिस्टेट) 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, Girhar 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 पड़ी 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed 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 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.

- 1^o 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)-

- (Section) सैंड 11D के तहत निर्धारित राशि;
- इस सिया गलत सेन्वैट क्रेडिट की राशि;
- अप सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लविट 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 Rao Forex, 2nd Floor, Acumen Building, University Road, University, Ahmedabad— 380 009 (hereinafter referred to as the "the Appellantss") against Order in Original No. CGST-VI/Dem-284/RAO FOREX/AC/DAP/2022-23 dated 10.02.2023 issued on 10.02.2023 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner, CGST, Division VI, Ahmedabad South (hereinafter referred to as "adjudicating authority").

2. Briefly stated, the facts of the case are that the Appellantss were not registered with Service Tax department holding PAN No. AAOFR9046D. As per the information received from the Income Tax Department, it was noticed that the Appellants had earned substantial income from service provided during F.Y. 2014-15, however they failed to obtain Service Tax Registration and also failed to pay service tax on such income. The Appellantss were called upon to submit copies of relevant documents for assessment for the said period, however, they neither submitted any required details/documents nor did offer any clarification/explanation regarding gross receipts from services rendered/income earned by them.

3. Subsequently, the Appellantss were issued Show Cause Notice bearing No. V/WS06/O & A/SCN-113/2020-75/WS0603 dated 24.09.2020, wherein it was proposed to:

- a) Demand and recover an amount of Rs. 3,80,272/- for the F.Y. 2015-16 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 (hereinafter referred to as "the Act").
- b) Impose penalty under the provisions of Section 70, 77 (1)



and 78 of the Act.

3. The SCN was adjudicated vide the impugned order wherein:

- a) The demand of service tax amounting to Rs. 3,80,272/- was confirmed along with interest.
- b) Penalty amounting to Rs. 3,80,272/- was imposed under 78(1) of the Act.
- c) Penalty amounting to Rs. 10,000/- was imposed under 77(1) of the Act.
- d) Penalty amounting to Rs. 40,000/- was imposed under 70 of the Act read with Rule 7(c) of Service Tax Rules, 1994.

4. Being aggrieved with the impugned order passed by the adjudicating authority, the Appellants have preferred the present appeal on the following grounds:

➤ SCN needs to be based on the principal of natural justice. The OIO has not taken into consideration that the SCN has been issued merely based on the data from the income tax Department. No further investigation has been done by the Service Tax department and no opportunity was provided before the issuance of SCN. In support reliance is placed in the case of case law of Uma Nath Pandey Vs State of UP reported at 2009 (237) ELT 241 (S.C.) explaining meaning of natural justice. It was held in that order that hearing should be given to each assessee.

➤ No investigation was done by the department and OIO is passed based on the basis of SCN which is issued merely based on third party data of Income tax Department. While raising the demand it was not proved by the adjudicating authority that the differential amount was received on account of providing of taxable service. Before raising demand on the differential value between ST-3 Return and Balance Sheet the adjudicating authority should reconcile figures by adopting proper methods. In support they rely on the decision of the Hon'ble Tribunal in



the case of (1) Commissioner of Service Tax, Ahmedabad V. Purni Ads. Pvt. Ltd. [2010 (19) S.T.R. 242 (Tr.-Ahmd.)], (2) Synergy Audio Visual Workshop Pvt. Ltd. V. Commr of Service Tax Bangalore [2008 (10) S.T.R 578 (Tr. - Bang.)], (3) Calvin Wooding Consulting Ltd. V. Commissioner of C.Ex. Indore [2007 (7) S.T.R. 411 (Tr.-Del.)], (4) Sharma Fabricator & Erectors Pvt. Ltd. [2017 (5) GSTL 96 (Tri.-All.)

➤ Demand raised in the SCN is based on differential amount between income reported in ITR/TDS and ST 3 return. However, it has been proved nowhere how the differential receipts are classifiable as taxable service. This shows that the demand has been raised mechanically without proving the allegations with cogent and corroborative evidences which is not justified in the light of the following cases: -

- M/S Mahadev Trading Company Vs Union of India [2020(10) TMI 431 GUJ-HC]
- Sahibabad Printers Vs Additional Commissioner CGST (Appeals) [2020 (12) TMI 582- Allahabad HC]
- Sahitya Mudranalaya Pvt Ltd Vs Addi Director General [2020 (3) TMI 154-GUJ-HC]
- CC Chennai v/s M/s Flemingo (DFS) Pvt Ltd [2010-TIOL-60-HC-MAD CUS]
- K. Harinath Gupta vs Collector of Central Excise, Hyderabad [1994 (71) ELT 980 (Tribunal)]
- M/s Aviat Health Care Pvt Ltd Vs CC & CE, Belapur [2008-TIOL-1924 CESTAT-MUM.

➤ The allegation in the SCN are expected to be based on a prima-facie reasoning by the department. If the allegation is based on violation of provisions the whole proceedings lose validity. In this regard reliance is placed on the decisions of the following case laws:

- Rajmal Lakhichand V. Commissioner of Customs [2010(255) ELT 357 Bom]



- Royal Oil Field Pvt. Ltd. V. UoI, [2006 (194) ELT 385 (Bom)]
- CCE V. Brindavan Beverages P Ltd. [2007 (213) ELT 487 (SC)]
- Kaur 7 Singh V. Collector of Central Excise, New Delhi [1997 (94) ELT 289 (S.C.)]
- Oryx Fisheries 9P] ltd. V. UoI, [(2010) 13 SCC 427]
- Om Vir Singh V. UoI, [2016 (340) E.L.T. 277 (Guj.)]
- Vaiyapuri V. Commissioner of Customs (Seaport) Chennai, [2015 (325) E.L.T. 403 (Tri.-Chennai)]

➤ Demand is barred by limitation and hence extended period is not invocable. It is necessary that there must be suppression of facts or willful mis-statement with intend to evade payment of tax for invoking extended period of limitation. The department has failed to substantiate the intention to evade payment of tax at the end of Appellants so extended period cannot be invoked. In support the Appellants relied on the case of case laws of Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur 2013(288) E.L.T. 161(S.C.) and the case laws of Anand Nishikawa Co. Ltd. Vs. CCE, Meerut, 2005 (188) E.L.T., 149 (S.C.).

➤ No positive action shown by the department relating to intention to evade payment of taxes at the end of Appellants. The Appellants places reliance on the following decisions: (1) Continental Foundation Jt. Venture V. CCE, Chandigarh-I, [2007 (216)E.L.T. 177 (S.C.)] (2) CCE, Mumbai IV Vs. Damnet Chemicals Pvt. Ltd. [2007 (216) E.L.T. 3 (S.C.)]

➤ The demand of service tax for F.Y. 2014-15 (April 2014 to September 2014) by invoking extended period of limitation and even beyond a period of five years from relevant date and as such the SCN was issued on 24.09.2020 almost a year after last date of 24.10.2019 and received by them 02.10.2020 hence the demand for F.Y. 2014-15 is clearly time barred.



➤ The OIO has erred in imposing Interest U/s 75 and Penalty U/s 70(1), 77(1)(a), and 78(1) of the Act. As the Appellants are not liable to pay Service Tax they are liable to pay Interest and Penalty. The Appellants relied on the case of Pratibha Processor V. Union of India [196(88) ELT 12 (S.C.)] wherein the Hon'ble Supreme Court held that in tax matters, Interest is not liable to be paid if there is not liability to pay tax itself. Penalty under Section 78 of the Act cannot be imposed subject to the condition of fraud, suppression of facts, willful mis-statement, etc. with an intention to evade service tax. Penalty U/s 78 of the Act can be proposed only when any assessee commits any positive act for evading service tax. mere failure to disclose or declare would not amount to 'suppression'. Reliance in this regard is placed on the case of Anand Nishikawa Co. Ltd. V. Commission of Central Excise, Meerut (Supra). It is submitted by the Appellants that they did not commit any positive act for evading service tax. Therefore Penalty under Section 78 of the Act is not imposable. Reliance is placed on the following judgement of the Hon'ble Supreme Court in this regard:

- Collector V. Chemphar Drugs & Liniments- 1989(40 E.L.T. 276 (SC)
- Padmini Products V. CCE , Banglore (supra)
- Sarabhai M. Chemicals V. CCE ,Vadodara-2005 (2) SCC 168=2005(179 E.L.T. 3 (S.C.)
- Pahwa Chemicals Pvt. Ltd. V. Commissioner - 2005 (189) E.L.T. 257 (S.C.)
- Uniworth Textiles Ltd. v. Commissioner - 2013 (288) E.L.T. 161 (S.C.)

➤ In terms of Section 80 Penalties cannot be imposed under section 77 & 78 of the Act. In this regard reliance is placed on the following judgments:

- ETA Engineering Ltd. V. CCE Chennai, 2004 (174) E.L.T. 19 (Tri-LB)



- Flyingman Air Courier Pvt. Ltd. Vs. CCE 2004 (170) E.L.T. 417 (Tri. - Del.)
- Star neon Singh V. CCE, Chandigarh, 2002 (141) E.L.T. 770 (Tri.-Del.)

5. Personal Hearing in the case was held on 10.10.2023. Shri Nitesh Jain, and Sh. Pravin Maheshwari, Chartered Accountant, appeared on behalf of Appellants for the hearing and reiterated the contents of the written submissions made in appeal memorandum and requested to allow the appeal. The Appellants submitted P & L Account, Balance Sheet for F.Y. 2014-15, Commission Income ledgers for the period 1st April, 2014 to 30th September, 2014 and 1st October, 2014 to 31st March, 2015. The detail of taxable service income is given as under:

6. I have gone through the facts of the case, submission made in the Appeal Memorandum, the submission made at the time of personal hearing and the material available on record. The issue before me for decision is whether the impugned order passed by the adjudicating authority confirming demand of service tax amount of Rs. 3,80,272/- along with interest and penalties, considering the facts and circumstances of the case, is legal and proper or otherwise. The dispute pertains to the period F.Y. 2014-15.

7. On careful examination of the submission made by the Appellants and the impugned order, I find that the Appellants have failed to produce the documentary evidence before the adjudicating authority in support of his claim. They also contended that no investigation was done by the department before issuance of OIO and it is merely issued on the basis of SCN which is issued based on the information of third party data of Income tax Department. While raising the demand it was not proved by the adjudicating authority that the differential amount was received on account of providing of taxable service. Before raising demand on the differential value between ST-3 Return and Balance Sheet the adjudicating authority should



reconcile figures by adopting proper methods. It has also been nowhere proved how the differential receipts are classifiable as taxable service.

8. Accordingly, I remand back the matter to adjudicating authority to re-examine the issue whether the income received by the Appellants is taxable service income or otherwise and to pass the appropriate order. With this observation the matter is remanded back to the adjudicating authority to decide the matter as discussed hereinabove.

9. अपीलकर्ता द्वारा दायर अपील का निपटान उपरोक्त तरीके से किया जाता है।

The appeal filed by the Appellants stands disposed of in above terms.

G.C.J.
29.11.23

(Gyan Chand Jain)

Commissioner (Appeals)

Dated: 29.11.2023

Attested

A.K. Jaiswal
(Amendra Kumar)

Superintendent(Appeals)

CGST Ahmedabad.



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Appellants

The Assistant Commissioner
CGST & Central Excise
Division VI, Ahmedabad South.

Respondent

Copy to :

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner Central GST, Ahmedabad South.
3. The Asstt. Commissioner, CGST, Division-VI, Ahmedabad South.
4. The Asstt. Commissioner (HQ System) Central GST, Ahmedabad South (for uploading the OIA).
- ~~5. Guard File.~~
6. P.A. File.



