

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद— 380015.

क फाइल संख्या : File No : V2(ST)190/A-II/2015-16 / 3296-3300
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-159-16-17
दिनांक Date : 28.11.2016 जारी करने की तारीख Date of Issue 05/12/16
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

ग _____ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं
_____ दिनांक : _____ से सृजित
Arising out of Order-in-Original No STC/Ref/151/HCV/YEF/Div-III/15-16 Dated 19.02.2016
Issued by Assistant Commissioner, Div-III, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता Name & Address of The Appellants

M/s. Yogeshwar Education Foundation Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-

Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.



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(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 43 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

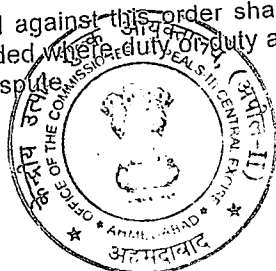
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, 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।

4(1) 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 ::

M/s. Yogeshwar Education Foundation, 37, Dhananjay Bungalows, B/h Shyamal-3, 132 ft. Ring Road, Satellite, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeal against the Order-in-Original No. STC/Ref/151/HCV/YEF/Div-III/15-16 dated 19.02.2016 (*hereinafter referred to as 'impugned order'*) by the Deputy Commissioner, Service Tax, Div-III, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. Briefly stated the facts of the case are that the appellants had filed a refund claim for ₹54,08,570/- on 01.05.2015 on the ground that they had wrongly paid Service Tax on procurement of services for creating infrastructure facilities and ancillary services to create facilities for education as exempted under 'Mega Exemption Notification 25/2012-ST dated 20.06.2012'.

3. The appellants, being recipient of the services, had claimed that the exemption benefit under Notification No. 25/2012-ST dated 20.06.2012 was available to the service providers and accordingly, not required to pay Service Tax. Since, the appellants had paid Service Tax to the service providers, the former had filed the above mentioned refund claim.

4. On scrutiny of the claim certain discrepancies were noticed and accordingly a show cause notice dated 30.10.2015 was issued to the appellants which was adjudicated by the adjudicating authority. The adjudicating authority, vide the impugned order, rejected the refund claim citing reasons which would be discussed below.

5. Being aggrieved with the impugned order, the appellants preferred the present appeal. They stated that they are eligible for the refund as per Notification No. 25/2012-ST dated 20.06.2012 and the adjudicating authority has wrongly rejected the claim.

6. Personal hearing in the case was granted on 14.09.2016 wherein Shri Vipul khandhar, Chartered Accountant, on behalf of the said appellants, appeared before me and reiterated the contention of their submission. He submitted photocopy of the Circular number 172/7/2013-ST dated 19.09.2013 and excerpt from the Mega Exemption Notification number 25/2012-ST dated 20.06.2012.

7. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. Now, let me examine the reasons of rejection and the defense reply given by the appellants.



8. To start with, I find that the adjudicating authority has rejected the refund amount of ₹54,08,570/- citing reasons which are mentioned below;

(a) Certain invoices amounting to ₹28,90,386/- were not submitted along with the claim and rest of the invoices submitted by the appellants were photocopies of the original ones.

(b) on verification of documents, it was found that the appellants were not fulfilling the criteria of 'educational institution' as provided in the Mega Exemption Notification number 25/2012-ST dated 20.06.2012.

© Some invoices were found to be time barred as per the provisions of Section 11B of the Central Excise Act, 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994.

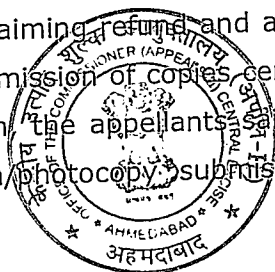
(d) The claim was hit by the provisions of unjust enrichment.

Now I will discuss all the above issues point wise in detail.

8.1. The first issue to be discussed is non-submission of invoices and submission of photocopies of the original invoices by the appellants. In paragraph 9 of the impugned order, the adjudicating authority has stated that the appellants had failed to submit 21 invoices on which an aggregate amount of ₹28,90,386/- was claimed by them as refund. Also, the invoices which were submitted along with the claim were only photocopies of the original ones. In view of the above, I would like to quote, below, the CBEC's instruction regarding documents to be submitted for claiming Service Tax refund under Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax matters vide Section 83 of the Finance Act, 1994;

Sl. No	Types of Refund/ Rebate application	Section /Rule/ Notification under which filed	List of documents required to be filed with refund claim
1	Refund Claim of service tax	Under Section 11B of CEA, 1944 read with Section 83 of the Finance Act, 1994	<ol style="list-style-type: none"> 1. Application in prescribed Form-R. 2. Copy of TR-6/GAR-7/PLA/copy of return evidencing payment of duty. 3. Copy of invoices (in original) 4. Documents evidencing that duty has not been passed on to the buyer. 5. Any other document in support of the refund claim. 6. Any other document as prescribed by the Central Excise Officer.

Thus, it is quite clear from the above that original invoices should be submitted as and when refund for Service Tax is claimed. In the sixth edition of the booklet "Frequently Asked Questions", the Director General of Service Tax, vide clarification dated 16.09.2011 elucidated that in terms of the notification, original invoices are needed for claiming refund and after receiving the refund, originals can be taken back on submission of copies certified by Chartered Accountant. In their appeal memorandum, the appellants said nothing in their argument as to why the non submission/photocopy submission should be accepted by the



adjudicating authority. However, on being asked, Shri Vipul khandhar informed me that the said invoices are in the custody of their bank as the appellants had availed bank loan against infrastructure building. In support of their claim, a letter from the State Bank of India, Satellite, Ahmedabad certifying that original copies of bills are with their possession, has been submitted by the appellants before me. In view of the above, I remand back this particular issue to the adjudicating authority with the direction to verify the authenticity of the invoices with the concerned bank. The appellants are directed to produce photocopies of the invoices before the adjudicating authority. The adjudicating authority should verify the genuineness of the said photocopies and if found correct, should allow the amount of ₹28,90,386/- as refund.

8.2. Regarding the second issue of the appellants not fulfilling the criteria of 'educational institution' as provided in the Mega Exemption Notification number 25/2012-ST dated 20.06.2012, I would like to state that in serial number 9 of the Notification number 25/2012-ST dated 20.06.2012, it is very clearly explained the types of services to be offered to an educational institution for claiming exemption.

"Services provided,—

(a) by an educational institution to its students, faculty and staff;

(b) to an educational institution, by way of,—

(i) transportation of students, faculty and staff;

(ii) catering, including any mid-day meals scheme sponsored by the Government;

(iii) security or cleaning or house-keeping services performed in such educational institution;

(iv) services relating to admission to, or conduct of examination by, such institution"

For further clarification, contents of the Circular number 172/7/2013-ST dated 19.09.2013 is quoted below;

"Services provided to an educational institution in respect of education exempted from service tax, by way of,—

(a) auxiliary educational services; or

(b) renting of immovable property;"

As defined in the said notification, "auxiliary educational services" means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge-enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution.

Thus, it is quite clear that exemption would be applicable to the services that are related to the service of education. For additional clarification, I am going



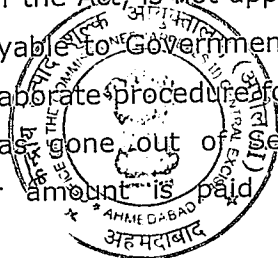
to quote some more relevant portions (paragraph 3 and 4) of the Circular number 172/7/2013-ST dated 19.09.2013 as below;

"3. By virtue of the entry in the negative list and by virtue of the portion of the exemption notification, it will be clear that all services relating to education are exempt from Service Tax. There are many services provided to an educational institution. These have been described as 'auxiliary educational services' and they have been defined in the exemption notification. Such services provided to an educational institution are exempt from Service Tax. For example, if a school hires a bus from a transport operator in order to ferry students to and from school, the transport services provided by the transport operator to the school are exempt by virtue of the exemption notification.

4. In addition to the services mentioned in the definition of 'auxiliary educational services' other examples would be hostels, housekeeping, security services, canteen etc."

It can be seen from the example given in paragraph 3 and 4, of the circular mentioned above, that a wide variety of services has been included and the list provided in paragraph 4 are only illustrative because of the word "etc". Therefore, it is now very clear that auxiliary educational services mean any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge. Therefore, any work done in the premises pertains to auxiliary education services and hence, the appellants are rightful claimant of the refund as provided in the Mega Exemption Notification number 25/2012-ST dated 20.06.2012. In view of the above, I allow the appeal for refund.

8.3. Regarding the issue of rejection of the claim on the point of time bar, I would like to point out that as the services are exempt from Service Tax, the Tax wrongly paid by them are not to be treated as duty but deposit and therefore time limit will not apply in this case. The condition of Section 11B would be applicable on the refund of Service Tax paid on the services offered. In the instant case, the said services are exempted and hence Service Tax is not payable at all. Hence, the Service Tax paid by the respondent is not to be treated as tax but a deposit and condition of Section 11B would not be applicable to it. In this connection it is pertinent to note here that various higher judicial forums had time and again held that the time prescribed under Section 11B is applicable only to those tax which is collected as permitted by the statute and where the tax was collected without authority of law, the time limit under Section 11B of the Act, is not applicable. I also find that when any amount is not legally payable to Government, it becomes 'deposit' and thus there need not be any elaborate procedure for claiming refund. In the instant case, the respondent has gone out of Service Tax net and under such circumstances, whatever amount is paid by him, has to be paid back

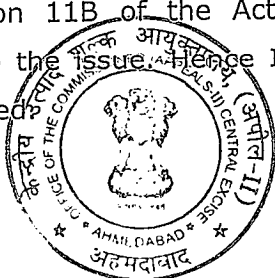


summarily without any hesitation. Supreme Court in Union of India v. ITC Ltd. 1993 (67) ELT 3 (SC) upheld Delhi High Court ruling that money realized in excess of what is permissible in law is outside the provisions and such money not covered under "duty of excise" - Limitation under Section 11B of Central Excise Act, 1944 not applicable to amount paid which cannot be taken as duty of excise. In Cawasi & Co case [1978 E L T (J 154)] the Supreme Court observed that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known, be it 100 years after the date of payment. This judgment has been quoted and depended upon by the following judgment of the Andhra Pradesh High Court. In the case of U Foam Pvt Ltd vs Collector of Central Excise -1988 (36) E L T 551(A P), the issue was that Revenue rejected the refund quoting the time limit under Rule 11 of the Central Excise Rules, 1944, and Section 11B of the Central Excises and Salt Act, 1944. The high court held that "*the period of limitation to be applied is three years from the date when the assessee discovered the mistake in the payment of duty, or from the date when it came to the knowledge of the assessee that it is entitled to the refund*". In view of the above discussion, I allow the appeal for refund filed by the appellants.

8.4. Regarding the final issue of applicability of unjust enrichment, the appellants have stated that they have borne the burden of Service Tax. I find that when the refund is treated as deposit, the principle of unjust enrichment will not be applicable on it. In the case of Hexacom (I) Ltd vs CCE, Jaipur - 2003 (156) E L T 357 (Tri -Del), the tribunal held that if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The time limit under Section 11B of Central Excise Act, 1944 does not apply. The tribunal observed the following;

"We have perused the records and heard both sides. It is not in dispute that no service tax was leviable during the period in question. Therefore, whatever payment was made did not relate to service tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of service tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to service tax. Therefore, if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct".

9. From the above discussions and judicial pronouncements, it is clear that where the tax was collected without authority of law, neither the time limit under Section 11B of the Act nor the principle of unjust enrichment is applicable to the issue. Hence I held that the appellants are eligible for the refund claimed.



10. In view of above, I remand the case back to the adjudicating authority for verification of invoices only as discussed in paragraph 8.1. For rest of the matters I allow the appeal filed by the appellants as discussed in paragraphs 8.2, 8.3, 8.4 and 9. The issue mentioned in paragraph 8.1 should be decided by the adjudicating authority within 30 days of receipt of this order.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

11. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED

28/11/16
(S. DUTTA)

SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

BY R.P.A.D.

To,
M/s. Yogeshwar Education Foundation,
37, Dhananjay Bungalows,
B/h Shyamal-3, 132 ft. Ring Road, Satellite,
Ahmedabad

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Deputy/Assistant Commissioner, Service Tax, Division-III, A'bad.
4. The Assistant Commissioner, System-Ahmedabad
5. Guard File.
6. P.A. File.

