

रजिस्टर्ड डाक ए.डी. द्वारा

दूरभाष : 26305065

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) 3/RA/A-II/2016-17 | 3251-56
ख अपील आदेश संख्या Order-In-Appeal No. AHM-SVTAX-000-APP-0170-16-17
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. SD-02/REF-196/DRM/2015-16 Date : 18.12.2015
Issued by Asst Commr Div-II STC Abad, Service Tax, Ahmedabad

घ प्रतिवादी का नाम / Name & Address of the Respondent
M/s. Tulsidas Khemji Pvt Ltd, 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, Meghani Nagar, New Mental Hospital Compound, 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी। स्टे के लिए आवेदन- पत्र के साथ रूपए 500/- 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. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



A. file

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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 भेजनी 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. यथाराशोधित 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, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 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 रूपए 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.



3

ORDER IN APPEAL

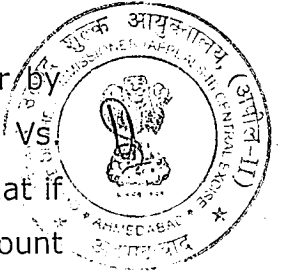
Revenue Department (*hereinafter referred to as 'appellant'*) have filed the present appeals against the Order-in-Original number SD-02/REF-196/DRM/2015-16 dated 18.12.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Asst.Commissioner, Service Tax Div-II, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*) in respect of M/s. Tulsidas Khimji Pvt. Ltd, 313/314, Devendra Mega Mall, Opp. Sanyas Ashram, Nr. M.J. Library, Ahram Road, Ahmedabad(*hereinafter referred to as 'respondent'*)

2. The facts of the case, in brief, are that the respondents have filed claim on ground that DGCEI show cause notice dated 08.05.2009 has been dropped vide OIO No. SD-02/OIO No. 27/2011-12 dated 30.06.2011. Respondent had paid duty Rs. 1,43,631/- on 25.05.2009 immediately after issue of SCN and before issue of OIO. Refund of said duty was filled much late on 07.10.2015. Adjudicating authority sanctioned the claim vide impugned OIO.

4. Being aggrieved with the impugned order, the revenue preferred an appeal on 21.03.2016 before the Commissioner (Appeals-II) wherein it is contended that claim is filled after gap of 4 years and 3 months, therefore claim is barred by limitation under section 11B of CEA, 1944, of one year as refund has been filed on 07.10.2015.

5. Personal hearing in the case was granted on 06.11.2016. Shri Nilesh V. Suchak and Pinakin Pandya, Regional Manage of respondent, appeared before and submitted written submission wherein it is stated that-

- I. Amount deposited by us during investigation was not payable at all and hence it can not be treated as "service tax" at all , therefore provisions of limitation of time u/s 11B are not applicable.
- II. When levy is not in accordance with the provisions of Service Tax Law, such payment can not be taken as payment of tax or duty made relatable to section 11B of CEA, 1944.
- III. The issue involved in this case is squarely covered in our favour by decision of Hon. Tribunal in case of Maheshraj Chemicals Pvt. Ltd Vs CCE [2015 (317) ELT 366 (Tri,- Ahmedabad), wherein it is held that if the assessee deposits any amount during investigations, said amount



unless on confirmation appropriated, can not be considered as duty and the provisions of section 11B can not be applied.

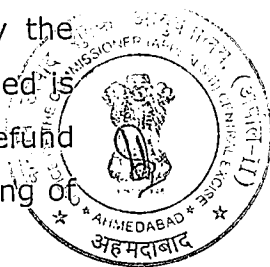
- IV. Attention is invited to Principal of judicial discipline as set by Hon'ble Supreme Court in case of UOI v. Kamalshri Finance Corporation Ltd. [1991 (55) ELT 433 (SC)] wherein it is held as under:

"6..... It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws."

- V. Appellant produced judgment in case of Advance steel Tube Ltd. V. CCE [2014(210) ELT 370(Tri.-Del LB)] wherein at para 4 it is held that.....*"However, the amounts were not paid as duty at the time of providing services but was paid when the investigation was initiated by the Revenue. In the facts and circumstances the amount paid will be case of "deposit" and will not be a situation of payment of duty when on merits respondent got a favorable order from appellate channel."*

DISUSSION AND FINDINGS

6. 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 respondents at the time of personal hearing. Sort question to be decided is as to whether limitation of time period is applicable or not in case of refund arising out of adjudication of SCN wherein demand is paid before passing of OIO dated 30.06.2011.



7. I find that there is force in respondent's argument that in the facts and circumstances the amount paid will be case of "deposit" because it no more a statutory levy when verdict has been given in favor of respondent in OIO dated 30.06.2011. The normal statutory time limit under 11B applies if the goods or services are taxable i.e. within purview of CEA 1944 or within purview of Service tax Act. Judgments produced by respondent are squarely applicable to instance case, therefore limitation of time prescribed u/s 11B of CEA, 1944 are not applicable.

8. CHA in instance case was not required to pay tax on reimbursement charges/expenses/fees. Such tax paid by respondent is not levy by constitution or act. I am of considered view that in such a circumstances, refund of amount paid before adjudication of SCN need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944. Therefore, in all cases where the appellate authority has decided the matter in favor of the appellant, refund should be paid to the appellant on the receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not. My view is supported by The Hon'ble Supreme Court judgments in case of Miles India Ltd. V/s ACC [1987 (30) ELT 641 (SC)], CCE V/s Doaba Co-operative Sugar Mills [1988 (37) ELT 478 (SC)] and in numerous other cases wherein it is pronounced that the time limit is applicable only for refund of duty paid and not "refund of disputed amount deposited".

9. After investigation a Show Cause Notice is issued to the assessee. If the assessee is contesting the show cause notice or filing appeal against the adjudication order, such amount deposited is deemed to be duty deposited under protest and limitation of one year shall not apply. My view is supported by judgments in case of Hutchison Max Telecom V/s CCE [2004 (165) ELT 175], wherein tribunal held that filing appeal is itself shows that the payment of duty was under protest and hence refund claim is not time barred. Similar view was held in Bayshor Glass Trading V/s CCE [2002 (148) ELT 1243] and in S&H Gears V/s CC [2004 (167) ELT 538]. Deposit of duty during course of investigation in respect of which proceedings ultimately dropped is not hit by bar of limitation. My view is supported by Judgement in the case of Chemtrols Engineering Ltd. [2007 (212) E.L.T. 557 (Tri. - Mumbai)] and Hon'ble High Court, Mumbai judgment in case of Hindustan Cocoa Products Vs. UOI [1994 (74) E.L.T. 525 (Bom.)] In view of these judgments, when assessee contest the liability in adjudication proceeding,



such payment or deposit of duty during investigation is deemed to be made under protest and time limit of one year is not applicable in these cases.

10. In view of above, appeal filed by the revenue is not allowed.

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

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

U. Shukla

(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED

R.R. Patel

(R.R. PATEL)

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

To,

M/s. Tulsidas Khimji Pvt. Ltd,
313/314, Devendra Mega Mall,
Opp. Sanyas Ashram, Nr. M.J. Library,
Ahram Road,
Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax ,Ahmedabad-
- 3) The Additional Commissioner, Service Tax, Ahmedabad
- 4) The Asst. Commissioner, Service Tax Div-II, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

