

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)071/A-II/2016-17
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-237-16-17
दिनांक Date : 22.02.2017 जारी करने की तारीख Date of Issue 28/02/2017

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-05/25/DKJ/AC/2015-16 Dated 18.03.2016 Issued
by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Nirantar Security 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 :-

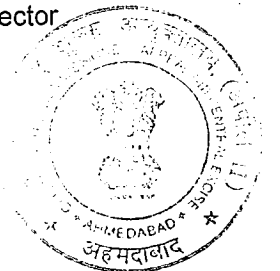
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैनटल 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 और लगाया गया जुर्माना रूपर 5 लाख या उससे कम है वहाँ रूपर 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 5 लाख या 50 लाख तक हो तो रूपर 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 50 लाख या उससे ज्यादा है वहाँ रूपर 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 accompany ed 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 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.



(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. 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 (सीस्टेट) 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, 1994 की धारा 83 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 हैं -

- (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,

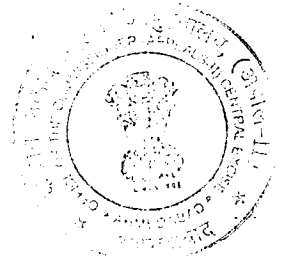
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

1. This order arises out of the appeal filed by M/s. Nirantar Securities Pvt. Ltd., 1 & 2, Ronak Apartment, Maniyasa Society, Maninagar (East), Ahmedabad (hereinafter referred to as the "said appellants") against the Order-In- Original No. SD-05/25/DKJ/AC/2015-16 dated 18.03.2016 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner of Service Tax, Division-V, Ahmedabad (hereinafter referred to as the "adjudicating authority").
2. The facts of the case, in brief, are that the appellants are engaged in providing taxable services under the category of 'Security Service Agency' and hold a valid Service tax Registration number AABCN6806BST001. It was observed that the appellants had not filed ST-3 return, due for the half year ending March 2007, to be filed by 25.04.2007. They however, filed the said ST-3 return on 24.07.2007 and paid penalty of ₹ 2,000/-. On going through the ST-3 return, it was noticed that they had not discharged their Service tax liability on the actual value received towards taxable services provided by them and hence, there was a short payment of Service Tax of ₹ 98,593/-. Further, it was noticed the appellants had not paid Service Tax on its due dates and had paid interest amount of ₹ 14,649/- instead of ₹ 20,111/- and hence there was a short payment of interest of ₹ 5,462/- for such delayed payment. In view of the above, a show cause notice dated 07.08.2007 which was adjudicated vide OIO number SD-02/OIO No. 170/09-10 dated 07.08.2009 confirming Service Tax amounting to ₹ 98,593/- under Section 73(1), interest of ₹ 5,462/- and interest on ₹ 98,593/- under Section 75 of the Finance Act, 1994 and imposed penalty under Section 76 of the Finance Act, 1994.
3. Being aggrieved with the said order, the appellants preferred an appeal before the then Commissioner (Appeals-IV) with contention that they had actually excess paid the Service Tax and adjustment of Service Tax is needed. The then Commissioner (Appeals-IV), vide Order-in-Appeal number 475/2010(STC)MM/Commr(A)/Ahd dated 15.12.2010, rejected the appeal filed by the appellants. Being aggrieved with the said OIA, the appellants filed an appeal before the Hon'ble CESTAT, West Zonal Bench, Ahmedabad. The Hon'ble CESTAT, vide order number A/1234/WZB/AHD/2011 & S/980/WZB/AHD/2011 dated 01.07.2011, remanded the case back to the original adjudicating authority for appropriate decision. Accordingly, the case came back to the original adjudicating authority who, vide OIO number SD-02/OIO No. 112/2011-12 dated 27.02.2012, once again confirmed the demand of Service Tax amounting to ₹ 98,593/- along with interest and penalty on the ground that the appellants had not fulfilled the conditions as prescribed in Rule 6(3) of the Service Tax Rules, 1994. Once again, the appellants preferred an appeal before the then Commissioner (Appeals) who vide Order-in-Appeal number 234/2012(STC)/AK/Commr(A)/Ahd dated 28.09.2012 rejected the appeal filed by the appellants. The appellants again filed an appeal before the Hon'ble CESTAT, West Zonal Bench, Ahmedabad. The

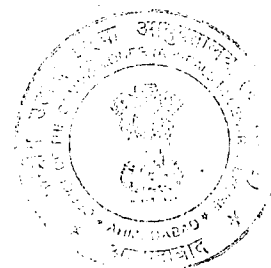


Hon'ble CESTAT, vide order number A/10949/2014 dated 01.07.2011, allowed the appeal by way of remand to the original adjudicating authority. The appellants once again approached the adjudicating authority who, vide the impugned order, confirmed the demand of Service Tax amounting to ₹98,593/- along with interest and penalty stating that the appellants had not submitted any documentary evidence to show that they had made excess payment. Also, the adjudicating authority claimed that the appellants had submitted bank account, bank statement and ledgers to justify their claim of excess payment however, it was noticed that they had not taken into consideration the amount deducted by the service recipient in respect of TDS, payments made to third party etc. while arriving at the correct taxable value received during the FY 2006-07.

4. Being aggrieved with the impugned order, the appellants filed the present appeal. The appellants stated that during the material period as per prevailing provisions under the Service Tax Acts and Rules made thereunder, the liability to pay Service Tax by the service provider was on the basis of payment received and not on the invoice basis. Accordingly, during the year 2006-07, the appellants paid the Service Tax on the amount received from their customers. The payments made by the customers were inclusive of Service Tax amount. The appellants, by mistake, calculated the Service Tax liability on the gross amount (i.e. value of services plus Service Tax amount). This had resulted in excess payment of Service Tax during April to September 2006. The appellants adjusted the excess amount of Service Tax paid by them in the subsequent month i.e. October 2006. The department has not accepted the adjustment of excess amount and issued a show cause notice proposing recovery of differential amount of ₹98,593/- and confirmed the demand along with interest and penalty. As per the direction of the Hon'ble Tribunal, the appellants had submitted, before the adjudicating authority, all the required documents and challans but the adjudicating authority has not given any finding on the submissions made by the appellants. Regarding the issue of consideration of TDS amount, the appellants state that the issue was not alleged in the show cause notice and is therefore, beyond the jurisdiction of the adjudicating authority.

5. Personal hearing in the case was granted on 06.01.2017 and Shri M. A. Patel, authorized signatory and consultant of the appellants, appeared before me. Shri H. N. Rathod, Superintendent of Service Tax, AR-III, Division-V, appeared before me as a representative of the department. Shri M. A. Patel, representative of the appellants, submitted before me certain invoices and challans. Shri H. N. Rathod, Superintendent, was directed by me to reconcile the said challans with actual payment particulars and submit a verification report within fifteen days. The adjudicating authority, vide letter dated 19.01.2017, issued from file number SD-05/4-30/SCN/Nirantar Security/2015-16 submitted a verification report from the said Superintendent.

6. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum and written submissions made by the appellants. In the impugned order, I find that, the adjudicating authority has not actually disputed the contention of the appellants regarding excess

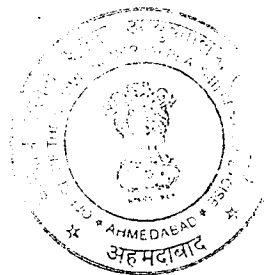


payment but the only argument the adjudicating authority has placed in the impugned order is that the appellants have not submitted required documents. Surprisingly, the adjudicating authority has failed to mention as to what documents were submitted by the appellants and what were the documents that were left to be submitted. It is not even mentioned as to why those documents, which were left to be submitted, were so significant that without those documents the claim of the appellants would not be entertained. I believe, the concerned invoices and challans were enough, after reconciling them with bank ledgers and statements, to conclude whether there was excess payment by the appellants or otherwise. The adjudicating authority has, from the very beginning, maintained that the appellants were not allowed to adjust the excess amount of Service Tax paid by them in the subsequent month i.e. October 2006 as they did not fulfill the criteria of Rule 6 of the Service Tax Rules, 1994 as they have not submitted concerned documents. The appellants have submitted all the required documents before me and the concerned Superintendent has verified the same as stated in the letter of the adjudicating authority. I am satisfied with the correctness of the documents pertaining to excess payment and proclaim that the appellants are eligible to adjust the excess amount of Service Tax paid by them in the tax liability of the subsequent month which they have rightly done. Further, regarding the argument of the appellants that the adjudicating authority has travelled beyond the scope of the show cause notice by dragging the issue of consideration of TDS amount, I find that this issue is purely an unnecessary one and should have been avoided by the adjudicating authority. By discussing the TDS issue, the adjudicating authority has travelled beyond the scope of the show cause notice as it was not discussed in the show cause notice. This is a gross violation of Rules and procedures as laid down by the Board. In the case of M/s. Jetlite (India) Ltd. vs. CCE, New Delhi, the CESTAT, West Block, New Delhi, very clearly says that;

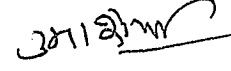
"Adjudicating Authority cannot travel beyond SCN ; the adjudicating authority, did travel beyond the scope of the show cause notice while deciding the matter. The authority below clearly erred in imposing such liability upon the appellants. Apart from traveling beyond the scope of the show cause notice, undoubtedly, the department has failed to produce any evidence regarding the basic ingredient of Section 65(19)(ii) of the said Act so as to justify classification of whatever activity carried out by the appellants in the form of display of logo being classifiable under the category of business auxiliary service". The issue could have been taken by the adjudicating authority after issuance of proper show cause notice and offering personal hearing to the appellants. However, same has not been done by the adjudicating authority thus denying the appellants the chance of natural justice.

7. In view of my foregoing conclusions, I set aside the impugned order and allow the appeal in above terms.

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



8. The appeal filed by the appellants stands disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTA) 270217

SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD

To,
M/s. Nirantar Securities Pvt. Ltd.,
1 & 2, Ronak Apartment, Maniyasa Society,
Maninagar (East),
Ahmedabad-380 008

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Dy./Asst. Commissioner, Service Tax, Division-V, Ahmedabad.
- 4) The Asst. Commissioner (System), Service Tax, Hq, Ahmedabad.
- 5) Guard File.
- 6) P. A. File.

