

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)097/A-II/2016-17 ¹³³⁹/₁₃₄₃
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-255-16-17
दिनांक Date : 23.03.2017 जारी करने की तारीख Date of Issue 5/4/17 *Original*

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-14/DRM/2016-17 Dated 27.04.2016 Issued
by Assistant Commr STC, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Kinjal Prafulbhai Sheth 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 :-

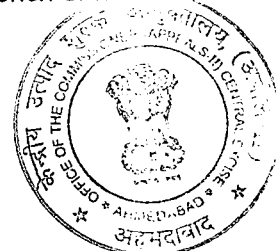
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू सैन्टल
हॉस्पिटल कम्पाउण्ड, मेघानी 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 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।

(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 24) दिनांक: 08.08.2014 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, बशर्त 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 बशर्त 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,

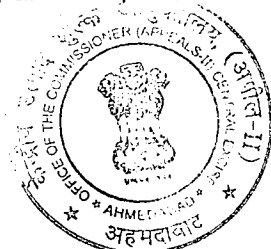
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

Shri Kinjal Prafulbhai Sheth, A-501, Popular Domain, Nr. Mahindra Showroom, Off. S. G. Road, Satellite, Ahmedabad (hereinafter referred to as "the appellant"), has filed the present appeal against the Order-in-Original No SD-02/Refund-14/DRM/2016-17 dated 27.04.2016 (hereinafter referred to as the 'impugned order') passed by the Assistant Commissioner of Service Tax, Division-II, Ahmedabad (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the appellant had filed refund claim on the ground that he had wrongly paid Service Tax on the purchase of the flat, mentioned above, from M/s. Popular Developers, Ahmedabad after receipt of B.U. permission.

3. On verification of documents it was seen that the appellant had booked the above flat (A-501) on 26.04.2015 and as per the agreement entered with M/s. Popular Developers, Ahmedabad, the appellant had to fulfill the condition of payment in 18 EMI from the start of the construction work at site. However, on going through the B.U. permission letter, it was found that the same was issued by the competent authority on 29.12.2014. This was found quite illogical as to when the B.U. was already issued, how the booking could be entered into showing the construction of the flat and payment thereon to be made in next 18 EMI. On further verification of the sale deed, it was seen that the B.U. permission and other relevant papers had been completed and accordingly the appellant had paid the entire amount of ₹1,00,00,000/-. Thus, it was quite clear that the appellant was well aware at the time of signing sale deed that the B.U. permission was granted to the builder by the competent authority. Also, it was seen that the appellant could not prove that even if they had paid the Service Tax to the builder, same has been credited in the Government account by the builder or otherwise.

4. Therefore, from the available records, it was concluded that the appellant had failed to comply with the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax under Section 83 of the Finance Act, 1994 and rules framed thereunder and accordingly a show cause notice dated 31.03.2016 was issued to the appellant.

5. The said show cause notice was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority fixed three dates of personal hearing on 04.04.2016, 06.04.2016 and 08.04.2016. However, the appellant failed to appear before the adjudicating authority on the allotted dates for personal hearing and thus, the adjudicating authority decided the case *ex-parte*. The adjudicating authority, vide the impugned order, rejected the refund claim of ₹3,71,000/- stating that the appellant is not entitled for the refund under Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax under Section 83 of the Finance Act, 1994.



6. Being aggrieved with the impugned order of rejecting the refund amounts, the appellant filed the present appeal. The appellant claimed that the flat was booked after the date of B.U. and there was no finding in the impugned order about it. Further, the adjudicating authority had accepted the fact regarding the B.U. date, payment of the booking and consideration after the date of the B.U. So only on reading of the general terms, which was not applicable to the appellant, denial of refund was not justifiable and tenable.
7. Personal hearing in the case was granted on 21.02.2017 wherein Shri Vipul Khandhar, Chartered Accountant, on behalf of the appellant appeared before me and reiterated the contents of appeal memorandum. He submitted additional documents in support of his claim which includes booking letter, copy of the ledger, confirmation of accounts from the builder, payment receipts, sale deeds etc.
8. I have carefully gone through the facts of the case on records, grounds of the appeal, and written submission put forth by the appellant as well as oral submission made at the time of personal hearing. Looking to the facts of the case, I proceed to decide the case on merits.
9. In the present case, I find that the appellant was a recipient of services from M/s. Popular Developers, Ahmedabad and had decided to file the claim of refund amounting to ₹3,71,000/- on the ground that the builder had demanded Service Tax, which was not payable, but paid to them by the appellant. In this regard I would like to state that Service Tax is applicable, only on properties that are booked at under-construction stages. So, Service Tax cannot be levied on properties that are purchased, after the builder has obtained its completion certificate. Similarly, there is no Service Tax for completed properties that are purchased under resale. On going through the impugned order, I find that a lot of things are not clear in terms of B.U. permission, sale deed etc. In fact the contents in the impugned order are quite vague and not clear. In fact, the adjudicating authority had decided the case *ex-parte* as the appellant could not produce himself before the former. Thus, in absence of the relevant documents/contents from the part of the appellant the impugned order is riddled with many unanswered questions like the adjudicating authority was not certain whether the builder had credited in the Government account the Service Tax collected from the appellant. In fact, I find that the adjudicating authority has decided the case without granting the appellant an effective hearing in breach of principle of natural justice. The Tribunal, East Zonal Bench, Kolkata in the case of Meenakshi Associates (supra) at para 6 held as under:-

"6. We do not appreciate such approach of the Original Authority to issue one hearing notice for three dates, which is not in accordance with principal of natural justice. The essence of justice requires that a person who is to



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decide must give the parties a fair hearing before him enabling them to state their case and view. Fairness is a flexible, pragmatic and relative concept and not a rigid, ritualistic or sophisticated abstraction. In this case, the appellants have not given proper opportunity of hearing to defend the case. Accordingly, we set aside the impugned order and the matter is remanded to the Commissioner to decide afresh after granting proper opportunity of hearing. In this context, we direct the appellant to appear before the Commissioner of Central Excise on 16-2-2009 at 11.00 A.M., who will fix the date of hearing and to decide the matter expeditiously. The appeal is allowed by way of remand."

Further, in the case of M/s Venkateshwara Power Project Ltd. vs the CCE, Belgaum, the Tribunal South Zonal Bench, Bangalore also stated the same. The relevant contents of the proclamation are quoted below;

"After hearing both sides, I find that the appellants were not heard personally since appellant sought adjournments and the hearing was fixed on three occasions and on the last date also they did not appear. The first three hearings were fixed on 21.2.2011, 25.2.2011 and 31.3.2011. It appears that all the three dates were given in a single letter, which according to the precedent Tribunal decisions is not the correct procedure to be followed.Under these circumstances, there is a clear violation of principles of natural justice by the original adjudicating authority in this case. Therefore without going in to the merits of the case or expressing any opinion, I consider that the matter should go back to the original authority for fresh consideration of all the issues and after giving a copy of the verification report to the appellant. Needless to say that the appellant should be given a reasonable opportunity to present their case."

In view of the above, I believe that the appellant should be given an opportunity to represent himself which would enable the adjudicating authority to satisfy his queries regarding payment of Service Tax, details of B.U., sales deed etc.

10. In light of the above discussion, I remand back the matter to the adjudicating authority to decide the case afresh following the principle of natural justice. The adjudicating authority is further instructed to pass a proper speaking order which is more clear and comprehensible. If needed, the adjudicating authority may verify from the builder regarding the details of payment of Service Tax etc. The appellant is also directed to put all the evidences before the Adjudicating Authority in support of his contention as well as any other details/documents etc. that may be asked for by the adjudicating authority when the matter is heard in remand proceedings before the adjudicating authority.

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



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V2(ST)97/A-II/2016-17

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

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED

S. Dutta
(S. DUTTA) 23/03/17

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



To,

Shri Kinjal Prafulbhai Sheth,

A-501, Popular Domain, Nr. Mahindra Showroom,

Off. S. G. Road, Satellite,

Ahmedabad-380 015

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Dy./Assistant Commissioner, Service Tax, Division-II, Ahmedabad.
4. The Assistant Commissioner (Systems), Service Tax,, Ahmedabad
5. Guard File.
6. P.A. File.