

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)92/A-II/2015-16 / 269 to 223
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-047-16-17
दिनांक Date : 21.07.2016 जारी करने की तारीख Date of Issue 28/07/16

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/67/HCV/CNSDiv-III/15-16 Dated 21.07.2016

Issued by Deputy Commr., Din -III, Service Tax, Ahmedabad

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

M/s. Chhatbar Nimesh Suryakant 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
हॉस्पिटल 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-धारा (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/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For 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 or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise 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 adjuration 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 35फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 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 अर्जी 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,

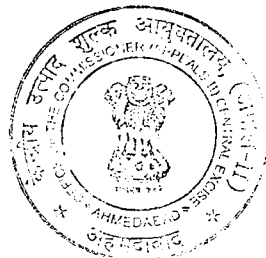
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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)(i) 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)(i) 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 Mr. Chhatbar Nimesh Suryakant , D-101 , Pushkar-4, P.T. College road, opp. Pratiyag Society, Paldi, Ahmedabad 380007 (hereinafter referred to as 'the appellant') against the Refund OIO No. STC/Ref/67/HCV/CNS/Div-III/2015-16 dated 30.09.2015 (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, Service Tax, Division III, Ahmedabad (hereinafter referred to as 'the sanctioning authority') on 21.10.2015

2. The relevant facts of the case are that the appellant had purchased vide sale deed dated 21.08.2013 ready built flat having B.U. Permission dated 09.11.2012. Payment of 15 lakhs was made in the month of June and August 2013 towards flat amount. After executing sale deed builder demanded service tax without which builder was not giving possession of flat. Rs. 54,250/- Service Tax of amount vide Receipt No. 899/22.08.2013 by appellant to Flat Builder and seller ,Shree Pushkar Construction Co., 403/ Asthan Com, Opp. Polytechnic, Ambawadi, Ahmedabad. On getting knowledge that service tax is not payable after B. U. Permission is received, the appellant filed a refund claim Rs. 54,250/- on 30.07.2014 with the sanctioning authority.

3. Sanctioning authority rejected the refund claim vide impugned OIO on following grounds-

(i) Applicant is Service receiver. Service receiver not being registered with Service Tax Authority can not file the refund claim. Applicant does not fall under the category of 68(1) or 68(2) of Finance Act 1994.

(ii) Applicant has not deposited tax to government exchequer. Person who has deposited service tax to exchequer can only file the refund.

(iii) There was no mention on receipt No. 899/22.08.2013 that payment of Rs. 54,250/- is received to-wards service tax.

4. Being aggrieved with the impugned order, the appellant filed an appeal on 23.11.2015 wherein it is pleaded that-

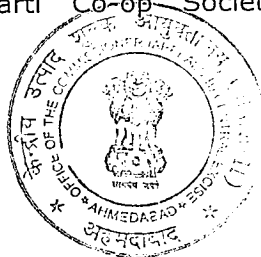
(i) Appellant was compelled to pay service tax though it was not payable.

(ii) Receipt is showing service tax registration of builder ABMFS 4283N SD001 and that is enough to prove that payment is towards service tax purpose.

(iii) Provisions of subsection(3) of Section 73A of Finance Act 94 empowers the C. Ex. Officer to recover from Builder the wrongly collected and retained service tax from customers. Adjudicating authority should have initiated the legal action.

(iv) Provisions of subsection (6) of Section 73A of Finance Act 94 contains provisions for grant of refund of such tax to person who has born the incidence of such amount. Appellant produced following judgments to substantiate their contention-

- (a) Chandigarh Vayu Bharti Co-op Society V/s C.C.E. Chandigarh - 2009(14)STR(Tri. Del.)



- (b) McNally Bharat Engineering Co. Ltd V/s Commr. C. Ex. Guntur - 2006(194)ELT 318(Tri. Bang.)
- (c) Commr. C.Ex. Banglore V/s Supreme Renewable Energy Ltd.- 2009 (238) ELT 494(Tri. Chennai)

(v) Appellant claimed interest under Section 11B for delay beyond three months of filling refund.

5. Personal Hearing in the matter was held on 05.07.2012, wherein Ms. Narendra D. Thakkar, Advocate on behalf of the appellant and Appellant himself appeared and reiterated the contents of the appeal memorandum. They also submitted additional submission dated 05.07.2015 during the course of hearing wherein it is stated that-

(i) Adjudicating authority by exercising power conferred under Section 73A(3) ibidi should have ascertained as to whether the said builder has paid aforesaid amount tax to credit of Government or not. No such action is taken.

(ii) following judicial decision pronounce that recipient of service or person who has suffered tax can file refund claim under 11B.

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|-----|---|-------------------------------|
| (a) | Shankar D. Modani V/s CCE Pune-III | 2016(41)STR 98(Tri. Mumbai) |
| (b) | Abraham Pothan V/s CCE & ST Cohin | 2015(39)STR 676(Tri.- Bang) |
| (c) | CCE & ST Bhavnagar V/s Madhvi Procon Ltd. | 2015(38)STR74(Tri.-Ahmd.) |
| (d) | IFFCO Ltd. V/s CCE Meerut-II | 2014(35) STR 422 (Tri. Del.) |
| (e) | Jyotsana D. Patel V/s CCE Nagpur | 2014 (35) STR 77 (Tri.- Mum.) |

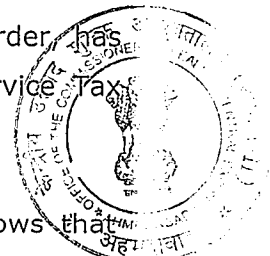
6. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, and oral/written submissions made by the appellant at the time of personal hearing.

6. There is no dispute that appellant was not required to pay service tax to builder. Appellant was also aware of the fact that demand of service tax was illegal but has paid out of compulsion and blackmailing. Appellant would have filled police complain instead of taking recourse of circuitous route of making payment and then filing refund claim. This tantamount to misuse of Central Excise law and Service tax law.

8. The appellant with this present appeal against the impugned order, has pleaded that service recipient customer who is not registered with Service Tax Department can claim the refund of wrongly paid service tax.

9. I find that judgments produced during course of hearing shows that recipient of service can file refund claim of wrongly paid tax to service provider. I hold that appellant can file the refund claim. I set aside the impugned order requiring service provider to file claim.

10. In all the judgments cited by appellant it is established, in one or other way, by claimant that duty claimed as refund has been deposited in Government



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Account. Appellant contention that receipt bearing service tax No. of service provider is enough to prove that service tax is paid and they are entitled for refund is not acceptable. As per section 11B(2) sanctioning authority has to satisfy himself that amount claimed as refund has been paid. Sanctioning authority has categorically said at para 10 of impugned OIO that builder i.e. service provider has not credited the said amount to Government exchequer. I find that appellant has failed to substantiate that payment of Rs. 54,250/- made vide receipt No. 899/22.08.2013 has been deposited to Government Account by the service provider Builder. I hold that for sanctioning the claim it is required to produce evidence that amount claimed is deposited in Government.

11. Appellant contention regarding invoking section 73A(3) of FA 1994 I find that section 11B of CEA 1944 do not cast any obligation on department to initiate action under section 73A(3) of FA 1994 to recover the wrongly collected service tax by service provider. Section 73A(3) of FA 1994 and section 11B of CEA 1944 are independent of each other.

12. Moreover it is pleaded that instead of rejecting such refund department should invoke power under section 73A(3) of FA 1994 to prove that such wrongly paid tax has been deposited with Government by service provider. I find that appellant has complaint regarding department inaction for recovering tax not deposited by builder. It is not in power of this judicial authority to address inaction of departmental officer. This Appellate forum is entrusted for delivering justice and hearing complaint of officers is in purview of next higher authority of sanctioning authority.

13. The impugned order rejecting the refund of service tax is upheld, however appellant is at liberty to file fresh claim evidencing that service tax payment made by him is deposited in Government exchequer.

14. In view of facts and discussion herein above, the appeal filed by the appellant is disposed off in above terms.



(UMA SHANKER)
COMMISSIONER (APPEALS-II)
CENTRAL EXCISE, AHMEDABAD

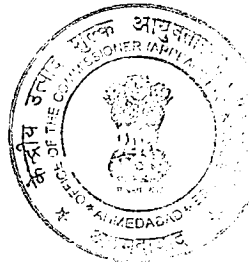
ATTESTED



(R.R. PATEL)
SUPERINTENDENT (APPEALS-II),
CENTRAL EXCISE, AHMEDABAD.

By R.P.A.D.:

Mr. Chhatbar Nimesh Suryakant ,
D-101 , Pushkar-4, P.T. College road,
opp. Pratiyag Society, Paldi,
Ahmedabad 380007



Copy To:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Deputy Commissioner, Service Tax, Division-III/Ahmedabad.
- 5) The Assistant Commissioner (Systems), Service Tax(HQ), Ahmedabad.
- 6) The P.A. to Commissioner (Appeals-IV), Central Excise, Ahmedabad.
- 7) Guard File.

