



आयुक्त (अपील) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क:
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / काइन संख्या / Appeal / File No V2/278/RAJ/2016	मूल आदेश सं / OIO No 03/ADC/RKC/2016-17	दिनांक / Date 27.09.2016
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ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-076 -2017-18

आदेश का दिनांक / Date of Order:	27.09.2017	जारी करने की तारीख / Date of issue:	29.09.2017
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अग आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / संधीधाम, द्वारा उपरोक्तित जती मूल आदेश से सूचित /

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellant & Respondent :-**
M/s. Sahara Construction,, "Sahara"Om nagar Part-A., Maydi Plot, 150ft Ring Road,,Rajkot

इस आदेश(अपील) से व्यभिक्त कोई व्यक्ति डिजिटल तौरक से उपरोक्त परिष्कारी / परिष्कार के समस्त अपील द्वारा कर सकता है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत डिजिटल तौरक से कर सकता है।

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) विशेष न्यायाधिकरण में सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपील के अलावा सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (विस्टेट) की पश्चिम क्षेत्रीय पीठिकर, द्वितीय तल, बहुमारी अवर अखण्ड अहमदाबाद- 380015 को की जानी चाहिए।

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380015 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील न्यायाधिकरण के समस्त अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) विधायकी, 2001, के नियम 6 के अन्तर्गत निर्धारित किए गए प्रथम EA-3 को धारा 35B में दूजे किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा, उत्पाद की सीमा और लगाया गया जुर्माना, रुपए 5 लाख का उससे कम, 5 लाख रुपए का 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति सादर करे। निर्धारित शुल्क का अग्रतः संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी बैंक/डिजिटल बैंक के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का अग्रतः बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। अथवा आदेश (स्टे ऑर्डर) के लिए अवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा कराया होगा।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/-, Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपील न्यायाधिकरण के समस्त अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर विधायकी, 1994, के नियम 9(1) के अन्तर्गत निर्धारित प्रथम S.T.5 में धारा 35B में दूजे किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा, उत्पाद की सीमा और लगाया गया जुर्माना, रुपए 5 लाख का उससे कम, 5 लाख रुपए का 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति सादर करे। निर्धारित शुल्क का अग्रतः संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी बैंक/डिजिटल बैंक के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का अग्रतः बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। अथवा आदेश (स्टे ऑर्डर) के लिए अवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा कराया होगा।

The appeal under sub sections (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 fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is 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. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

::ORDER IN APPEAL ::

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The present appeal has been filed by M/s. Sahara Construction, "Param", Om Nagar Part-A, Mavdi Plot, 150 Feet Ring Road, Rajkot (hereinafter referred to as "the appellant") against Order-in-Original No. 03/ADC/RKC/2016-17 dated 27.09.2016 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. The facts of the case are that the appellant is engaged in providing taxable services in the category of "Commercial or Industrial Construction service" and "Renting of Immovable Property service" and registered with the department. The appellant had filed ST-3 returns for the period from April, 2010 to September, 2010, October, 2010 to March, 2011 and April, 2011 to September, 2011 showing service tax liability of Rs. 37,15,491/- as paid, however they had paid Rs. 17,00,000/- only during the said period resulted into short-payment of service tax of Rs. 20,15,491/-. The statement of Shri Ghansyambhai Popatbhai Pambhar, Partner of the appellant firm recorded under Section 14 of the Central Excise Act, 1994 (made applicable to service tax matters vide Section 83 of the Finance Act, 1994) wherein he admitted that they could not pay the service tax in full due to financial crisis; that they, have under wrong impression had shown the service tax as paid; that service tax liability upto March, 2012 came to Rs. 29.89 lakhs; that they debited cenvat credit of Rs. 7,99,725/- and voluntarily tendered post dated cheques of Rs. 15 lakhs and Rs. 11 lakhs towards their service tax liability for the period upto March, 2012. The service tax liability for the period from October, 2011 to March, 2012 of Rs. 9,95,895/- and interest of Rs. 8,956/- were also adjusted from the amount paid by the appellant, Rs. 23,94,874/- was considered as lump sum payment for the disputed period as against total liability of Rs. 26,48,841/- (Service Tax Rs. 20,15,491/- and interest Rs. 6,33,350/-).

2.1 Show Cause Notice No. V.ST/AR-I/DIV-I-RJT/ADC(PV)/88/2015-16 dated 21.10.2015 was issued to the appellant demanding Service Tax of Rs. 20,15,491/- under proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Act and appropriation of Rs. 23,94,874/- against service tax and Rs. 6,33,350/- against interest so demanded and for imposition of penalty under Section 77(2) and Section 78 of the Act. The SCN was adjudicated by the lower adjudicating authority vide impugned order wherein he confirmed demand of Service Tax of Rs. 20,15,491/- along with interest of Rs. 6,33,350/- and appropriated the said amount deposited against service tax and interest liability of the appellant and imposed penalty of Rs. 10,000/- under Section 77(2) of the Act and penalty of Rs. 20,15,491/- under Section 78 of the Act.

3. Being aggrieved with the impugned order, the appellant filed the present appeal, *inter alia*, on the grounds that the appellant had paid service tax

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before issuance of SCN and the entire amount of interest also before issuance of the impugned order. However, the lower adjudicating authority has imposed penalty under Section 78 of the Act. The appellant has correctly assessed service tax in their ST-3 returns and the only reason for short payment of service tax was the financial crisis of the appellant which had been explained to the lower adjudicating authority. The department did not find any extra liability of payment of service tax than those assessed by the appellant. The appellant has not suppressed material facts from the department while filing ST-3 returns. Delayed payment cannot be equated with evasion of tax, hence extended period cannot be invoked for demanding service tax and penalty under Section 78 of the Act cannot be imposed, when there is no intention to evade service tax. No SCN was required to be issued in terms of Section 73(3) of the Act as service tax was paid along with interest except part amount of interest remained to be unpaid before issuance of SCN. The imposition of penalty of Rs. 20,15,491/- is very harsh. The SCN is time barred as it was issued on the basis of ST-3 returns for the period from April, 2010 to September, 2011 filed within statutory time limit as per Section 73 and SCN issued on 21.10.2015, after 4 years.

4. Personal hearing in the matter was attended to by Shri Rushi Upadhyay, Chartered Accountant, who reiterated grounds of Appeal. He submitted that penalty is not imposable under Section 78 of the Finance Act, 1994 as there is no suppression of facts; that the service tax demanded has been arrived on the basis of ST-3 returns filed by them; that on the query that SCN has invoked Section 76 and hence if Section 78 is not applicable then penalty is imposable under Section 76 of the Finance Act, 1994, he requested for more time to make written submission in this regard. He was allowed to make submission and personal hearing in this regard fixed on 15.09.2017. He appeared on 15.09.2017 and submitted written P.H. submission that penalty under Section 76 of the Act should not be imposed as the SCN has not proposed penalty under Section 76 of the Act and as per settled principal of law, the adjudicating authority cannot go beyond charges alleged in the SCN.

Findings:

5. I have carefully gone through the facts of the case, impugned order, grounds of appeals and submissions made by the appellant. I find that the issues to be decided in the present appeal are that (i) whether imposition of penalty of Rs. 20,15,491/- under Section 78 of the Act in the facts of the case is proper or not; and (ii) whether penalty under Section 76 of the Act is imposable if penalty under Section 78 is not imposable.

6. I find that the appellant has not challenged the liability of payment of service tax and interest on account of delayed payment of service tax and penalty imposed under Section 77(2) of the Act. Hence, the impugned order confirming

demand of Service Tax of Rs. 20,15,491/- along with interest and imposing penalty of Rs. 10,000/- under Section 77(2) of the Act is upheld.


6.1 The appellant has vehemently contested the impugned order imposing penalty of Rs. 20,15,491/- under Section 78 of the Act by contending that they had paid differential service tax of Rs. 20,15,491/- before issuance of SCN and the entire amount of interest after issuance of SCN but before issuance of the impugned order and that no SCN was required to be issued in terms of Section 73(3) of the Act as service tax had been paid. I find that the partner of the firm during recording of his statement had deposed that he would pay service tax debiting cenvat credit of Rs. 7,99,725/- and he had tendered post dated cheques of Rs. 15 lakhs and Rs. 11 lakhs towards their service tax liability for their outstanding service tax liability. However, Rs. 9,95,895/- and interest of Rs. 8,956/- required to be paid by the appellant for period under investigation and Rs. 23,94,874/- only were available towards service tax liability for the period April, 2010 to September, 2011 against service tax liability of Rs. 20,15,491/- and interest amount of Rs. 6,33,350/-. Since, interest was not fully paid by the appellant, there was need to issue SCN by the department and the appellant cannot find fault for issue of SCN as they had not paid interest and also penalty as prescribed under Service Tax law.

6.2 The appellant has contended that the department has not found any extra liability of payment of service tax other than those assessed by the appellant and that the appellant has not suppressed any material facts from the department while filing ST-3 returns, hence extended period cannot be invoked for demanding service tax and imposing penalty under Section 78 of the Act and also cannot be imposed, when there is no intention on their part to evade service tax. However, I find that this is factually not correct as they had declared in their ST-3 returns as service tax having been fully paid. Even though ST-3 returns were filed within time but service tax paid had been falsely declared as paid whereas they had not paid service tax. In such facts of the case, the appellant's say that this was wrongly declared under wrong impression is nothing but to escape the clutches of law. I find that the appellant had attempted to evade payment of service tax by false declaration in ST-3 returns as service tax paid. Therefore, I find reason to hold that the appellant has suppressed the facts of non-payment by stating service tax paid with intent to evade payment of tax. Hence, I uphold penalty of Rs. 20,15,491/- imposed on the appellant under Section 78 of the Act by the lower adjudicating authority.

6.3 Since first issue whether penalty is imposable under Section 78 or not in this case is already answered, there is no need to go into 2nd issue as to whether penalty under Section 76 of the Act is imposable or not.

7. In view of above facts and legal position, I uphold the impugned order and reject the appeal.

- ७.१ अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
- 7.1 The appeal filed by the appellant stand disposed of in above terms.


 (कुमार संतोष)
 आयुक्त (अपील्स)

By Regd. Post AD

To,

M/s. Sahara Construction,
 "Param",
 Om Nagar Part-A,
 Mavdi Plot,
 150 Feet Ring Road,
 Rajkot

मै. सहारा कन्स्ट्रक्शन,
 "परम",
 ओम नगर पार्ट - अ,
 मवडी प्लॉट,
 १५० फीट रिंग रोड,
 राजकोट

Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST & Central Excise, Division-I, Rajkot.
4. Guard File.