



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



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan
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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/268/GDM/2017	10/AC/2017-18	09.01.2018
	V2/269/GDM/2017	11/AC/2017-18	09.01.2018
	V2/1/GDM/2018	5/GST/AC/2017-18	31.01.2018

ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-013-TO-015-2019

आदेश का दिनांक /
Date of Order: **31.01.2019** जारी करने की तारीख /
Date of issue: **04.02.2019**

कुमार संतोष, प्रधान आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर,
राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,
Rajkot / Jamnagar / Gandhidham :
घ अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent :-

1. Shri. Kesharam Kumbharam Chaudhary, Railway Slum Area, Railway Colony, New Kandla, Kutch.
2. Shri. Kesharam Chaudhary, Railway Slum Area, Railway Colony, New Kandla, Kutch.
3. Shri. Chandrashekhar Maurya, House No. B-66, Sector-6, Gandhidham, Kutch.

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर 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 अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती 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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर० के० 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 बताया गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above
- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 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 संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना 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) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 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 संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

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 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/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994 के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 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 Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये में अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं- 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।
For an appeal to be filed before the CESTAT, 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, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 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.
- (C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सूचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिवेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो.ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं- 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के माध्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। / 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.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

The present three appeals have been filed by three appellants (hereinafter referred to as Appellant No.1, Appellant No2 and Appellant No.3) against respective Orders-in-Original (hereinafter referred to as "impugned orders") issued by the respective lower adjudicating authority (hereinafter referred to as "the adjudicating authority") as mentioned in Table below:-

Sr. No.	Appeal No.	Appellant	Order-In-Original No./Date/ Issued by
1	2	3	4
1	V2/268/GDM/2017	Shri Kesharam Kumbharam Chaoudhary, Railway Slum Area, Nr Gurudwara, New Kandla (AMTPC7873NSD001) (Appellant No.1)	10/AC/2017-18 dated 9.1.2018 Issued by AC, CGST Rural Division, Gandhidham
2	V2/269/GDM/2017	Shri Kesharam Chaudari, Slum Area, Railway Colony, New Kandla Kutch. (ALMPC2382HST001) (Appellant No.2)	11/AC/2017-18 dated 9.01.2018 Issued by AC, CGST Rural Division, Gandhidham.
3	V2/1/GDM/2018	M/s. Chandrashekhar Maurya, House No. B-66, Rotary Nagar, Section -6, Gandhidham (ARPPM9205PSD001) (Appellant No.3)	5/GST/AC/2017-18 dated 31.01.2018 Issued by AC, CGST, Gandhidham (Urban) Division, Gandhidham.

2. The issue in all above mentioned three appeals is common, the same are taken up together for disposal under this common order.

3. The brief facts of the cases are that during the course of investigation against M/s. Mahadeshwar Logistics, Gandhidham, the officers of DGCEI, RRU, Rajkot resumed documents in respect of Cenvat Credit availed by them. Scrutiny/ verification of documents of M/s. Mahadeshwar Logistics revealed that Appellant No.1, Appellant No.2 and Appellant No.3 (hereinafter referred to as 'Appellants') had provided "Cargo handling Service" to them but had not not deposited the service tax as under:-

	Year	Service tax not paid/ short paid
Appellant No.1	2012-13	Rs.5,13,607/-
Appellant No.2	2011-12	Rs.5,06,470/-
Appellant No.3	2011-12 & 2012-13	Rs.3,46,412/-+ Rs.2,21,728/- (=Rs.5,68,140)

(Signature)

3.1 Show Cause Notices under Section 73 of the Finance Act, 1994 (hereinafter referred to as "the Act") were issued to the appellants demanding short paid service tax along with interest and proposing penalty under Section 78 of the Act and recovery of Late fee under Section 70 of the Act. The lower adjudicating authority vide the impugned orders confirmed demand and interest and fee and also imposed penalty on the appellants under Section 78 of the Act.

4. All three Appellants filed appeals on the grounds, that the lower adjudicating authorities have wrongly confirmed demands along with interest and imposed penalty as findings are not justified and are bad in law.

5. Personal hearing in the matter was attended by Shri Abhishek Doshi, C.A. on behalf of all three appellants who reiterated the ground of appeals and submitted written PH submissions stating that entire Service tax has been paid by the appellant before initiation of inquiry by DGCEI through summons proceedings; that service tax could not be paid by them in time because of fraud committed by their common accountant but they could not lodge FIR with Police because case records pertained to 2011-12 and hence, they had no hard evidences against that common accountant; that fraud committed by Accountant can't be attributed to them and hence, no penalty is imposable on them as per Hon'ble CESTAT's orders cited by them in their written submissions.

5.1 The Appellants in their written submissions stated that their accountant siphoned off the amount of service tax given by them and not deposited the cheques in government account; that on coming to know of fraud played by the Accountant, they deposited the due service tax amount; that they were not literate persons and do not have knowledge of finance, accounts, banking, and other laws; that they were totally dependent on the said Accountant Mr.Pankaj Trivedi (PAN No.AFTPT0946C) for his financial, banking and Service Tax related work; that they had issued cheques for payment of service tax, which were given to the accountant Pankaj Trivedi but he siphoned off money by transferring the cheque in his name and by withdrawing cash from the Bank account; that the Appellants have periodically issued cheques to the accountant for paying service tax but the cheques were misused by the said Accountant; that other contractors of M/s. Mahadeshwar Logistics



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filed FIR with police against the said Accountant Pankaj Trivedi and they produced copy of that FIR; that Gandhidham Police Station (Division-B) has booked case against the said accountant under Section 406, Section 420 and Section 114 of the Code of Criminal Procedure and they produced copy of the charge sheet; that Shri Pankaj Trivedi was arrested by the Police and he is still in the judicial custody; that Appellants have filed affidavit in this regard and produced copies of the same.

5.2 Appellant No.1 stated that payment of due service tax was made by him prior to issuance of summons or even letter issued to them; that the payment was made by him on his own and hence penalty was not imposable under Section 78 of the Act; that benefit of reduced penalty of 50% under Section 78 is also not given in the impugned order; that Section 80 of the Act provides that no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure; that they rely on the following case laws:

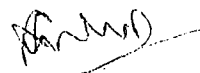
- * Hemangi Enterprise [2015-TIOL-2184-CESTAT-MUM]
- * M/s. Ganesh Enterprise [2015-TIOL-1650-CESTAT-MUM]
- * Sh.Hari Enterprise [2015-TIOL-1586-CESTAT-MUM]
- * M/s. Motorwarld and other {2012-TIOL-418-HC-KAR-ST}
- * M/s. Hindustan Steel Ltd[2002-TIOL-148-SC-CT-LB]

5.3 Appellant No.2 and Appellant No.3 also made similar submissions as above, made by Appellant No.1.

FINDINGS:

6. I have carefully gone through the facts of the case, the impugned orders, the grounds of all 3 appeals and submissions made by all three appellants. The issues to be decided in the present appeals are as to,

- (i) whether the impugned orders confirming demands and ordering payment of interest are correct or not;
- (ii) whether appropriation of amounts paid by the appellants is correct or otherwise;
- (iii) whether imposition of penalty on the appellants under Section 78 of the Act is correct or not.

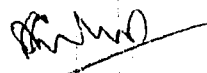


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7. I find that the appellants have, in the grounds of appeal, contended that the demands have been wrongly confirmed by the lower adjudicating authorities, however, in P.H. submissions, they did not contest their liabilities to pay service tax and also stated that the payments of Service Tax were made by them before the initiation of inquiry against them. I find that there is nothing substantial submitted by them as to why Service Tax and interest on Service Tax for delayed payment was not payable by them. I find that service tax along with interest at applicable rate is payable by the appellants. Hence, the impugned orders confirming demand of service tax along with interest from all three appellants are upheld as demanded in the respective SCNs.

8. Regarding imposition of penalty under Section 78 of the Act, the appellants have contended that fraud has been committed on them by their common Accountant, who got money from them but did not deposit into the Government account; that they paid entire service tax before issuance of SCNs. I find that the appellants in their respective statements during investigation had also stated that the said common accountant had been given cheques by them for depositing service tax into Government accountant but he did not deposit those cheques into Government account and had transferred/withdrawn the amount of cheque in his personal account. However, the contention of the appellants that they were defrauded are not supported by evidences except an affidavit filed by them. The Appellants have not produced any FIR lodged by them with Police or any complaint or any legal suit filed by them with the banks or any other authorities in spite of the appellants having knowledge of fraud committed with them till date/ even now. I further find that service tax payments made by them in the year 2016 pertain to S.Tax liability for the years 2011-12 and 2012-13. Hence, I am unable to agree with the appellants contention that non deposition of service tax was on account of fraud committed by their common accountant. Further, the appellants have also not deposited interest payable by them on account of late deposit of service tax. The benefit of no penalty can be given to a person liable to pay service tax only if he pays service tax along with interest before issue of SCN, which is not the case here. Therefore, equal penalty imposed by the lower adjudicating authority with an option of reduced penalty @25% in under Section 78 of the Act is justified. However, proviso to Section 78 stipulates penalty of 50% of the service tax demand in cases where transactions have been recorded in the book of accounts. Relevant portion of Section 78 reads as under:-

"1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or



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collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :

.....”

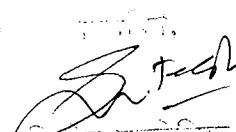
(Emphasis supplied)

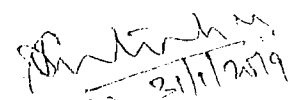
8.1 I find that the show cause notices issued to the appellants are only after verification of records of the appellants and hence, transactions have been recorded by the appellants in their records. Therefore, imposition of equal penalty is not correct, legal and proper and penalty @50% of service tax is required to be imposed under proviso to Section 78 of the Act.

9. Accordingly, the impugned orders are upheld for confirmation of demand and recovery of interest, as per applicable rate and for appropriation of amounts deposited towards Service Tax, however, penalty imposed on the Appellants under Section 78 of the Act is reduced to 50% of service tax confirmed in the respective impugned orders.

९.१. अपीलकर्ताओ द्वारा दर्ज की गई अपीलस का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. The appeals filed by the appellants are disposed off in above terms.


निदेश उपरोक्तिया
अधीक्षक (अपील्स)


(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By Speed Post

To,

1	Shri Kesharam Kumbharam Chaudhary, Railway Slum Area, Nr Gurudwara, New Kandla	श्री केशरम कुंभाराम चौधरी (S Tax Reg. No. AMTPC7873NSD001) रेल्वे स्लम एरिया, गुरुद्वारा के पास न्यू कांडला (कच्छ)
2	Shri Kesharam Chaudari, Slum Area, Railway Colony, New Kandla Kutch. (ALMPC2382HST001)	श्री केशरम चौधरी (S Tax Reg. No. ALMPC2392HST001) रेल्वे स्लम एरिया, गुरुद्वारा के पास न्यू कांडला (कच्छ)
3	M/s. Chandrashekhar Maurya,	श्री चंद्रशेखर मौर्य

House NO. B-66, Rotary Nagar, Section -6, Gandhidham (ARPPM9205PSD001)	हाउस नं बी-66 , रोटरी नगर, सेक्शन -६ गांधीधाम (कच्छ)
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Copy to:

- 1) The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for kind information please.
- 2) The Commissioner, CGST & Central Excise, Gandhidham Commissionerate, Gandhidham (Kutch) for necessary action.
- 3) The Deputy/Assistant Commissioner, Central GST Urban Division, Gandhidham for necessary action.
- 4) The Deputy/Assistant Commissioner, Central GST Rural Division, Gandhidham for necessary action.

5) Guard File. 6)F.No.V2/269/GDM/2017 7)F.No. V2/1/GDM/2018