



::आयुक्त (अपील्स) 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

रजिस्टर डाक ए.डी.द्वारा :-

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/63/GDM/2018-19	08/Asstt.Comm. /2018	22-10-2018

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

KCH-EXCUS-000-APP-006-2020

आदेश का दिनांक /

Date of Order: 09.01.2020

जारी करने की तारीख /

Date of issue:

09.01.2020

श्रीगोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri. Gopi Nath, 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 :-**

Shree Enterprise 3rd Floor, Raghav Darshan, Prasadi Plot, Sanskar Nagar, Bhuj-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, 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 बताए 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

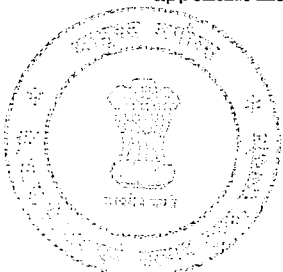
(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 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 रजिस्टार 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 नियमवाली, 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 रजिस्टार 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 fee of Rs. 1000/- 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 नियमवाली, 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 जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से 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 होंगे। /
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 पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, 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 (रिबेट) 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 इयूटी 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 साक्ष्य 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।
जहाँ 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, not withstanding 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
(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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.



that “the provisions of the Central Excise Act also constitute “law” within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under “the authority of law” within the meaning of the said Article”.

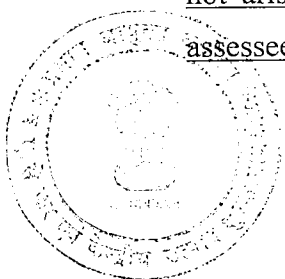
10. Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provision of Section 11B for period of limitation. The statutory time limit cannot be extended by any authority, held by the Apex Court.”

(Emphasis supplied)

9.2. I also rely on the Order passed by the Hon’ble CESTAT, New Delhi passed in the case of Hot Spot Color Lab reported as 2017 (49) S.T.R. 420 (Tri. - Del.), wherein it has been held that

“6. The appellants kept quiet for a period of three years and it is only after the Supreme Court’s decision in other assessee’s case laying down that the value of the materials is not required to be added in the value of the services, was passed, the appellant approached the Revenue for refund of the excess amount deposited by them. However, by that time a period of three years had already lapsed. When the assessee at the time of deposit of the dues never contested the same and deposited the same as service tax under the accounting head of service tax, it has to be considered that the appellant agreed with the view of the audit, accepted their liability and deposited the service tax, without contesting the same. It is not the appellant’s case that the said service tax was deposited with a protest to the Revenue’s stand. If that be so, the payments made by the appellant has to be considered as service tax payment and not as deposit.

7. Having held that the payments made by the appellant were on account of differential amount of service tax and was not mere deposit during the period of investigation, the provisions of Section 11B would admittedly apply. As per the said provisions, the refund can be staked only within the period of one year from the relevant date. The authorities working under the said act are bound by the provisions of the act, and cannot travel beyond Section 11B. The appellants claim for refund was based upon the declaration of law by the Hon’ble Supreme Court in the case of other assessee and not in appellants own case. As such the same was not arising as a consequence of any higher appellate order passed in the said assessee’s case.



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8. The refund claim having been admittedly filed after a period of one year from the date of payment of the same, stands rightly rejected by the authorities below on the ground of limitation. I find no infirmity in the views adopted by the lower authorities. Accordingly, the impugned orders are upheld and appeal is rejected.”

(Emphasis supplied)

10. I have examined the case laws of 3E infotech - 2018 (18) G.S.T.L. 410 (Mad.), Sujaya Dalva - 2019 (28) GSTL 196 (Kar.), KVR Construction - 2012 (26) S.T.R. 195 (Kar.) etc relied upon by the Appellant. I find that said decisions have been rendered by the Hon'ble High Courts by invoking powers vested under Article 226 of the Constitution of India in writ jurisdiction whereas this appellate authority is a creature of statute and has to function within the ambit of the statute which has created it and cannot assume powers and jurisdictions of constitutional courts such as the Hon'ble High Court. I, therefore, cannot condone delay in filing refund application, ignoring the limitation prescribed under Section 11B of the Central Excise Act, 1944.

11. Regarding reliance placed by the Appellants on the orders passed by the Hon'ble Tribunal in the case of Shankar Ramchandra Auctioneers- 2010 (19) STR 222 (T) and Jubilant Enterprises P. Ltd. - 2014 (35) STR 430 (T), I find that both orders were passed by single member bench. However, order passed by the Larger Bench of the Hon'ble CESTAT, Chandigarh in the case of Veer Overseas Ltd. reproduced supra will prevail over relied upon case laws.

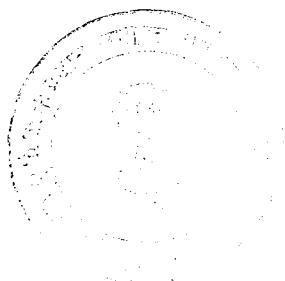
12. In view of above, I hold that the refund claims filed beyond limitation prescribed under Section 11B ibid are not maintainable and correctly rejected by the refund sanctioning authority as barred by limitation. Since, the refund claims are not sustainable on limitation, I do not find it necessary to examine merits of the appeals.

13. I uphold the impugned orders and reject both the appeals filed by the Appellants.

14. अपीलकर्ताओं द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

14. The appeals filed by the appellants are disposed off as above.


(GOPI NATH) 27/8/2020
Commissioner (Appeals)



:: ORDER-IN-APPEAL ::

M/s. Shree Enterprise, 3rd Floor, Raghav Darshan, Prasadi Plot, Sanskar Nagar, Bhuj-Kutch (hereinafter referred to as 'Appellant') has filed the present appeal against Order-In-Original No. 08/Asstt.Commr/2018 dated 22.10.2018 (hereinafter referred to as 'the impugned order'), passed by the Assistant Commissioner, CGST Division, Bhuj – Kutch (hereinafter referred to as "the adjudicating authority").

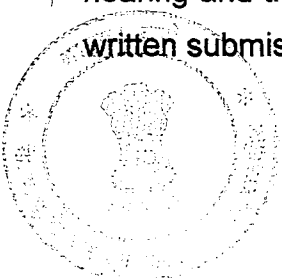
2. The brief facts of the case are that during investigation carried out against the Appellant, it was revealed that the appellant had rendered services under the category of 'Supply of Tangible Goods Service', 'Mining of Mineral, Oil or Gas Services' and 'Transport of goods by Road Service' during the year 2011-12 but had failed to discharge service tax.

2.1 Therefore, a Show Cause Notice No. IV/06-06/CEP/KUTCH/2015-16 dated 07.12.2017 was issued to them and the proceedings were finalized by the adjudicating authority vide Order-in-Original No. 08/Asstt.Commr/2018 dated 22.10.2018 wherein demand of Service Tax of Rs. 7,55,540/- was confirmed with interest Under Section 75 of the Finance Act, 1994, Penalty of Rs. 2000/- under Section 77 and penalty amount of Rs. 7,55,540/- under Section 78 of the Finance Act, 1994 was imposed.

3. Aggrieved, the appellant preferred the present appeal, *interalia*, on the following grounds:

- (i) The Adjudicating Authority has erred in laws as well as on fact by not considering the services provided during F.Y. 2011-12 amounting to Rs. 80,90,875/- as exempted services. Therefore, the liability of Service Tax computed on reverse calculation basis of Rs. 7,55,540/- is liable to deleted.
- (ii) The Show Cause Notice is time barred and invalid, therefore the order of the adjudicating authority is liable to be quashed.
- (iii) There is no single ingredient present to conclude that the noticee has not disclosed, suppressed, willfully acted to provide any information called for. Therefore, the adjudicating authority has erred in law as well as on fact in imposing penalty of Rs. 7,55,540/- under Section 78 of the Finance Act, 1994. The Penalty imposed is liable to be deleted.

4. Personal hearing in the matter was fixed on 02.01.2020, the appellant vide their letter dated 01.01.2020 submitted that they do not wish to avail opportunity of personal hearing and they solely rely on their written submission and requested to consider their written submission and allow the appeal on merit.

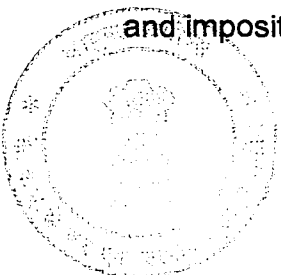


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4.1 The appellant vide letter dated 01.01.2020 has submitted further written submissions, *interalia*, as under:

- (i) The adjudicating authority has erred in laws as well as on fact by not considering the services provided during financial year 2011-12 as exempted services. Prior to Finance Act, 2012 i.e. up to 30.06.2012, emphasis was mainly on classification of composite services i.e. services where more than one services provided and which cannot be classified on the basis of specific description of taxable services. Appellant was providing services of composite services which includes excavation and transportation of overburden. Considering the cost and charge attributable to activities of excavation and transportation, the portion of transportation was compared to excavation. The transportation charges per trip was below Rs. 1500/- (exemption limit); appellant was under bonafide belief that services provided by them are exempted services and not liable to service tax and therefore they have not charged service tax on their bills and same income declared by them as exempted services in their Service Tax returns.
- (ii) The SCN is time barred and invalid as the same is failed to invoke the proviso to Section 73(1) of the Act and the scope of the SCN has to be taken as limited to the main portion of Section 73(1), as the ST-3 return for annexure containing details of liability or otherwise for financial year was filed on 13.12.2012. On the basis of above, Section 73(1) can not be invoked for the financial year 2011-12; hence the Show Cause Notice is time barred.
- (iii) There is no single ingredient present to conclude that the noticee has not disclosed, suppressed, willfully acted to provide any information called for; therefore the Adjudicating authority has erred in law as well as on fact in imposing penalty under Section 78 of the Finance Act; as the appellant was under bonafide belief that services provide by them is exempted from the purview of service tax and appellant has not charged service tax in their invoices and they have also shown the same in their service tax return as exempted services.

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and the written submission made by the appellant. The issue to be decided in the present case is as to whether the determination of Service Tax liability and imposition of penalty under various section is legally sustainable?



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(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;

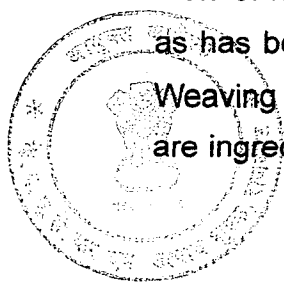
(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.]

6.1 From the above, it is clear that in case of fraud or; collusion; or willful mis-statement; or suppression of facts; or contravention of any of the provisions of the Chapter V or of the rules made thereunder with intent to evade payment of service tax; the service tax demand can be raised for five years from relevant date. In present case the non-payment of service tax by the Appellant was unearthed during investigation undertaken. Had there been no investigation of the records of the Appellant, the non-payment of service tax by the Appellant would have gone unnoticed. So, there was suppression of facts and extended period of limitation was rightly invoked in the show cause notice and impugned order.

7. Further I find that, appellant has claimed that in bonafide belief, they have not charged service tax in their bills raised to their service recipients as the service provided by them is exempted from the purview of service tax and they have declared service as exempted service in the ST-3 returns filed by them and adjudicating authority has erred in laws as well as on fact by not considering the services provided during Financial Year 2011-12 amounting to Rs. 80,90,875/- as exempted service. I find that such argument is not tenable in the legal position. Service tax is indirect levy where the person liable to pay service tax may collect the tax from service recipient for discharging the responsibility casted on him, there is no relief if they do not collect the tax from service recipient.

7.1 From the impugned order, it is clear that appellant has not disputed and shown willingness to pay his service tax liabilities amounting to Rs. 7,55,540/- for the financial year 2011-12 and willingly paid the same with interest and penalty.

8. Regarding penalty imposed under Section 78 of the Act, I find that nonpayment of service tax by the Appellant was unearthed during investigation. Had there been no investigation of the Appellant, the non-payment of service tax by the Appellant would have gone unnoticed. So, there was suppression of facts and extended period of limitation was rightly invoked in the impugned order. Since the Appellant suppressed the facts of non-payment of Service Tax, penalty under Section 78 of the Act is mandatory as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition



N.

6. I find that appellant has claimed that show cause notice is time barred, for the same I would like to examine Section 73 in respect of recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded which reads as under:

SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. —

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

- (a) fraud; or*
- (b) collusion; or*
- (c) wilful mis-statement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,*

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted.

(2) ..

(3) ..

(4) ..

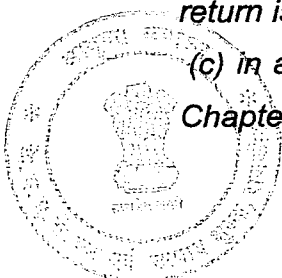
(5) ..

(6) For the purposes of this section, "relevant date" means, — (i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;




of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty as proposed by the adjudicating authority.


9. Therefore, considering the facts and circumstances of the case, I uphold the impugned order and reject the appeal.

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

10. The appeal filed by the appellant stands disposed of in above terms.

Attested


(S.D. Sheth)
Superintendent


(Gopi Nath) 9/11/2020
Commissioner (Appeals)

By R.P.A.D.

To,
M/s. Shree Enterprise,
3rd Floor, Raghav Darshan,
Prasadi Plot, Sanskar Nagar,
Bhuj-Kutch

Copy to:

1. The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham - Kutch.
3. The Assistant Commissioner, GST & Central Excise Division, Bhuj - Kutch.
4. Guard File.

