



:: आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर/कीरकेन्द्रीय 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:-

DIN-20220764SX0000616082

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/49/GDM /2021	39/JC/2020-21	30-03-2021

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

KCH-EXCUS-000-APP-42-2022

आदेश का दिनांक/ Date of Order:	28.07.2022	जारी करने की तारीख / Date of issue:	29.07.2022
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श्री अखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Akhilesh Kumar, Commissioner (Appeals), Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधामा 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 :-

M/s Hardik Hotels Pvt. Ltd., Plot No. 29-30, Sector no. 9, Near Central Bank of India, Gandhidham-Kutch-370201.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दाखल 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 नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती 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 fees 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 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/-.



- (ii) 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.
- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपील 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 भाग 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 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) सेनबेट जमा की ली गई वसत राशि
(iii) सेनबेट 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 स्थान नहीं 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 पुनरीक्षणवाहिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपारंतुक के अंतर्गत अवर सचिव, 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, जहाँ 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 छूटी केसीट 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 सारिक अथवा समयावधि 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 प्रतियाँ प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क के साथ अर्थात् 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 चाहिए। इस ढंग के होते हुए भी की सिद्धा पट्टी कार्य से बचने के लिए भयास्थिति 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 filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
(E) न्यायाधीन न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 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-1 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 बर्णित एवं अन्य संबन्धित मामलों को सम्प्लित करने वाले नियमों की और 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 ::

M/s. Hardik Hotels Pvt Limited, Gandhidham (hereinafter referred to as "Appellant") has filed Appeal No. V2/49/GDM/2021 against Order-in-Original No. 39/JC/2020-21 dated 30.03.2021 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST, Kutch, Gandhidham (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was engaged in providing various services viz. Hotel Inn, Club and Guest House Service etc. and was having Service Tax Registration No. AACFH7185BSDO01. Intelligence gathered by the Preventive Wing, erstwhile Central Excise, Gandhidham revealed that the Appellant had provided various taxable services and collected service tax from their customers but did not deposit the same in Government account. Accordingly, investigation was carried out by the departmental officers in the matter. On the basis of the investigation, a Show Cause Notice dated 13.11.2019 was issued to the appellant proposing as under:

- (1) Demand and recovery of service tax amount of Rs. 1,00,57,834/- for the period from F.Y. 2014-15 to F.Y. 2017-18 (upto June-17) along with interest, by invoking extended period of limitation under proviso to Section 73 (1) of the Finance Act, 1994 ("the Act");
- (2) appropriation of an amount of Rs. 30,31,512/- and Rs. 1,07,874/- already paid by the Appellant towards service tax and interest liability respectively;
- (3) imposition of penalty under Section 76, 77 & 78 of the Act ;
- (4) recovery of late of fee under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994 for not filling /late filing ST-3 returns.

2.1 The Show Cause Notice was adjudicated vide impugned order wherein the adjudicating authority has passed orders as detailed below:

- (1) He has reduced the service tax demand from Rs. 1,00,57,834/- to Rs. 58,92, 550/- after extending the benefit of abatement and appropriated the amount of Rs. 38,53,672/- paid by the Appellant, towards above service tax liability;
- (2) Confirmed the demand of interest under Section 75 of the Act and appropriated an amount of Rs. 1,07,874/- paid by the Appellant towards interest liability;
- (43) Imposed a penalty of Rs. 10,000/- under Section 77 of the Act and a penalty of Rs. 58,92,550/- under Section 78 of the Act;
- (4) Imposed a late fee of Rs. 1,35,100/- under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994;

3. Being aggrieved, the Appellant has preferred the present appeal contending, *inter-*



alia, as under:

(i) They had paid service tax along with interest and filed ST-3 returns before issuance of Show Cause Notice and hence, their case is covered by provisions contained in Section 73(3) of the Act and under the circumstances, Show Cause Notice itself was not required to be issued by the adjudicating authority;

(ii) In terms of provisions of Section 73(3) of the Act, the notice specified under Section 73(1) of the Act shall not be served where the 'service tax not paid' had been paid by the person either on his own ascertainment or on the basis of tax ascertained by the Central Excise Officer, before service of notice on him under sub-section (1) in respect of such service tax and inform the central excise officer of such payment in writing, who on receipt of the said information shall not serve any notice under sub-section (1) in respect of the amount of service tax so paid;

(iii) The liability ascertained by the Appellant as well as the central excise officer for the period is as under:

Service Tax payable, as ascertained by the Appellant

Nature of Service	2014-15	2015-16	2016-17	April-2017 to June-2017	Total
Room Tariff	9,99,838	11,23,313	14,30,061	2,65,272	38,18,484
Restaurant service	5,49,940	6,65,067	7,03,727	1,55,332	20,74,066
Total	15,49,778	17,88,380	21,33,788	4,20,604	58,92,550

Service tax payable ascertained by the Joint Commissioner.

Nature of Service	2014-15	2015-16	2016-17	April-2017 to June-2017	Total
Room Tariff	9,99,838	11,23,313	14,30,061	2,65,272	38,18,484
Restaurant service	5,49,940	6,65,067	7,03,727	1,55,332	20,74,066
Total	15,49,778	17,88,380	21,33,788	4,20,604	58,92,550

The periodical payment of service tax dues are as follows:-

April-2017 to June-2017					
Particular	Paid through cenvat credit	Paid through various challans	Challan amount	Challan No.	Date of payment
Room tariff and Restaurant service	0	3853672	As per OIO		
		295970	295970	33	06.06.2019
		240000	240000	119	03.04.2019
		531430	531430	35	06.06.2019
		4921072	Paid by challan		

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- It can be seen that the service tax payment was made on before 06.06.2019 itself;
- (iv) The amount payable was ascertained by the central excise officer during their visit on 04.10.2018 and the amount payable as service was ascertained by the central excise officers on the basis of the documents like Balance Sheet, 26AS and other documents furnished by them; that Director of the Appellant in his statement had stated that due to non-receipt of the fund there was delay in the payment of service tax;
- (v) The present case is fully covered by the provisions of sub-section 3 of the section 73 and the adjudicating authority was not required to issue SCN as per the provisions of Section 73(3) of the Act;
- (vi) The application of Section 73(3) of the Act is restricted by the provisions contained in the sub-section (4) of Section 73 of the Act . It is settled position of law that the allegation in respect of ingredient viz., fraud, collusion, willful misstatement, suppression of fact or contravention of law; with intent to evade the tax payment must be cogently expression the SCN. However, notice fails to comply with this requirement.
- (vii) The notice mere stated that the assessee appellant had suppressed the alleged non-payment of tax by not filing the prescribed return. However, in the para 5 of the said impugned SCN , the notice itself stated that on scrutiny of the balance sheet, 26AS , income tax form, and other document of the appellant they determined the service tax liability.
- (viii) The entire value of the services has been declared in the books of accounts for the relevant period. Therefore, when the service tax liability is itself determined based on the balance sheet and other books of accounts maintained by the appellant therefore the charge of suppression of facts with an intent to evade tax payments does not hold water.
- (ix) Accordingly, the ingredient mentioned in the section 73(4) had not been cogently expressed in the said SCN therefore the provision of Section 73(3) of the Act is applicable in the present case. The SCN was issued in contravention to the provision of Section 73(3) of the Act and therefore whole proceeding initiated by this illegal SCN vitiated and the OIO passed by the adjudicating authority must be held as illegal, invalid and without authority of law.
- (x) They rely upon following case laws in support of their contention:
- (a) Onward E-Services Ltd – 2019 (21) GSTL 167(Tri.Mumbai)
- (b) Thyssenkrupp Electrical Steel India Pvt Ltd – 2016 (45) STR 99(Tri.Mumbai)
- (c) Bhoruka Aluminum Ltd – 2017 (51) STR 418-(Tri.Bang)



- (xi) Interest and penalty under section 77 is also not imposable as the demand is not legal and liable to be set aside
- (xii) Without prejudicing the content of the above submission and without accepting, it is to submit that the Appellant were in the bona fide belief that the charges as stated in the SCN are not falling under the definition of taxable service and service tax is not applicable, Therefore, the bona fide Appellant should not be penalized .
- (xiii) The issue involved in the appeal is of interpretation of Notification hence penalties under section 77 and 78 under the Act may be waived under Section 80 of the Act;
- (xiv) The reliance is placed upon the case of CST Mumbai Vs. Boparai's Martial Security Services Pvt Ltd (2014(34)STR 45(Tri.Mumbai);
- (xv) Even the service tax is not payable on the basis of the above submission. Since the service is not payable at all therefore the penalty imposed must be considered as excessive and therefore the Appellant must be relieved from the imposition of penalty. Even the demand is time barred therefore the appellant must be saved from being penalized.

4. Personal hearing was conducted in virtual mode through video conferencing on 14.07.2022. Shri Sudhir Kumar Maheshwari, Authorised representative of the Appellant, attended the hearing. He re-iterated submission made in appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order, the Appeal Memorandum and oral submissions made at the time of hearing by the Appellant. The issue to be decided in the present case is as to whether the impugned order confirming service tax demand of Rs. 58,92,550/- under Section 73(1) of the Act, along with interest under Section 75 and imposing penalties under Sections 77 and 78 and late fee under section 70 of the Act is correct, legal and proper or not.

6. Ongoing through the records, I find that the Appellant was engaged in providing taxable services viz. Hotel Inn, Club and Guest House Service etc. and had allegedly collected service tax from their customers but did not deposit into the Government account. Accordingly, proceedings were initiated against the Appellant and a SCN was issued proposing recovery of service tax amount of Rs. 1,00,57,834/- along with interest and penalties. The adjudicating authority has vide impugned order, after considering the submissions, has extended benefit of abatement @ 60 % and @ 40% on Restaurant service and Room Accommodation service respectively and confirmed the demand of service tax of Rs. 58,92,550/- [Rs. 20,74,065/- (Restaurant service) + Rs. 38,18,485/- (Room Accommodation service)] against the demand of Rs. 1,00,57,834/- proposed in the SCN. The



adjudicating authority also confirmed demand of interest and imposed penalties / late fee under relevant Sections of the Act. The adjudicating authority has also appropriated an amount of Rs. 38,53,672/- and Rs. 1,07,874/- already paid by the Appellant towards service tax and interest liability respectively.

6.1 I find that the Appellant has contested the demand on the ground that as they had paid service tax along with interest and filed ST-3 returns before issuance of Show Cause Notice and hence, their case is covered by provisions contained in Section 73(3) of the Act and SCN was not required to be issued to them. The Appellant further contended that the allegation in respect of ingredient viz., fraud, collusion, willful misstatement, suppression of fact or contravention of law; with intent to evade the tax payment must be cogently expressed in the SCN, however, the SCN issued to them failed to comply with this requirement. The Appellant has also argued that extended period of limitations cannot be invoked in their case as the entire value of the services have been declared in the books of accounts for the relevant period and the service tax liability is itself determined based on the balance sheet and other books of accounts. The Appellant has also relied upon various case laws in support of their contentions.

6.2 I find that there is no dispute about the quantification of demand of service tax in the impugned order and the same has been accepted by the appellant as per the calculations made given by them in appeal memorandum. In order to examine the contention of the Appellant that their case is covered under the provisions of Section 73(3) of the Act, it is pertinent to refer the relevant provisions of Section 73 of the Act which are extracted below:-

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,



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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.

Explanation. — ----

(1A) ----

(1B) ----

(2) ----

(2A) ----

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the [Central Excise Officer] may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [thirty months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation. [1] ----

Explanation 2. ----

(4) Nothing contained in sub-section (3) shall apply to a case 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.

From the legal provisions above, it is clearly emerging that the SCN is not to be issued only in the cases where the assessee makes the payment of entire amount of service tax short-paid or short levied, along with interest, whether on the basis of own ascertainment or on the basis of the tax ascertained by a central excise officer, before the issuance of SCN under sub-section (1) of Section 73 of the Act. It is also clear from the provisions of Section 73(4) of the Act that the provisions of Section 73(3) will not apply in cases where the service tax has not been levied or paid or has been short-levied or short-paid by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of service tax.

6.3 In the present case, admittedly, the service tax amount based on Appellant's own assessment and as per impugned order, worked out to Rs. 58,92,550/- . In the Appeal memo,



the Appellant has claimed that they had paid service tax of Rs. 49,21,072/- upto 06.06.2019 i.e., before the issuance of SCN dated 13.11.2019. As per the above payment particulars, the Appellant has claimed that besides Rs. 38,53,672/- already appropriated in the impugned order, it has made payment of Rs. 2,95,970/-, 2,40,000/- and 5,31,430/- on 06.06.2019, 03.04.2019 and 06.06.2019 respectively. The Appellant has provided copies of challans showing payment of above amount.

6.4 I find that there are certain discrepancies in the payment details mentioned in the SCN, impugned order and in the appeal-memorandum filed by the Appellant. As per the facts narrated in the SCN, the Appellant had paid service tax amount of Rs. 30,31,512/- and interest of Rs. 1,07,874/- only. Whereas, as per the details of personal hearing held on 30.03.2021, as recorded in the impugned order, the representative of the Appellant had furnished particulars relating to payment of Rs. 5,00,000/- made on 04.10.2018, Rs. 2,77,648/- on 15.11.2018 and Rs. 44,512/- on 15.11.2021 (appears to be a typographical error as it should be 15.11.2018) before the adjudicating authority. It appears that the adjudicating authority, by considering the above payment particulars and payment details already mentioned in the SCN, has appropriated an amount of Rs. 38,53,672/- vide the impugned order.

6.5 I also find that above facts have not been disputed by the Appellant in the present proceedings. I further find that though the Appellant has furnished copies of challans showing payment of Rs. 2,95,970/-, 2,40,000/- and 5,31,430/-, but it appears that the Appellant had not furnished these payment particulars before the departmental officer during the investigation, or, at the time of adjudication, hence, the same cannot be relied upon without verification by the jurisdictional authority. Under the circumstances, I have no other option but to rely on the facts narrated in the impugned order, from which it appears that the Appellant had made payment of only Rs. 38,53,672/- before the issuance of SCN. Thus, I find that the Appellant had not paid entire service tax amount before the issuance of SCN, and their case is not covered under Section 73(3) of the Act. Even otherwise, since the demand of service tax has been confirmed by invoking the extended period, in terms of provisions of Section 73(4) also, the benefit of Section 73(3) of the Act cannot be extended to the Appellant.

7. As regards argument of the Appellant regarding invocation of extended period, I find that similar arguments were made by the Appellant before the adjudicating authority also. The adjudicating authority has at Para-23 to 25 of the impugned order recorded his findings



justifying the invocation of extended period of limitation in the SCN. The adjudicating authority has observed that the Appellant had collected service tax from their clients but had not deposited the same with the exchequer and have willfully suppressed the facts from the department by not filing the statutory returns. The adjudicating authority further observed that Appellant's deliberate omission clearly manifest that their intention was to suppress the fact of having received the consideration towards rendering taxable service in order to evade payment of service tax. The adjudicating authority also observed that above non payment service tax would not have come to light if the department officer had not inquired into the matter. The adjudicating authority also relied upon Hon'ble Supreme Court's judgments for invoking the extended period of limitation.

7.1 I find that the Appellant has not raised any cogent grounds to counter the above categorical findings by the adjudicating authority. In the era of self-assessment, it is upon the appellant to assess their tax liability and intimate the department by filing the ST-3 returns periodically, which the appellant has failed in this case. Hence, the adjudicating authority has correctly invoked the extended period of limitation and imposed penalty under Section 78 of the Act. Though the Appellant have relied upon following judgments in support of their arguments but I find that none of these judgments is squarely applicable in the present case as discussed below.

(a) Onward E-Services Ltd ~ 2019 (21) GSTL 167(Tri. Mumbai):- In above case, it was observed by the Hon'ble Tribunal that the assessee concerned had correctly declared the value of its services in the ST-3 returns and hence, not suppressed the material facts from the department. Whereas, in the present case the Appellant had not filed ST-3 returns and thus, suppressed the value of services rendered and service tax liability thereon, from the department.

(b) Thyssenkrupp Electrical Steel India Pvt Ltd - 2016 (45) STR 99 (Tri.Mumbai):- The Hon'ble Tribunal while deciding the above matter had categorically observed that the concerned assessee had reflected the fact of payment of service tax under GTA services and Management or Business Consultant Service, from Cenvat credit account in the ST-3 returns and paid the entire amount of service tax before the issuance of SCN. On the other hand, in the present case the Appellant had not filed the statutory returns and thereby concealed the facts of non-payment of service tax from the department.

(c) Bhoruka Aluminum Ltd - 2017 (51) STR 418-(Tri.Bang):-In the above judgment the dispute involved the non-payment of service tax as recipient of services



of foreign company for maintenance and repair of capital goods. Also, it was observed by the Hon'ble Tribunal that the assessee *bona fide*ly believed that he is not liable to pay service tax but during the audit, the audit party informed him that he is liable to pay service tax, then he immediately paid the entire service tax along with interest. In the present case, the Appellant had already collected the service tax from their clients and did not deposit to the Government account, and to suppress the above facts, it did not file statutory returns.

7.2. I find that in addition to the judgments of Hon'ble Supreme Court in case of CC Vs. Candid Enterprises (2001(130)ELT 404(SC) and Commissioner Vs. Aafloat Textiles Pvt Ltd (2009(235)ELT 587(SC) relied upon by the adjudicating authority, the ratio of judgment of Hon'ble High Court in the case of Responsive Industries Ltd Vs. Commissioner (2019 (26) G.S.T.L. 457 (Bom.) is also applicable in the facts and circumstances of the present case. The Hon'ble High Court at para-8 of the judgment has observed that:-

8. From the record it is undisputed that Appellant had not paid the service tax as the outward transportation under the category of GTA for the period from April, 2009 to December, 2011, this even though they had admittedly incurred expenses for the same. It is only during the course of EA 2000 audit that above non-payment of service tax on the part of the Appellant was discovered by the revenue. This discovery on the part of the Revenue led the Appellant to deposit the service tax as well as interest thereon even before the show cause notice was issued by the revenue. In the above circumstances, even if the tax and the interest on the same was paid before the issue of notice, it is not open to the Appellant to take benefit of Section 73(3) of the Act as the non-payment of the service tax was on account of suppression with a mala fide intention to evade payment of service tax. Thus in view of Section 73(4) of the Act, the benefit of Section 73(3) of the Act, claimed by the Appellant would not be available.

7.3 In view of above, I concur with the observations of the adjudicating authority that the non-payment of the service tax came to the fore only because of the proceedings were initiated by the department against the Appellant. Accordingly, I find that it is a clear case of suppression with an intention to evade the payment of service tax and hence, the extended period has been rightly invoked for demanding service tax from the Appellant. Also, the benefit of Section 73(3) of the Act cannot be extended to the Appellant as they had not paid the entire amount of service tax before the issuance of SCN and the elements of suppression are also present in the case.

8. The Appellant has argued that the interest and penalty under Section 77 of the Act is not imposable as demand is not legal and liable to be set aside.

8.1 As already discussed above, the demand of service tax has been rightly confirmed



against the Appellant, hence, the same is required to be recovered along with interest as rightly held by the adjudicating authority relying on the judgment of Hon'ble Supreme Court in the case of M/s. Pratibha Processors Vs. Union of India(1996(88)ELT12(SC) . Since the Appellant had failed to assess the correct service tax liabilities and not paid service tax in accordance with the provisions of Section 68 of the Act read with Rule of the Service Tax Rules, 1994 nor filed statutory returns in time, I find that penalty under Section 77 of the Act has also been rightly imposed.

9. The Appellant's another contention is that they were in the bona fide belief that the charges as stated in the SCN were not falling under the definition of taxable service and service tax is not applicable. The Appellant further contended that the issue involved in the appeal is of interpretation of Notification hence penalties under Section 77 and 78 of the Act may be waived under Section 80 of the Act. The Appellant has also placed reliance upon the judgment in the case of CST Mumbai Vs. Boparai's Martial Security Services Pvt Ltd (2014(34)STR 45(Tri.Mumbai).

9.1 I find that when the Appellant had already collected the service tax from their clients, the argument that they were having bona fide belief about taxability of the service and interpretation of Notifications, is absurd and did not merit consideration. I also find that the judgment in the case of CST Mumbai Vs. Boparai's Martial Security Services Pvt Ltd (2014(34)STR 45(Tri.Mumbai) relied upon by the Appellant is also not applicable , as there is no question of interpretation of Notification involved in the present case as the Appellant had already collected service tax from their clients.

9.2 Since it is a clear case of suppression with intention to evade payment of service tax collected from their clients as already discussed above, the adjudicating authority has rightly imposed penalty under Section 78 of the Act relying on the judgments of the Hon'ble Supreme Court in the case of Dharmendra Textile Processors & Others (2008(231)ELT 3(SC) and Rajasthan Spinning & Weaving Mills (2009(238)ELT 3(SC).

10. I also find that the adjudicating authority has rightly imposed late fee under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994 for delay / failure to file ST-3 returns.

11. In view of above, I uphold the impugned order and reject the appeal filed by the Appellant.

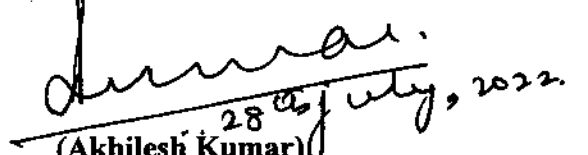


12. अपीलकर्ता द्वारा दर्जकी गई अपील का निपटारा उपरोक्त तरीकेसे किया जाता है।

12. The appeal filed by the Appellant is disposed off as above.

सत्यापित / Attested


Ketan Dave
अधीक्षक (अपील)
Superintendent (Appeal)


28th July, 2022
(Akhilesh Kumar)
Commissioner (Appeals)

By RPAD

To M/s. Hardik Hotels Pvt Limited, Plot No. 29-30, Sector No. 9, Near Central Bank of India, Gandhidham (Kutch)-370201.	प्रति मैसर्स हार्दिक होटल्स प्राइवेट लिमिटेड, प्लॉट नंबर 29-30, सेक्टर नंबर 9, सेंट्रल बैंक ऑफ इंडिया के पास, गांधीधाम (कच्छ)-370201.
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प्रति:-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, मंडल गांधीधाम(urban), गांधीधाम, को आवश्यक कार्यवाही हेतु।

✓ गार्ड फाइल।

