

#### ःः बायुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय उत्पाद शुल्कःः O/O THE COMMISSIONER (APPEALS), GST &CENTRAL EXCISE

द्वितीय तल,जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142Email: commrappl3-cexamd@nic.in



DIN20221164SX0000424474

अपील / फाइलसंख्या/ Appeal /File No. GAPPL/COM/STP/1737/2022 मूल आदेश सं / O.I.O. No. 05/SERVICE TAX/DEMAND/2020-21 दिनांक/Date 17-Aug-21

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

### BHV-EXCUS-000-APP-091-2022

आदेश का दिनांक / Date of Order: 11.11.2022

जारी करने की तारीख / Date of issue:29.11.2022

श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Shiv Pratap Singh, Commissioner (Appeals), Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुरूक/ सेवाकर/वस्तु एवंसेवाकर,राजकोट / जामनगर / गांधीधाम। द्वारा उपरतिश्रित जारी मूल आदेश से सृजितः /

Arising out of above mentioned OIO issued by Additional/joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot

/ Jamnagar / Gandhidham :

B)

**MINTER** 

केन्द्रीय

अपीलकर्ता के प्रतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent :-

## M/s. Rekhaba Bharatsinh Jadeja, Hariomnagar-2, Near Sardar Patel School, Bhavnagar

इस आदेश(अपीस) से व्यथित कोई व्यक्ति निम्नसिश्चित तरीके में उपयुक्त प्राधिकारी / प्राधिकरन के समक्ष अपील दावर कर सकता है।/ Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

सीमा शुल्क कन्द्रीय उत्पाद शुल्क एवं संवाकर अर्थासीय न्यायाधिकरण के प्रति अर्थाल, कन्द्रीय उत्पाद शुल्क आंधीनयम, 1944 की घारा 35B के अंतर्गत एव (A) वित्त आंधीनियम, 1994 की घारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती हैं।/

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) दर्गीकरण 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 दिल्सी, 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 अपीलें सीमा शुल्क केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीटिका, द्वितीय तल, बहुमाली भवन असावा अहमदाक्षाद- ३८००१६को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>rd</sup> Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरणं के समझ अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्न हिन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्न हिन्द्र के आप प्रति के साथ अहा उत्पाद शुल्क की मौग अप लगाया गया प्रपत्न हिन्द्र के आप प्रति के साथ अहा उत्पाद शुल्क की मौग अप लगाया गया प्रपत्न हिन्द्र के प्रति शाका के सहायक अवदा 10,000/- रुपये का निर्धारित अम् शाका के सहायक अवदा 10,000/- रुपये का निर्धारित अम् शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का मुगतान, संबंधित अपिलीय न्यायाधिकरण की अला किया जाता चाहिए। संविधित इाफ्ट का मुगतान, के की उस रिजस्टार के नाम से किसी भी सार्विजनक क्षेत्र के के विद हारा जारी रेखांकित बेक इाफ्ट का साथ हिए। संविधित इाफ्ट का मुगतान, के की उस शाखा में होना चाहिए जहां संविधित अपिलीय न्यायाधिकरण की शाखा स्थित है। स्वयन आदेश (स्ट ऑर्डर) के लिए आवेदन-पत्र के सीय 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 dutydemand/interest/penality/refund is upto 5 by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of crossed bank draft in Iavour of Asst, Registrar Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in Iavour of Asst, Registrar of branch 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/-

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 more Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than 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 standard & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the standard Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is standard. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

वित्त अविनियम, 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 प्रयप्त 5.7.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुक्क बयवा आयुक्त (अपील), केन्द्रीय उत्पाद शुक्क द्वारा गारित आदेत की प्रतियों तंत्रफ करें (उनमें से एक प्रति प्रभाषित होंगी धारित अपीलीय न्याधाविकरण को काबेदन दर्ज करने का निर्देश होंगी शिष्ठा अपीलीय न्याधाविकरण को काबेदन दर्ज करने का निर्देश होंगी शिष्ठा अपीलीय न्याधाविकरण को काबेदन दर्ज करने का निर्देश होंगी शिष्ठा अपीलीय न्याधाविकरण को काबेदन दर्ज करने का निरंप होंगी शिष्ठा शिष् (i)

(ii)

भारत सरकार कोपनरिक्षण व्यवेदन :

शारत सरकार कोपनरिक्षण व्यवेदन :

Revision application to Government of India:
इस अदेश की पुनरिक्षणवार्षिका निम्निशिव गामनी में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतज्ञवर सचिव,
भारत सरकार, पुनरिक्षण व्यवेदन 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 Delhi110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to subsection [1] of Section-35B ibid: (C)

वृदि माल के किसी नुक्सान के मामले में, जहां नुक्सान किसी माल को किसी कारखाने से भंडार मुद्द के पारणमन के दौरान वा किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे संडार गृह पारचमन के दौरान, वा किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी के भंडार गृह में माल के नुक्सीन 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 (i)<sup>\*</sup>

मारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के बिनिर्माण 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. (ii)

यदि उत्पाद शुल्क का मुमतान 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. (iii)

सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगवान के लिए जो क्यूटी केडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे खदेश जो अपना (अपील) के द्वारा वित्त अधिनियम (न॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीब अथवा समायाविधि पर या बाद में पारित किए राए 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. fivì

उपरोक्त आवेदन की दो प्रतियां प्रपन्न संक्वा EA-8 में, जो की केन्द्रीय उत्पादन मुक्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के अपेश्वन के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मुल्क आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुक्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुक्क की जदायगी 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 OlO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed lee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account. (v)

पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदावयी की जानी चाहिए। जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का मुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का मुगतान 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. (vi)

यदि इस जादेत में कई मूल कारेगों का समावेश है तो प्रत्येक मूल आदेश के लिए शुरूक का मुगतान, उपर्युक्त बंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पड़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केदीय सरकार को एक अपेदन किया जाता है। / In case if the order covers various umbers 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. (D)

वधासंशोधित न्यायानय शुरू अधिनिवस, 1975, के अनुसूची-I के अनुसार मूल खदेश एवं स्थयन खदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायानय शुरूक टिकिट नया होना चोहिए। / 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. (E)

सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय त्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्वान कार्कचित 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. (F)

उच्च अपीलीय प्राधिकारी को अपील दाश्चिल करने से संबंधित ज्यापक, 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. (G)



# :: अपील आदेश / ORDER-IN-APPEAL ::

- M/s. Rekhaba Bharatsinh Jadeja, Hariomnagar-2, Near Sardar Patel School, Bhavnagar (hereinafter referred to as "Appellant") has filed the present appeal against Order-in-Original No. 5/Service Tax/Demand/2021 dated 17.08.2021 (hereinafter referred to as 'impugned order') passed by the Superintendent, Range-2, CGST Division Bhavnagar-1 (hereinafter referred to as 'adjudicating authority').
- 2. The facts of the case, in brief, are that on the basis of departmental audit, proceedings were initiated against M/s. So Lucky Cable Service, Bhavnut ("M/s. So Lucky") for evasion of service tax under the category of "Cable Operators Services". Proceedings were also initiated against sub-cable operators of M/s. So Lucky including the Appellant, for non-payment of service tax by wrongly claiming benefit of value-based exemption under Notification ... 06/2005-\$T dated 01.03.2005, despite providing services under other's bit is name. These proceedings resulted in issuance of SCNs to various service providers including the Appellant. Based on these SCNs the jurisdictional authority issued another SCN No. BVN/ST/CTY/SCN-SOLUCKY/101/16-17 dated 25.10.2018, for the period from April-2015 to March-2016 to the Appellant proposing demand of service tax amount of Rs. 1,20,975/- (including Education Cess and S.H. Education Cess) along with interest and for imposition of penalty under Sections 76, 77 and 78 of the Finance Act, 1994("the Act").
- 3. The above Show Cause Notice was adjudicated vide impugned order wherein the adjudicating authority confirmed the demand of service tax amount of Rs. 1,20,975/- (including Education Cess and S.H. Education Cess) under Section 73 of the Act along with interest under Section 75 of the Act; imposed penalty of Rs. 5,000/- or Rs. 200/- for every day during which such failure continues whichever is higher starting with the first day after the due date, all the date of actual compliance under Section 77(2) of the Act for not filing 51-3 returns; imposed a penalty of Rs. 5,000/- under Section 77(1) (a) of the Act for not obtaining registration and imposed a penalty of Rs. 25,000/- under Section 76 of the Act;
- 4. Being aggrieved by the impugned order, the Appellant preferred present appeal contending, *inter-alia*, as under:
- legal interpretation of provisions of the Act. The Appellant was providing the taxable services of "Cable Operator" to transmission of waives through electronically system. The taxable value had not been exceeded support than Rs. Ten Lakh in any of the financial year for the period under

AD

reference. They had not provided the taxable service by using symbol of "So Lucky" cable. They are entitled to avail the benefit of Notification No. 06/2005-ST dated 01.03.2005 as they have not provided the taxable service using the brand name of So lucky cable and value of their service is less than threshold limit prescribed. The amount of Service Tax mentioned in the Order-In-Original is nothing but the taxable value mentioned in the business carried out by So lucky which is not in or in relation to the business carried out by them;

- (ii) In another similar type of case of Shri Chiragbhai Andhariya, the Commissioner (Appeals), Rajkot vide OIA No. BHV-EXCUS-000-019-2021-22 dated 01.04.2022 has clearly held that the Appellant is liable to avil the benefit of Notification No. 6/2005-ST dated 01.03.2005.
- (iii) They rely on case law as reported at 2009 (14) STR 511 (Tri.-Del.) and 2018 (18) GSTL 152 (AAR-GST).
- 5. The personal hearing in the matter was held on 20.10.2022 which was attended by Shri N. K. Maru & U. H. Qureshi, Consultants' of the Appellant. During the personal hearing they reiterated the grounds of appeal.
- 6. I find that the impugned order was issued on 17.08.2021 by the adjudicating authority. As stated by the Appellant in appeal memorandum, the date of communication of the impugned order is 10.05.2022. The Appellant has also filed application for condonation of delay by stating that the family members had forgotten to hand over the impugned order and hence they could not file the appeal within the time.
- 7. To ascertain the date of communication of the impugned order, a letter dated 21.10.2022 was issued to the jurisdictional Range Superintendent to convey the date of delivery of the impugned order to the Appellant. The Superintendent, Range-2, Bhavnagar-1 Division vide his letter dated 28.10.2022 stated that the said impugned order was dispatched to the Appellant registered postal address through registered post having ID No. RG049505225IN on 01.09.2021 and the same was not returned back as 'undelivered'.
- 8. It is on record that the Appellant has received the impugned order well within time but the family members forgot to hand over the impugned order to the Appellant. The Appellant traced out impugned order from his premises on 10.05.2022 and hence they had stated the date of receipt of impugned order as 10.05.2022 which is not correct. The Appellant has filed Appeal on 22.06.2022, i.e. after almost 9 months from date of issue of impugned order. They had deliberately not mentioned the date of receipt of the impugned order but has mentioned the date on which they traced out the impugned order from their

premises with ulterior motive to admit their appeal. The Appellant was required to file appeal within 60 days from the receipt of the said order as stipulated under Section 85(3A) of the Act. This appellate authority has powers to condone delay of one month in filing of appeal, over and above two months mentioned above, if sufficient cause is shown, as per proviso to Section 85(3A) *ibid*. I find that there is a delay of 7 months in filing the appeal from the date of receipt of impugned order over and above the normal period of 2 months. Thus, the appeal filed beyond the condonable time limit prescribed under Section 85(3A) *ibid* cannot be entertained.

- 9. This appellate authority is a creature of the Statute and has to act as per the provisions contained in the Act. This appellate authority, therefore, cannot condone delay beyond the period permissible under the Act. When the legislature has intended the appellate authority to entertain the appeal by condoning further delay of only one month, this appellate authority cannot beyond the power vested by the legislature. My views are supported by the following case laws:
  - (i) The Hon'ble Supreme Court in the case of Singh Enterprises reported as 2008 (221) E.L.T. 163 (S.C.) has held as under:
  - "8. ... The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period."
  - (ii) In the case of Makjai Laboratories Pvt Ltd reported as 2011 (274) E.L.T. 48 (Bom.), the Hon'ble Bombay High Court held that the Commissioner (Appeals) cannot condone delay beyond further period of 30 days from initial period of 60 days and that provisions of Limitation Act, 1963 is not applicable in such cases as Commissioner (Appeals) is not a Court.
  - (iii) The Hon'ble High Court of Delhi in the case of Delta Impex reported as 2004 (173) E.L.T. 449 (Del) held that the Appellate authority has no jurisdiction to extend limitation even in a "suitable" case for a further period of more than thirty days.
- 10. I find that the provisions of Section 85 of the Finance Act, 1994 are pari pareria with the provisions of Section 35 of the Central Excise Act, 1944 and

Airy

hence, the above judgements would be squarely applicable to the present appeal also.

- 11. By respectfully following the above judgements, I hold that this appellate authority cannot condone delay beyond further period of one month as prescribed under proviso to Section 85(3A) of the Act. Thus, the appeal filed by the Appellant is required to be dismissed on the grounds of limitation. 1, accordingly, dismiss the appeal.
- 12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
- 13. The appeal filed by Appellant is disposed off as above.

सत्यापित / Attested

(शिव प्रताप सिंह)/(Shiv Pratap Sir

आयुक्त (अपील)/Commissioner (Appeals)

Superintendent
Central GST (Appeals)
By R.P.A.D. Raikot

To, M/s. Rekhaba Bharatsin Jadeja, Hariomnagar-2, Near Sardar Patel School, Bhavnagar सेवा में, मे. रेखाबा भरतिसंह जाडेजा, हरीओम नगर-२, सरदार पटेल स्कूल के पास, भावनगर।

### प्रतिलिपि :-

- मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेदा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेत्।
- अपर आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेत्।
- 4) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर मण्डल-१ को ,
   आवश्यक कार्यवाही हेतु।
- 5) अधीक्षक, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क रेंज-2, भावनगर मण्डल-१ को आवश्यक कार्यवाही हेत्।



