

:: अपील आदेश / ORDER-IN-APPEAL ::

M/s. Kachhadiya Vijaybhai Kalubhai, Amreli (hereinafter referred to as "Appellant") has filed the present Appeal against Order-in-Original No. 92/AC/NIS/BVR-3/22-23 dated 26.05.2022 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Central GST Division-3, Bhavnagar (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Income Tax Department shared the third party information/ data based on Income Tax Returns/ 26AS for the Financial year 2014-15 & 2016-17 of the Appellant. Letter was issued by the Jurisdictional Assistant Commissioner requesting the Appellant to provide information/documents viz. copies of I.T. Returns, Form 26AS, Balance Sheet (including P&L Account), VAT/ Sales Tax Returns, Annual Bank Statement, Contracts/ Agreements entered with the persons to whom services provided etc. for the Financial year 2014-15 & 2016-17. However, no reply was received from the Appellant.

3. In absence of data/information, a Show Cause Notice dated 17.08.2020 was issued to the Appellant, demanding Service Tax and cess to the tune of Rs. 6,80,434/- under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act') alongwith interest under Section 75 of the Act. It was also proposed to impose penalties under Section 78 and 77(1)(a), 77(2) & 77(1)(c) of the Act upon the Appellant.

4. The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order confirmed Service Tax demand of Rs. 6,80,434/- under Section 73(1) along with interest under Section 75 of the Act, imposed penalty of Rs. 6,80,434/- under Section 78 of the Act, imposed penalty of Rs. 5,000/- each under Section 77(1)(a) & 77(2) of the Act.

5. Being aggrieved, the Appellant has preferred the present appeal on various grounds that the impugned order passed by the Adjudicating Authority is contrary to the provisions of law, facts and evidence. They have provided services of construction of single residential unit which is exempted vide Sr. No. 14(b) of exemption Notification No. 25/2012-Service Tax dated 20.06.2012. They have no knowledge of law and has not submitted written submission or even could not approached consultants. They have entered into the contract with service receivers but being very old documents, they will submit within short period of time. The penalty imposed under Section 78 is not correct as they have not suppressed anything from the department. They were under reasonable belief that the service provided by them is not liable for Service Tax as per Sr. No. 14(b) of Notification No. 25/2012-Service Tax. It is a fit case to invoke



(Signature)

section 80 of the Act and they relied on the decision in the case of Multi Trake Net Work Vs. CST Delhi. Imposition of penalty under Section 77(1) and 77(2) is not correct. They relied on the decision in the case of Commissioner of Central Excise, Tirunelveli Vs. Global Software Solutions (P) Ltd. - 2011 924 STR 707, Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras - ELT 1994 (74) ELT 9 (SC). The demand is time barred. The Show Cause Notice based on the TDS/26AS is not sustainable and they rely in the case of Forward Resources Pvt. Ltd. Vs. Commissioner of Central Excise & Service Tax, Surat - 2022-TIOL-624-CESTAT-AHM.

6. The matter was posted for hearing on 14.02.2023. CA Rushi Upadhyay appeared for personal hearing and handed over additional supporting documents. He submitted that in both the cases, the appellant provided service of construction of single residential unit. The same is exempted vide Sr. No. 14(b) of Notification No. 25/2012-Service Tax. Therefore, he requested to set aside the impugned order.

6.1 The CA in his written additional submission dated 14.02.2023 has submitted construction agreement for the construction of single residential house. As per Sr. No. 14(b) of exemption Notification No. 25/2012-Service Tax dated 20.06.2012, the said service is exempted and requested to set aside the impugned order and allow the appeal.

7. I have carefully gone through the case records, impugned order and appeal memorandum filed by the Appellant. I find that the issue to be decided in the case on hand is whether the Appellant is liable to pay Service Tax for the services provided by them or otherwise.

8. I find that the Appellant have not produced any evidences regarding pre-deposit of 7.5% as envisaged under Section 35FF of the Central Excise Act, 1944 which is made applicable to Service Tax matters vide Section 83 of the Act. The Appellant filed appeal on 14.09.2022. In the ST-4 form at column No. 6, they have mentioned that they tried to make the payment on CBIC-GST Portal but due to error they were unable to make the same. They assure to submit the challan as soon as they are able to make payment. Further, as on personal hearing held on 14.02.2023, the Appellant has not produced any document evidencing payment of mandatory pre-deposit of 7.5% of the demand.

9. I find that the Appellate authority cannot entertain any appeal without mandatory pre-deposit of the required amount. The relevant section is as under:

Section 35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal..-

The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal -



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(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.

Explanation. - For the purposes of this section "duty demanded" shall include, -

(i) amount determined under section 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.]

In the case on hand the Appellant has not produced any evidence for making mandatory pre-deposit of 7.5% of duty amount and thus, I cannot entertain this appeal.

10. I find that the impugned order was issued on 26.05.2022 by the adjudicating authority. As stated by the Appellant in appeal memorandum, the date of communication of the impugned order is 16.06.2022. The Appellant has also filed application for condonation of delay by stating that delay in filing of appeal is due to non availability of consultant.

11. To ascertain the date of communication of the impugned order, a letter dated 14.02.2023 through email was issued to the jurisdictional Assistant Commissioner to convey the date of delivery of the impugned order to the Appellant. The Assistant Commissioner, CGST Division-3, Bhavnagar vide his letter dated 22.02.2023 submitted proof of delivery of the impugned order and forwarded copy of acknowledgement issued by Department of Post wherein the date of receipt by the Appellant is shown as 03.06.2022.

12. It is on record that the Appellant has received the impugned order on 03.06.2022 and the Appellant has filed Appeal on 14.09.2022, i.e. after 90 days from date of issue of impugned order. 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 more than 1 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.

13. 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 go 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.

14. I find that the provisions of Section 85 of the Finance Act, 1994 are *pari materia* with the provisions of Section 35 of the Central Excise Act, 1944 and hence, the above judgements would be squarely applicable to the present appeal also.





15. 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. I, accordingly, dismiss the appeal.

16. In view of discussions and findings, I uphold the impugned order and reject the appeal filed by the Appellant for not making mandatory pre-deposit under Section 35F of the Act made applicable to Service Tax matters as well as on grounds of limitation.

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

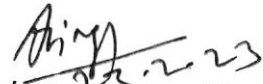
17. The appeal filed by Appellant is disposed off as above.

सत्यापित / Attested



आर. एस. बोरीचा / R. S. BORICHA
अधीक्षक / Superintendent
के. व. एवं सेवा कर अपील, राजकोट

By R.P.A.D., ST Appeals, Rajkot



(शिव प्रताप सिंह) / (Shiv Pratap Singh),

आयुक्त (अपील) / Commissioner (Appeals)

To, M/s. Kachhadiya Vijaybhai Kalubhai, Block No. 14, Amrut Nagar, Chakkargarh Road, Amreli.	सेवा में, मे. काछडिया विजयभाई कालुभाई, ब्लॉक नंबर: 14, अमृत नगर, चक्करगढ़ रोड, अमरेली।
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प्रतिलिपि :-

- 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, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 3) अपर आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेतु।
- 4) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल-3, भावनगर को आवश्यक कार्यवाही हेतु।
- 5) गार्ड फाइल।



