



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner

केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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By SPEED POST

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(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/2449/2023 / 9191
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-EXCUS-002-APP-130/23-24 and 30.10.2023
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	20.11.2023
(ङ)	Arising out of Order-In-Original No. 43/DC/D/VM/22-23 dated 13.01.2023 passed by The Deputy Commissioner, CGST Division-III, Ahmedabad North	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Mustufa Kezarbhai Patel, Near Jogni Mata Mandir, Gandhi Chowk, Aligarh, Viramgam.

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो सकता है।

Any person aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way.

भारत सरकार का पुनरीक्षण आवेदन:-

Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली: 110001 को की जानी चाहिए :-

A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :-

(क) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

In case of any loss of goods where the loss occur 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.



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(घ) अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं 2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(2) उक्तलिखित परिच्छेद में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004।

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad: 380004. In case of appeals other than as mentioned above para.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA- 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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registrar of a branch of any nominate public



sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number 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 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु 6.50 पैसे 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 adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन और संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपील के मामले में कर्तव्यमांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की मांग (Duty Demanded)।

- (1) खंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिया गलत सेनवैट क्रेडिट की राशि;
- (3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में 'अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994).

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.



★(6) (i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, 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."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Mustufa Kezarbhai Patel, Near Jogni Mata Mandir, Gandhi Chowk, Aligarh, Viramgam (hereinafter referred to as "the appellant") against Order-in-Original No. 43/DC/D/VM/22-23 dated 13.01.2023 passed by The Deputy Commissioner, CGST Division-III, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant are holding PAN No. BKYPP5687F. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the FY 2016-17, it was noticed that the appellant had earned an income of Rs. 25,02,217/- during the FY 2016-17, which was reflected under the heads "Sales of services" (Value from ITR)" filed with the Income Tax department. Accordingly, it appeared that the appellant had earned the substantial income by way of providing taxable services but has neither obtained Service Tax registration nor paid the applicable service tax thereon. The appellant were called upon to submit copies of relevant documents for assessment for the above said period. However, the appellant had not responded to the letters issued to them on dated 28.09.2020 & 20.09.2021 by the department.

2.1 Subsequently, the appellant was issued Show Cause Notice No. III/SCN/AC/156/MUSTUFA KEZARBHAI PATEL/21-22 dated 20.10.2021 demanding Service Tax amounting to Rs. 3,75,332/- for the period FY 2016-7 under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; imposition of Late Fee under Rule 7C of the S.tax Rules, 1994 read with the section 70 of the Finance Act, 1994 for ST-3 returns late/not filed and imposition of penalties under Section 77(1), 77(2) and Section 78 of the Finance Act, 1994. However, the appellant had not responded to the department.

2.2 The Show Cause Notice was adjudicated, ex-parte, vide the impugned order by the adjudicating authority wherein the demand of Service Tax amounting to Rs. 3,75,332/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period from FY 2016-17. Further (i) Penalty of Rs. 3,75,332/- was also imposed on the appellant under Section 78 of the Finance Act, 1994; (ii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(1) of the Finance Act, 1994; and (iii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(2) of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the following grounds:



- The appellant is an individual/proprietor, engaged in the business of trading of sand. They are having income from sale of sand which is taken from lake area by tractor. The appellant submitted that they have replied the department letters vide their mail dated 21.10.2021 along with attachments and clarified that the service provided is not exceeds 10 Lacs and does not attracts service tax as per Notification 30/2012-ST, dated 20.06.2012 but department didn't considered their submission.
- Further, they submitted that during the filing ITR for F.Y. 2016-17, they wrongly mentioned the "Sale of service" as source of the income but they are engaged in trading of sand. In supporting of their submission they have furnished the Form-26AS for F.Y. 2016-17 in which no TDS amount is deducted. They have also submitted bank statements for the concerned period, Ledgers, Registration Certificate of the Tractor. Further, they have also submitted that in the preceding F.Y. 2015-16, their total turnover was only 6,15,200/-.
- The appellant denies all the demand confirmed vide impugned OIO and submitted that the OIO is against the facts, equity and law and the same may be quashed and set-aside.

4. Personal hearing in the case was held on 12.10.2023. Shri Hardik Patel, Chartered Accountant, appeared on behalf of the appellant for personal hearing and reiterated the submission made in the appeal. He requested to allow their appeal and set aside the impugned order.

5. On going through the appeal memorandum, it is noticed that the impugned order was issued on 13.01.2023 and received by the appellant on 16.01.2023. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum, during the course of personal hearing and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of service tax against the appellant along with interest and penalty, in the facts and circumstance of the case, is legal and proper or otherwise. The demand pertains to the period FY 2016-17.

6. I find that in the SCN in question, the demand has been raised for the period FY 2016-17 based on the Income Tax Returns filed by the appellant. Except for the value of "Sales of Services" provided by the Income Tax Department, no other reason or justification is seen from the SCN for raising the demand against the appellant. As the appellant has shown their income from "Sales of Services", and in their further submission they submitted that during the filing ITR for F.Y. 2016-17, they wrongly mentioned the "Sale of service" as source of the income but they are engaged in trading of sand. In supporting of their submission they have furnished the sample Bills/vouchers of supplying sand to its various customers and bank statements.



7. In the present case, I find that letters were issued to the appellant seeking details and documents, which were submitted by them via mail dated 21.10.2021. However, without any further inquiry or investigation, the SCN has been issued only on the basis of details received from the Income Tax department. This, in my considered view, is not a valid ground for raising of demand of service tax.

8. It is observed that the main contentions of the appellant in the appeal memorandum is that they were engaged in the trading of sand by tractor which is taken from lake area. From their submission and supporting documents, it appears that they procure the sand from possible sources and deliver to their client and get payment against the same. While going through the documents/vouchers, it is seen that the appellant own the tractor and supplying sand to its various clients on the basis of verbal orders. From the above it appears that the income received by the appellant is from such sales of sand/trading activity. For the confirmation of the same the appellant has submitted the copies of sample sales vouchers/bills of sand supply to its various clients/customers. In favour their submission, the appellant has also submitted the copies 26AS from for F.Y 2016-17 in which it can be seen that no TDS has been deducted. Further, it is also verified from the P& L for F.Y 2016-17 that the appellant have income only from sales Ac. It appears that they are engaged in sale of sand /trading activity and not in the service providing. Being trader, the appellant has not taken service tax registration. Trading goods is the activity of buying, selling, or exchanging goods or services between people, firms, or countries. It can also mean the sale of goods by way of business to buyers, traders, or processors and the same is exempted from the service tax as per the Clause (e) of the Section 66D of Finance Act, 1994 specifies the Negative list of services i.e. the Services on which Service Tax is not applicable. Section 66D is been inserted in Finance Act, 1994 by Finance Act, 2012 and been notified to be effective from 1st July 2012 vide Notification No. 19/2012-ST dated 5 June 2012. Relevant portion of the above is re-produced as under:

66D. Negative list of services. - The negative list shall comprise of the following services, namely: -

- (a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere -
- (b).....,
- (c).....,
- (d).....,
- (e) trading of goods;

So once the activity falls within the meaning of any service provided in service tax negative list, the activity is out of service tax applicability. As they are engaged in sale/purchase i.e. trading activity, As per negative list [section 66D(e)] of Finance Act, 1994, service tax is not applicable.

The total turnover for the FY 2015-16 is as under:



Sr. No.	Particulars	Amount (in Rs.)	Remarks
1	Sale of sand shown as "Sale of Services	25,02,217/-	Exempted as per negative list [section 66D(e)] of Finance Act,1994

From the submission, it appears that The value is earned from Sales of sand i.e. Rs. 25,02,217/- during the subject period and while filing the Income Tax return it was wrongly shown by the filer of the appellant as Sale of Services.

10. The appellant were not having any other income other than the discussed above. In support of the same they have submitted Income Tax Returns for the FY 2015-16; Form 26AS for FY 2016-17; Profit & Loss Account for the FY 2016-17; RC of the Tractor, Account statements & copy of sample invoices issued by the appellant during the FY 2015-16.

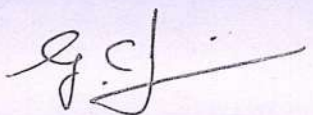
11. On scrutiny of the documents viz. Profit & Loss Account , bank statement, Vouchers/ invoices issued by the appellant during the FY 2016-17; I find that the appellant engaged in trading activity i.e. sale of sand, Therefore, the activity carried out by the appellant was exempted from service tax as per negative list [section 66D(e)] of Finance Act,1994 and the appellant not required to pay any service tax on the income of Rs. 25,02,217/- received by them during the FY 2016-17 from the sale of sand.

12. In view of the above discussion, I am of the considered view that the activity carried out by the appellant not liable to pay Service Tax during the FY 2016-17. Since the demand of Service Tax is not sustainable on merits, there does not arise any question of charging interest or imposing penalties in the case.

13. In view of above, I hold that the impugned order passed by the adjudicating authority confirming demand of Service Tax, in respect of "sales of sand" income received by the appellant during the FY 2016-17, is not legal and proper and deserve to be set aside. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

14. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

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

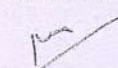


(ज्ञानचंद जैन)

आयुक्त (अपील्स)

Date :30.10.2023

Attested



Manish Kumar



Superintendent(Appeals),
CGST, Ahmedabad

By RPAD / SPEED POST

To,
M/s. Milanbhai Narsinhbhai Parmar,
Sadashivnagar Society, Nr. Shak Market,
Ranip Road, Ranip, Ahmedabad - 382480

Appellant

The Assistant Commissioner,
CGST, Division-VII,
Ahmedabad North

Respondent

Copy to :

- 1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
- 2) The Commissioner, CGST, Ahmedabad North
- 3) The Deputy Commissioner, CGST, Division III Ahmedabad North
- 4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North
(for uploading the OIA)
- 5) Guard File
- 6) PA file

