आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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सत्यमेव जयते

By SPEED POST

DIN:- 20240364SW00004934C8

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/5241/2023 [illegible]
(ख)	अपील आदेश संख्याऔर दिनांक / Order-In –Appeal and date	AHM-EXCUS-002-APP-271/23-24 and 13.03.2024
(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	19.03.2024
(ङ)	Arising out of Order-In-Original No. 35/AC/Demand/2023-24 dated 10.5.2023 passed by The Assistant Commissioner, CGST Division-I, Ahmedabad North	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	Nirav Rameshbhai Patel 43, Shukan Bunglow, Behind Parshwanath Township, New Naroda, Ahmedabad-382346

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 पूवोक्त 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 मे 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 मामलें 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 डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या वाद 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 दिनाँक 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 रूपये या उससे कम होतो रूपये 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 अपीलः-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गतः-
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 2ndfloor, 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-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.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. Registar 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 ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

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 संषोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू 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 ओर 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 in 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 अपीलो 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 राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंवित अपील' में पहले पूर्व जमा की तुलना मेंए अपील' दाखिल करने के लिए पूर्व शर्त वना 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. Shri Nirav Rameshbhai Patel,43,Shukan Bunglow, behind Parshwanath Township, New Naroda, Ahmedabad- 382346 (hereinafter referred to as "the appellant") against Order-in-Original No. 35/AC/Demand/2023-24 dated 10.05.2023 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division I, 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. ATOPP7934R. 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. 53,70,300/- during the FY 2016-17, which was reflected under the heads "sales of services (Value from ITR)"filed with Income Tax department.

F.Y.	Gross Receipt from sales of services (as per ITR)	Service tax not/ Short paid
2016-17	53,70,300/-	8,05,545/-

Accordingly, it appeared that the appellant had earned the said substantial income by way of providing taxable services but had neither obtained Service Tax registration nor paid the applicable service tax thereon. The appellant were called upon to submit copies of required documents for assessment for the said period. However, the appellant had not responded to the letters issued by the department.

2.1 Subsequently, the appellant were issued Show Cause Notice No. Div-I/AR-IV/TPD-UNREG/16-17/Nirav Rameshbhai patel dated 06.04.2022 demanding Service Tax amounting to Rs. 8,05,545/- for the period FY 2015-16, 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; and imposition of late fee/penalties under Section 70, Section 77 and Section 78 of the Finance Act, 1994. Further, the recovery of service tax not paid during the F.Y. 2017-19(upto june-2017) was also proposed.

2.2 The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority wherein the demand of total Service Tax amounting to Rs. 9,16,700/- 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 FY 2016-17 & 2017-18(Upto June-2017). Further (i) Penalty of Rs. 9,16,700/- was 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)(a) of the Finance Act, 1994 ; (iii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(1)(c) of the Finance Act, 1994 and (iv) Late fee/penalty of Rs. 60,000/- was

imposed on the appellant under Section 70 of the Finance Act, 1994 read with Rule 7 of service tax Rules,1994.

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

- The appellant was engaged in export of service as marketer to various foreign clients during the F.Y. 2016-17.The recipient of service were out side of India. They have provided Export Services i.e. publishing online product display on affiliated network (online plateform) like Brand reward and Awin Ltd. they worked as digital influencer or digital content provider and get marketing fee for these support services provided to main advertiser for expanding/promotion of goods.
- They stated that the activity performed by them during the subject period is out of the taxable territory as the location of the recipient is abroad. They own their own portal. They publish the goods of main advertiser on their portal. When a person moves on the Brand portal through their portal, they become eligible to get the marketing fee for above publishing service provided to the main advertiser. They have received Payment in Foreign currency.
- The appellant submitted that in a Invoice No 01/Exp/2016-17 dated 07.04.2016, the description of service is shown as "Repair and maintenance of Computer and software". They have received amount Rs.21,716/-(235.13 GBP) as service charge for providing support services but the service recipient has shown the service in FIRC as "Repair and maintenance of Computer and software" and they prepared invoice on the basis of the same. They have prepared the invoice only for their own record purpose.
- The appellant stated that they have fulfilled all the conditions of the Rule 6A of Service Tax Rules,1994 as the service provider is located in taxable territory, recipient is located out of taxable territory, they payment is received in convertible foreign exchange, service provider and recipient are not merely establishment of a distinct person. Being place of provision of service out of India, they are not liable to pay service tax. Purpose of remittance is shown as "Data Processing Consulting" in majority of their payment receipts and "Repair and maintenance of Computer and software" is shown only a few cases but the adjudicating authority ignored the facts and confirmed the demand which is unfair.
- The appellant submitted the service tax demand can't be raised only on the basis of difference of figures in ST-3 returns and Form 26AS. They made reference of the judgement of Hon'ble Tribunal in case of Kush Construction Vs. CGST NACIN, ZTI, Kanpur[2019(24) GSTL 606(Tri. All.)]
  a) The appellant submitted that they have not received any letter/mail from the department. The adjudicating authority wrongly confirmed the demand of service tax @15% on the receipt during the period from 01.04.2016 to 31.05.2016 where the

service tax rate was 14.5%. The adjudicating authority also not given the duty cum benefit while confirming the demand as they have not recovered the service tax amount separately. They have nothing suppressed from the department and the extended period can't be invoked in their case. The entire demand is time barred. They requested to allow their appeal.

4. Personal hearing in the case was held on 06.03.2024. Shri Nilesh Suchak, Chartered Accountant, appeared on behalf of the appellant for personal hearing. He reiterated the contents of the written submission and also conveyed that they have furnished additional submission through mail. He requested to allow their appeal.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum 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. It is observed that the main contention of the appellant is that all the services provided by them are not taxable being export of the service. From the submission it is observed that during 2016-17, the appellant has received amount Rs. 29,10,613.55/-(43545 USD) in CITI Bank as convertible foreign exchange against the service provided namely "Data Processing Consulting". They have furnished "certificate of inward remittance from Citibank" & Account Statement & Transaction history. From the above it appears that the appellant has provided the above service to it's overseas clients who are situated outside India i.e. taxable territory and payment for such services has been received in convertible foreign exchange. The same may be termed as export of service as per Rule 6A of the Service Tax Rules, 1994 which is reproduced as under:

Rule 6A Export of Services. –

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when, -

(a) The provider of service is located in the taxable territory,

(b) The recipient of the service is located outside India,

(c) The service is not a service specified in the section 66D of the Act,

(d) The place of provision of the service is outside India,

(e) The payment for such services has been received by the provider of service in convertible foreign exchange, and

(f) The provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act.

6.2 Further, vide Notification No. 28/2012 dated 20.06.2012, place of provision of service tax Rules, 2012 were introduced. As per rule 3 of the above rules provides that place of provision of a service shall be the location of the recipient of service, Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service. In the instant case the location of the service recipient is abroad i.e. out of taxable territory.

Rule 3 of place of Provision of Service Rules 2012 is reproduced herein under,

3. Place of provision generally.- The place of provision of a service shall be the location of the recipient of service, Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

In view of the above discussion, I find that the appellant has earned the income of Rs. 29,10,613.55/-(43545 USD) from providing the services to its overseas clients which is required to be considered as export of service.

6.3 Further the appellant has also furnished a copy of Invoice No 01/Exp/2016-17 dated 07.04.2016, wherein the description of service is shown as "Repair and maintenance of Computer and software" which has not been considered as export of service by the adjudicating authority. In contention of the same the appellant has submitted that the service recipient has mentioned the same in FIRC and they have prepared invoice on the basis of the FIRC for their own record purpose. In actual they have provided business support services and received amount Rs.21,716/-(235.13 GBP) as foreign convertible exchange service. It is not in dispute that the service provider is located in India i.e. taxable territory, recipient is out of taxable territory and the payment is received in foreign convertible exchange. Regarding place of provision of the service, generally the location of the recipient is the place of the provision of service. However it appears that adjudicating authority is thinking that as the nomenclature in FIRC is "repair and maintenance of computer and software", It might be that the computers were brought to India and service was rendered in India and computers were again sent to the foreign location. Even in that case, the place of provision of service will be outside India as per the proviso to Rule 4 of place of provision of service Rules,2012. For reference the Rule 4 is reproduced as under:

4. Place of provision of performance based services.-

The place of provision of following services shall be the location where the services are actually performed, namely:-

services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:

Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:

Provided further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair.

Repair and maintenance of software can be from remote location. Even considering the hypothetical scenario that the goods(in this case computers) are imported temporarily and after repair are retuned back, in that case also Rule 4 will not be applicable. While there is nothing on record to show that computers were actually brought into India for repair. Hence considering the Rule 3& Rule 4 of the POPS Rules and considering both the services i.e. online marketing for merchants on website service and repair and maintenance of computer and software, the place of provision of service is still outside India. Hence the appellant fulfills all the conditions prescribed in Rule 6A of Service Tax Rules,1994 with respect to export of service.

6.4 Further, the appellant has also furnished the CA certificate dated 14.06.2023 bearing UDIN 23155294BGXEOU6439 contents of which are as under:

"We have verified books of accounts and records of Nirav Rameshbhai Patel (PAN: ATOPP7934R) for the period from 01-04-2016 to 30-06-2017. On the basis of this verification, we certify as under:

1. Export Service Income of Nirav Rameshbhai Patel for the year 2016-17 is Rs. 5370300/- and the same is Rs. 741034/-for the period from 01-04-2017 to 30-06-2017 and all payments in respect of the said income is received in freely convertible foreign exchange.

2. All export service income from 01-04-2016 to 30-06-2017 are in respect of fee as Marketer and all recipients of these online marketing for merchants and/or online advertisement on website services provided by Nirav Rameshbhai Patel are located outside India. According to the explanations given to us, we state that the place of provision of these services is outside India.

3. Nirav Rameshbhai Patel has not charged or recovered any service tax on its export service income as no service tax is leviable under Section 66B of the Finance Act, 1994 on services provided outside the taxable territory.

4. Nirav Rameshbhai Patel has not availed any CENVAT credit during 1-4-2016 to 30-06-2017 and was not holding any service tax registration during this period as he was not liable to pay any service tax."

7. In view of the above, I am of the considered view that the appellant is not liable to pay service tax. As the service tax is not applicable, the question of interest and penalty does not arise.

8. In view of above, the impugned order is set aside and the appeal is allowed.

9. 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.

18.07.24

(ज्ञानचंद जैन)

आयुक्त (अपील्स)

Attested

Date :

Manish Kumar
Superintendent(Appeals),
CGST, Ahmedabad

By RPAD / SPEED POST

To,
M/s. Shri Nirav Rameshbhai Patel,
43,Shukan Bunglow,
behind Parshwanath Township,
New Naroda, Ahmedabad- 382346.

Appellant

Respondent

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

Copy to :

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