



Office of The Commissioner GST and CX.(Appeals-III), Mumbai

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F.No./फा.सं. CGST/AIII/MUM/137/2019-20
Mumbai, dated /मुंबई, दिनांक .08.2020

ORDER-IN-APPEAL NO. :NA/GST/A-III/MUM/84/2020-21 Dated: .08.2020

पारित करने की दिनांक / Date of Passing : 25.08.2020

जारी करने की दिनांक Date of Issue : 08.2020

जारीकर्ता श्री. नसीम अरशी	आयुक्त (अपील)-III, मुंबई	Passed by Shri Nasim Arshi	COMMISSIONER (APPEALS)-III, GST & CX, MUMBAI
मूल आदेश संख्या/ORDER-IN-ORIGINAL.NO.: -CGST/MUM(W)/R-107/2019-20 dated 06.12.2019			
जारीकर्ता/PASSED BY:- Deputy Commissioner (Refund), CGST & CX, Mumbai West			
अपीलार्थी कानामवपता: Name & Address of the Appellant:- Mr. Haresh V Kagrana (HUF) 304, Shalaka, Near Mayur Hotel, Juhu Road, Santacruz (W), Mumbai- 400 054		प्रत्यर्थी कानामवपता: Name & Address of the Respondent:- Deputy Commissioner (Refund) CX, Mumbai West	



इस अपीलीय आदेश से व्यथित कोई भी व्यक्ति मामले के अनुसार निम्नलिखित प्राधिकारी के समक्ष अपील कर सकता है :-

Any person aggrieved by this Order-In-Appeal may file appeal application to the authority as the case may be:

(I)(i) केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35E के तहत निम्नलिखित के सम्बन्ध में अपरसिचव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, 8th मंजिल विश्व व्यापार केंद्र, कफ परेड, मुंबई 400 005 के समक्ष अपील स्वीकार्य हो

(I)(i) Under Section 35EE of the Central Excise Act, 1944, an appeal lies to the Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, 8th floor, World Trade Centre, Cuffe Parade, Mumbai - 400 005, in respect of the following:-

(क) ऐसे मामले जहाँ कि सी फेक्टरी से वेर हाउस या दूसरी फेक्टरी या एक वेर हाउस से दूसरे में माल ले जाते अथवा ले जाते समय माल की क्षति हुई हो अथवा वेर हाउस में या स्टोर में माल प्रसंस्करण के दौरान क्षति हुई हो (a) A case of 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 or during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse;

(ख) देश अथवा क्षेत्र के बाहर निर्यातित माल पर उत्पाद शुल्क में छूट अथवा ऐसे उत्पाद शुल्क में छूट जिनका उपयोग किसी अन्य देश अथवा क्षेत्र में भेजे जाने वाले माल के निर्माण में किया जाता हो (b) A Rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any Country or territory outside India;

(ग) शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल और भूटान) निर्यात किए गए माल पर (c) Goods exported outside India (export to Nepal or Bhutan) without payment of duty.

(घ) निर्मित माल पर उत्पाद शुल्क चुकाने हेतु उत्पाद शुल्क क्रेडिट का उपभोग इस अधिनियम और इसके तहत बनाए गए नियम से संबंधित तथा आयुक्त अपील (द्वारा सयाउसके बाद की तारीख जैसा वित्त अधिनियम) न. 2, 1998 के धारा 109 के तहत निर्दिष्ट है, आदेश पारित की गयी हो। (d) Credit of any duty allowed to be utilized towards payment of excise duty on final product 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 Section 109 of Finance (No. 2) Act, 1998.

(ङ) वित्त अधिनियम 1998 के धारा (1) 86 के प्रोविजो के तहत सर्विस टैक्स में छूट सम्बन्धित मामले (e) matter involving rebate of Service Tax under proviso to Section 86(1) of Finance Act, 1994.

(ii). केन्द्रीय उत्पाद शुल्क अधिनियम 1984 के धारा 35E के तहत (3) के अनुसार आवेदन इस हेतु निर्धारित नियमों अनुरूप तथा (i) बाकी मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1984 के धारा 35B / वित्त अधिनियम 1998 के अध्याय V के धारा 86 के तहत अपील निम्नलिखित के समक्ष विवादित शुल्क टैक्स और पेनाल्टी का टैक्स या शुल्क/10% अथवा पेनाल्टी का 10% जहाँ सिर्फ पेनाल्टी विवादित होके भुगतान पश्चात् स्वीकार्य है। सीमा शुल्क, केन्द्रीय उत्पाद शुल्क तथा सेवाकर, अपीलीय प्राधिकरण [पश्चिम क्षेत्रीय बेंच (WZB)], जयसेंटर, लवीमंजिल

34, पीडीमेल्लो रोड, पूना स्ट्रीट, मस्जिद बंदर (पूर्व), मुंबई 400009-II (i) In all other cases, appeal under Section 35B of Central Excise Act, 1944 / Under Section 86 of Chapter V of the Finance Act, 1994, appeal lies to The Customs, Excise & Service Tax Appellate Tribunal, [West Zonal Bench (WZB)], Jai Centre, 4th floor, 34, P. D'Mello Road, Poona Street, Masjid Bunder (E), Mumbai-400009, on payment of 10% of the

तरीकेसे प्रस्तुत किये जाना चाहिए तथा स्थापित किया जाना चाहिए तथा उसके साथ -/200 या -/1000 के चालानटी आर 6- संलग्न किया जाना चाहिए।

(ii) The application shall be made in such form and verified in such manner as may be specified by Rules made in this behalf and should be accompanied by a fee as below or as prescribed by the appropriate authority:- Two hundred rupees, where the amount of duty/tax and interest demanded, fine or penalty levied by any Central Excise officer in the case to which the application relates is one lakh rupees or less; (a) One thousand rupees, where the amount of duty/tax and interest demanded, fine or penalty levied by any Central Excise officer in the case to which the application relates is more than one lakh rupees or less; In terms of Sub-Section (3) of Section 35EE of the Central Excise Act, 1944 and should be accompanied by a copy of TR-6 challan evidencing payment of fee as mentioned above under major heads of accounts.

II (i) बाकी मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम 1984 के धारा 5(बी) वित्त अधिनियम 1998 के अध्याय V के धारा 6 के तहत अपील निम्नलिखित के समक्ष विवादित शुल्क/टैक्स या शुल्क/टैक्स और पेनाल्टी का 10% अथवा पेनाल्टी का 10% जहाँ सिर्फ पेनाल्टी विवादित होके भुगतान पश्चात्, स्वीकार्य है। सीमा शुल्क, केन्द्रीय उत्पाद शुल्क तथा सेवा कर, वीमंजल (WZB), जयसेंटर, 4

34, पीडीमेल्लो रोड, पूना स्ट्रीट, मस्जिद बंदर) पूर्व, (मुंबई-400009) III (i) In all other cases, appeal under Section 35B of Central Excise Act, 1944 / Under Section 86 of Chapter V of the Finance Act, 1994, appeal lies to The Customs, Excise & Service Tax Appellate Tribunal, [West Zonal Bench (WZB)], Jai Centre, 4th floor, 34, P. D'Mello Road, Poona Street, Masjid Bunder (E), Mumbai-400009, on payment of 10% of the duty/tax demanded where duty/tax or duty/tax and penalty are in dispute, or penalty, penalty alone is in dispute, in terms of Section 35F of Central Excise Act, 1944.

(ii) केन्द्रीय उत्पाद शुल्क अधिनियम 1984 के धारा 5(6) वित्त अधिनियम 1998 के अध्याय 6 के धारा 6 के तहत अपील प्रथम प्राधिकरण के समक्ष कि जाने वाली अपील के साथ ट्रीब्यूनल बेंच के सहायक रजिस्ट्रार के नाम आहरित निम्नलिखित राशि की फीस का आभेयित बैंक ड्राफ्ट संलग्न होना चाहिये।

(ii) In terms of Section 35B(6) of Central Excise Act, 1944 / Section 86(6) of Chapter V of the Finance Act, 1994, an appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of duty/service tax and interest or levy of penalty in relation to which the appeal is made, be accompanied by a FEE in the form of crossed Bank Draft in favour of Assistant Registrar of the Tribunal. The FEE payable is mentioned below:-

(क) जिन मामलों में शुल्क/टैक्स तथा उस पर मांग किया गया एवं उस पर लगाये गए अर्धदंड की राशि पांच लाख रुपये अथवा उससे कम होवहाँ 1000 (एक हजार) रुपये का बैंक ड्राफ्ट।

(a) Where the amount of duty/tax and interest demanded and penalty levied by an Central Excise Officer in the case of which the appeal relates is five lakh rupees or less, one thousand rupees,

(b) जिन मामलों में शुल्क/टैक्स तथा उस पर मांग किया गया एवं उस पर लगाये गए अर्धदंड की राशि पांच लाख रुपये से ऊपर लेकिन पांच लाख रुपये से ज्यादा न होऐसे मामलों में, 25000 (दस हजार) रुपये का बैंक ड्राफ्ट, और ;

(b) Where the amount of duty/tax and interest demanded and penalty levied by any Central Excise Officer in the case of which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees.

(ग) जिन मामलों में शुल्क/टैक्स तथा उस पर मांग किया गया एवं उस पर लगाये गए अर्धदंड की राशि पांच लाख रुपये अथवा उससे अधिक होवहाँ 10000 (दस हजार) रुपये का बैंक ड्राफ्ट।

(c) Where the amount of duty/tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees;

(iv) ट्रीब्यूनल के समक्ष स्थान हेतु अथवा ट्रिब्यूनल के संसोधन हेतु अथवा अन्य किसी उद्देश्य हेतु अथवा अपील या आवेदन को वापस मान्य किए जाने हेतु किये गए प्रत्येक आवेदन के साथ शुल्क के रूप में पांच सौ रुपये का बैंक ड्राफ्ट संलग्न किया जाना चाहिए। (iv)

Every application made before the Appellate Tribunal in an appeal for grant of stay or for rectification of Mistake or for any other purpose or for restoration of an appeal or an application shall be accompanied by a fee of five hundred rupees.

(v) यदि इस आदेश के अंदर ऐसे कई मूल आदेश आजाते हैं तो यह अपील शुल्क राशि उक्त तरीके से ही बैंक ड्राफ्ट में ही भूरातान की जाय ताकि अनावश्यक िलखा पढ़ी न करनी पड़े (v) If this order covers a number of Orders-In-Original, fee of ₹. 200/- / ₹1000/- / ₹5000/- / ₹10000/- for such Order-in-Original should be paid in the aforesaid manner notwithstanding the fact that the appeal to the Appellate Tribunal or any application to the Central Government, as the case may be, filed.

2. (I) क्रमांक (1) के मामले में आवेदन पत्र दो प्रतियों में केन्द्र सरकार को दाखिल किया जाय तथा उसके साथ आदेश की दो प्रतियां तथा मूल आदेश, जिसके खिलाफ यह आवेदन दाखिल किया जा रहा है, की दो प्रतियां, संलग्न की जाय 2. (I) In case of Para No. 1 (i), an application to Central Government should be in duplicate and be accompanied by two copies of the Order and two copies of Order-in-Original which has given rise to the order. One copy of each application, the order appealed against and the order of the Adjudicating authority shall bear an item 6 of the Court Fee Act, 1870, as amended.

2. (II) इस आदेश से व्यथित कोई भी व्यक्ति आदेश प्राप्त होने के तारीख से 3 महीने के अंदर संबंधित प्राधिकारी को संबोधित अपील उपरोक्त (1) एवं (11) के अनुसार निर्धारित प्रपत्र में कर सकता है 2. (II) In case of Para No.1 (ii) the appeal to the Appellate Tribunal should be accompanied by four copies (One copy of which at least shall be certified copy). 2. (III) इस आदेश से व्यथित कोई भी व्यक्ति इस आदेश के चित किए जाने की तारीख से तीन महीने के अंदर आदेश के पैरा (1) और पैरा (11) में यथा उल्लिखित प्राधिकारी के समक्ष निर्धारित फार्म में अपील कर सकता है 2. (III) Any person aggrieved of this order may file an appeal in prescribed form to the authority as mentioned in Para I (i) and I (ii) within 3 months from the date of communication of this order and be addressed to the authority as the case may be.

3. आपका ध्यान केन्द्रीय उत्पाद शुल्क (1) संशोधित नियम 1984 के धारा 5(6) सीमा शुल्क, उत्पाद शुल्क एवं स्वर्ण नियंत्रण अपील प्रथम प्राधिकरण (प्रक्रिया) में निहित मामलों से संबंधित नियमों की और भी आकर्षित किया जाता है 3. Attention is also invited to Rules governing these and other related matters contained in Central Excise (Appeals) Rules, 2001 and the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.



ORDER-IN-APPEAL NO. : NA/GST/A-III/MUM/84/2020-21 Dated: 25.08.2020

The subject Service Tax appeal has been filed by Mr. Haresh V Kagrana (HUF) having address at 304,Shalaka, Near Mayur Hotel, Juhu Road, Santacruz (W), Mumbai- 400 054 (hereinafter referred to as the Appellant). The Appellant, who is a non assessee and not holding Service Tax Registration, has filed appeal against the Order-In-Original No. CGST/MUM(W)/R-107/2019-20 dated 06.12.2019 passed by the Deputy Commissioner (Refund), CGST& CX, Mumbai West (hereinafter referred to as the Respondent/ Adjudicating Authority or AA).

2. The facts of the case in brief are that the appellant had booked a residential flat in a project of M/s. Bharat Infrastructure & Engineering Pvt. Ltd.(ST Registration No.AABCB3630PST001) for the total agreement value of Rs. 52,58,245/- on 28.12.2015. M/s. Bharat Infrastructure & Engineering Pvt. Ltd., issued invoice No. BIEPL/ECO/ST/1002/2015-16 dated 29.12.2015 and BIEPL/ECO/ST/1007/2015-2016 dtd.01.01.2016 to Mr. Haresh V Kagrana (HUF) on receipt of Rs.25,00,000/- and Rs.27,50,000/- on 24.12.2015 from the appellant for service tax (including SBC) amounting to Rs.90,625/- and Rs.99,688/- respectively. The appellant cancelled the said flat, however, M/s. Bharat Infrastructure & Engineering Pvt. Ltd.have not refunded service tax amount to the Appellant. Therefore, the appellant claimed refund of the service tax of Rs. 1,90,313/- under the provisions of Section 11B of the Central Excise Act, 1944 (CEA) as applicable to Service Tax under Section 83 of the Finance Act, 1994.

3. The Adjudicating Authority (AA) vide the impugned Order-In-Original No.CGST/MUM(W)/R-107/2019-20 dated 06.12.2019 found that once a consideration has been received prior to receipt of the completion certificate, the entire value of construction become taxable and mere cancellation of booking of flat does not mean that there was no service. He further found that flat was booked by the Appellant on 28.12.2015 and booking was cancelled on 19.02.2019. The refund claim has been filed on 19.08.2019 that is after the expiry of one year from the date of agreement /intent or the date of payment of service tax, the same was hit by limitation of time under Section 11B of CEA and therefore liable for rejection. Accordingly vide the impugned Order-in-Original, AA rejected the refund claim.

4. Aggrieved by the impugned order, the appellant has filed the instant appeal on the following grounds:

- i. Cancellation of flats in case of construction activity starting at a later date will be treated as non-provision of service.
- ii. Section 142(5) of CGST Act, 2017 is identical to Rule 6(3) of Service Tax Rules, 1994 and the refund cannot be rejected on the ground no time limit was prescribed under the service tax laws for return of tax on services not provided under the provisions of Rule 6(3) of Service Tax Rules, 1994.
- iii. Without prejudice to the above, the time limit under Section 11B is required to be computed from the date of cause of action and not from the date of payment.
- iv. Doctrine of unjust enrichment is not applicable in the present case.



4.1. The appellant relied on the following case laws:

- i. Mercedes Benz (I) Pvt. Ltd., 2018 (11) G.S.T.L.389 (Tri.Mumbai)
- ii. Torque Pharmaceuticals Pvt. Ltd. 2014 (33) S.T.R. 331 (Tri. Del.)
- iii. Sunrays Engineers Pvt. Ltd. 2015 (318)E.L.T.583 (S.C.)
- iv. M/s.Akash The Place To Celebrate 2013(31) S.T.R. 251 (Tri. Ahmd.)
- v. M/s. Central Mine Planning and Design Institute Ltd. 2014(36) S.T.R.328 (Tri. Del.)

5. Various opportunities of Personal hearing were granted viz on 25.02.2020,11.03.2020,23.03.2020, 17.06.2020, 15.07.2020 and 05.08.2020. Personal hearing was held on 05.08.2020 which was attended by Mr. Haresh V Kagrana, the appellant. He reiterated the grounds of appeal. Appellant stated that he had booked a flat with the builder in December,2015 and had paid service tax amount to the builder who in turn had paid the Service Tax to the Govt. Exchequer. The booking got cancelled in Feb.,2019 by which time GST regime had been ushered in and the builder could not get adjustment under Rule 6(3) of Service Tax Rules, 1994. Hence the refund claim. Time upto 20.08.2020 was granted to enable the appellants to furnish documentary evidence of non-claim of refund claim by the builder. He furnished additional submission and a paper book. P.H was concluded.

6. Vide letter dated 10.08.2020 appellants furnished two documents viz (i) Indemnity/ Declaration from the builder, M/s. Bharat Infrastructure & Engineering P Ltd in original (ii) CA Certificate in Original. Vide the indemnity bond dated 06.08.2020, M/s Bharat Infrastructure furnished details of Service Tax paid to the Department on the transaction. The also stated that as pointed out vide their letter dated 19.02.2019, they have not refunded the Service Tax of Rs. 1,90,313/- to the Shri Haresh V Kagrana. They also declared that they have not filed any refund claim for the said amount of Rs. 1,90,313/- with the Department and undertook that they would not be filing a refund claim of the said amount in future.

7. I have gone through the case records, grounds of appeal, oral and written submission made by the appellant. The issue under consideration is refund of service tax paid on account of cancellation of booking of flat. The appellant had booked a flat in the project of M/s. Bharat Infrastructure & Engineering Pvt. Ltd. costing Rs.52,58,245/- from M/s. Bharat Infrastructure & Engineering Pvt. Ltd. and at the time of booking the flat had paid an amount of Rs.52,50,000/- vide cheque, which included service tax of Rs.1,90,313/-. The booking was later cancelled by the appellant on 19.02.2019. On cancellation, M/s. Bharat Infrastructure & Engineering Pvt. Ltd. deducted an amount of Rs.1,90,313/- towards taxes and agreed to refund Rs.1,90,313/- to the appellant after the cancelled flat was re-sold and sale amount was received from the subsequent purchaser. Hence refund claim of Rs.1,90,313/- was filed.

8. The appellant has also submitted letter dated 19.02.2019 from M/s. Bharat Infrastructure & Engineering Pvt. Ltd. wherein the builders have confirmed that they had collected and paid service tax amounting to Rs.1,90,313/- to the Government on booking of their flat and that they had refunded the entire advance excluding the service tax component. In the additional submission made dtd. 10.08.2020 the appellant had submitted Indemnity / Declaration and CA certificate from builder. They further confirmed that the service tax paid by them corresponding to the cancelled contract has not been adjusted against any future Service Tax/GST liability in



accordance with Rule 6(3) of STR or any other manner. The same has also been certified by the Chartered Accountants Kagrana & Associates . The appellant further submitted a certificate from Kagrana & Associates, Chartered Accountants certifying that M/s. Bharat Infrastructure & Engineering Pvt Ltd., had collected and deposited the service tax on the flat booked by Mr. Haresh Kagrana amounting to Rs.1,90,313/- to the Government vide challan No.000014 dated 16.01.2016 and had also shown the same in the Service tax return filed for the period Oct.,2015 to March,2016.

9. The AA found that Service Tax was rightly collected by the builder which is not disputed. AA has noted that the service tax so collected and deposited had been paid against the self-assessed service tax liability by the builder and the assessment was not provisional. So the question of refund does not arise. Mere cancellation of booking of flat does not mean that there was no service. The service was already provided at the material time on which there is a levy of service tax. The consideration for construction of complex was received before issuance of completion certificate and so the activity was taxable. The statutory provision does not prescribe that the consideration must be received from the ultimate buyer. Once a consideration has been received prior to receipt of the completion certificate, the entire value of construction becomes taxable. Further he found that the appellant had booked that flat on 28.12.2015 and Service Tax was required to be paid by the Service provider in the subsequent month. The refund claim was filed on 19.08.2019 and therefore it was time barred in terms of Section 11B of CEA. He also noted that Section 142(5) of the CGST Act, 2017, is applicable only in the refund case admissible to taxpayers under the existing Central Excise and Service Tax law; however the claim is filed in GST regime. AA also noted that the Service Provider (builder) has availed Cenvat Credit on selling of the under construction flat and has not reversed the availed Cenvat credit on the cancelled flat. Relying on the judgement of Hon'ble Apex Court in the case of Sahakari Khand Udyog Mandal Ltd, Vs CCE [2005(181)ELT328(SC)], AA has concluded that the claim is also hit by the doctrine of unjust enrichment.

10. As regards AA's finding that refund does not accrue as the assessment was final and not provisional, I find that the argument is devoid of merit as law does not anywhere provide that refund can be claimed only in provisional assessment cases or refund cannot be claimed if assessment was final. Further, as regards the finding that despite cancellation of booking, service is deemed to be provided the same is also does not tenable. I find that in case of construction service, service tax is required to be paid on amount received from buyers towards booking of flat before the issue of completion certificate by the competent authority and this process goes on for years and the bookings can be cancelled by the buyers before taking possession of the flat. The same has occurred in this case. I find that no service has been provided to the appellant in this case as the consideration for service was returned and the service contract got terminated. Once it is clear that service is not provided, refund under Section 142(5) of the CGST Act, 2017 becomes admissible.

11. In this regard it would be pertinent to refer to the latest FAQ issued on Banking, Insurance and Stock Brokers Sector (Updated as on 27.12.2018) by CBIC, wherein vide question no. 71, it has been specifically clarified that any service paid on or before 30 June 2017 for the services to be provided but subsequently not provided shall be eligible to claim refund under Section 142(5) of CGST Act, 2017. The said FAQ reads as under:



71.	When service tax was paid on or before 30th June, 2017 for the services to be provided, but subsequently not provided, whether refund claim can be made under Section 142(5) of the CGST Act?	Section 142(5) of the CGST Act, 2017 specifically provides for refund of tax paid under the Finance Act, 1994 in respect of services not provided. The same shall be disposed of in accordance with the provisions of the Chapter V of the Finance Act, 1994.
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The FAQ recognises that all claims for non-provision of Service in respect of which adjustment/ credit would have been available under erstwhile Rule 6(3) of Service Tax Rules, 1994 would merit to be honoured under Section 142(5) of CGST Act, 2017 in the GST regime. The import of the 2nd sentence of the answer (*The same shall be disposed of in accordance with the provisions of the Chapter V of the Finance Act, 1994*) is that if an assessee is entitled to credit under erstwhile Rule 6(3) of STR, refund under Section 142(5) ibid shall be granted. Thus, appellants claim for refund under Section 142(5) ibid gets strengthened from CBIC's above



12. It is important that Section 142(5) provides that any amount eventually accruing shall be paid in cash. I further find that the clause *notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944* is extremely crucial. It free such claims from the fetters of limitation which is provided under sub-Section (1) of Section 11B. The only thing that is not overridden is the requirement of fulfilment of unjust enrichment clause as provided under sub-Section (2) of Section 11B.

13. I find that no service has been provided to the appellant in this case and therefore the provision of relevant date of one year and date of payment of payment as per Section 11B of CEA cannot be made applicable in the present case. The service tax paid by the appellant is in the nature of deposit and not service tax.

14. Notwithstanding the above, even if the payment is in the nature of service tax, the date of cancellation of flat will be considered as the relevant date for calculating the time limit of one year, as the event that led to the refund of taxes is the cancellation by the buyer. If the cancellation would not have happened, the refund claim would not have arisen at all. Reliance is placed on the following case laws:

(i) CCE, Pune Vs Ispat Profiles India Ltd. [2007 (220) E.L.T. 218 (Tri. – Mumbai)] wherein it was held that:

Refund - Limitation - Relevant date - Price reduction by customer due to quality reasons after clearance of goods from factory - Claim for refund of excess duty filed by assessee after reversal of excess credit of duty by customer - HELD : Date of reversal of credit by customer should be considered as date of payment

of duty giving rise to cause of action - Payment of duty by assessee did not give rise to any cause of action and that date was irrelevant - Impugned order holding refund as eligible, upheld - Section 11B of Central Excise Act, 1944. [para 5]

(ii) SS Agro Industries Vs C.Cus., Air Cargo (Export), New Delhi [2014 (309) E.L.T. 334 (Tri - Del.)] wherein it was held that:


Refund of bank guarantee - Limitation - Refund arising out of encashment of bank guarantee by Revenue on 21-3-2006 for non-fulfilment of export obligation, cancelled subsequently on 26-6-2010 on completion of said export obligations - HELD : Identical issue decided in case of Stalwart Electroplating Works [2010 (252) E.L.T. 380 (Tri.-Del.)] wherein held that encashment of bank guarantee cannot be treated as duty payment and as such, limitation provision will not apply - In instant case, assessee could claim refund of encashed bank guarantee only after fulfilment of export obligations and as such relevant date for refund of said amount, not being duty payment, shifted to date of cancellation of bank guarantee and claim filed on 19-7-2010 within a period of one year - Refund admissible - Impugned order set aside. [paras 4, 5]

15. I also find that the judgement of Hon'ble Apex Court in the case of Sahakari Khand Udyog Mandal Ltd, Vs CCE [2005(181)ELT328(SC)] relied upon by the Adjudicating Authority is not applicable to the instant case. Appellant is the customer who had booked the flat. It is on record that the component of Service Tax was recovered from him by the builder and paid to the exchequer. It is also on record that the builder has not refunded Service Tax to the appellant. It is therefore clear that appellant has borne the incidence of Service Tax whose refund is being claimed. It is crystal clear that the claim is not hit by the doctrine of unjust enrichment.

ORDER

16. In view of the above findings, I set aside the Order-in-Original No. CGST/MUM(W)/R-107/2019-20 dated 06.12.2019 passed by the Deputy Commissioner (Refund), CGST, Mumbai West and allow the appeal filed by the Appellant, Mr. Haresh V Kagrana (HUF), with consequential relief.




25-08-2020
(NASIM ARSHI)
COMMISSIONER (APPEALS-III)
GST & CX, MUMBAI

BY REGD AD/SPEED POST

F.No. CGST/A III/MUM/137/2019-20

Mumbai, dated 25 August, 2020

To

Mr. Haresh V Kagrana (HUF),
304, Shalaka Near Mayur Hotel,
Juhu Road, Santacruz (W),
Mumbai- 400 054.

Copy to:-

1. The Principal Chief Commissioner, GST & CX, Mumbai
2. The Commissioner, CGST & CX, Mumbai West
3. The Dy/Asst Commissioner,(Refund), GST & CX, Mumbai West.
4. The Dy/Asst Commissioner, Division V, GST & CX, Mumbai West.
5. Office copy
6. Guard file.

WTF - Massenfeier - Nach 40F