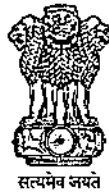


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**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India**
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F.NO. 196/05-06/WZ/2021 / 6496

Date of Issue: 16.11.2021

ORDER NO. 19/20²⁰21-ST (WZ) /ASRA/MUMBAI DATED 12/11/2021 OF
THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE
ACT, 1944.

Applicants : 1) M/s Kamallesh Aga & 2) Jainel Aga

Respondents: The Commissioner CGST & CX, Appeals-II, Mumbai

Subject : Revision Application filed, under Section 35EE of the Central
Excise Act, 1944 against the Orders-in-Appeal No.SM/191/
Appeals-II/ME/2020 dated 25-08-2020 passed by the
Commissioner CGST & CX, Appeals-II, Mumbai

ORDER

This two Revision Applications are filed by Shri Kamalesh Aga and Shri Jaineel Aga, 5303/5304, Crescent bay T5, Jerbai Wadia Road, Parel, Mumbai-12 (herein after as "the Applicant") against the Order-in-Appeal Nos. SM/191/ Appeals-II/ME/2020 dated 25-08-2020 passed by the Commissioner CGST & CX, Appeals-II, Mumbai.

2. The brief facts of the case are that the applicants are members of the same family and had booked two residential Flats viz. Flat no 1203, booked jointly by Naquiyah Gadiyali (WIFE), Jaineel Aga and Jyoti Aga and Flat no. 1204 booked jointly by Vipluv Aga, Stuti Aga (wife) and Kamalesh Aga under construction at Parel by M/s. Larsen & Toubro Ltd located at Powai, Mumbai-400072. The booking for both the flats were cancelled on 26th July, 2018 before the completion of the project. The builder i.e M/s. Larsen & Toubro Ltd, Parel Project, refunded the principal amount but did not refund the tax collected, instead passed on a letter acknowledging the non refund of taxes paid by them and promising to when refund is received from the government. M/s. Larsen & Toubro Ltd, Parel Project collected a letter of authority on 07/01/2019 on their behalf to submit to the competent authority. They were going to give a bulk application for refund.

3. M/s. Larsen & Toubro Ltd Parel Project, located at L & T Business Park, Tower-AG No 5, Saki Vihar Road, Powai Campus (L&T) Powai, Mumbai 400 072 (hereinafter refer to as the "Builder") holding Service Tax Registration No. AAFL4474FSD001 providing service under the category of "construction of residential Complexes, filed the refund claim in respect of 40 flat purchasers who cancelled agreement before completion of the project and sought refund of the amount paid by customers including the amount of service tax. The Builder filed refund claim on behalf of customers on 23.01.2019.

4. On perusal of the refund claim by the Adjudicating authority, certain discrepancies were noticed and same were communicated to the builder in the form of Deficiency Memo (DM). After following due process, the Adjudicating

Authority vide Order in Original No ME/REF/AC/KB/Div-VIII/35/2017-18 dated 31.03.2019 rejected the refund claim.

5. Aggrieved by the aforesaid Order, the builder filed appeal against the said Order. Commissioner Appeal's vide order No. SM/191/Appeals-II/ME/2020 dated 25.08.2020 rejected the appeal and held that builder is not entitled for refund as per the provisions of Section 11B(2) of the CEA,1944.

6. Aggrieved by the Commissioner Appeal's Order, the applicants who were the flat purchasers have filed the revision application on the following grounds:

- a) The Applicants have paid the Service tax and MVAT to the builder but have not been refunded the Tax component of the total amount paid at the time of booking when the booking was cancelled.
- b) As the service is considered "not provided" by service provider, when the booking of a flat is cancelled before the completion of construction, the service Tax is not payable and the amount paid is considered DEPOSIT and not SERVICE TAX.
- c) Without prejudice to other material facts of the case and statements made herein, they submitted that the same does not attract the limitation of time in case of application for repayment of deposit
- d) They referred to the Order in Appeal No.NA/GST/A-III/MUM/84/2020-21 dated 25/08/2020 passed by Commissioner (Appeals)-III GST&CX, MUMBAI in case of Mr. Haresh V. Kagrana(HUF) Vs. Deputy Commissioner (Refund) CGST & Cx Mumbai West. The application was rejected by the Asst. Commnr on grounds of limitation of time in filing refund application as this was rightly not held valid by the order in Appeal by Commissioner (Appeals) even the present revision in appeal is not hit by limitation of time due to the nature of refund claimed.

- e) Prayed for fairplay and justice and in case of appeal suffering due to non-production of documents to establish payments made to appropriate authorities, the builder may be directed to produce the same.

7. Government has carefully gone through the relevant case records available in case files, perused the impugned Order-in-Original and Order-in-Appeal.

8. On perusal of the records, Government observes that the Applicant, is one of the member/purchaser of flat of a under construction project at Parel by M/s. Larsen & Toubro Ltd. They cancelled their booking subsequently before the project was completed. The builder refunded the principal amount but did not refund the service tax paid by them, they stated they would pay the same when the Government refunds the same.

8.1 The Government has examined the matter and it is evident from the Revision Application and Order of lower authorities that the present case involves refund of Service Tax paid on the invoices raised to prospective flat purchaser. The text of Section 86 of the Finance Act, 1994 w.e.f. 14.05.2015 is reproduced below for ease of reference.

SECTION 86. Appeals to Appellate Tribunal. —

- (1) Save as otherwise provided herein an assessee aggrieved by an order passed by a Principal Commissioner of Central Excise or Commissioner of Central Excise under section 73 or section 83A by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the order.*

Provided that where an order, relating to a service which is exported, has been passed under section 85 and the matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service, such order shall be dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944 (1 of 1944):

Provided further that all appeals filed before the Appellate Tribunal in respect of matters covered under the first proviso, after the coming into force of the Finance Act, 2012 (23 of 2012), and pending before it up to the date on which the Finance Bill, 2015 receives the assent of the President, shall be transferred and dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944 (1 of 1944)." (1A)."

8.2 The Government has been vested with the revisionary power for the order of the Commissioner (Appeals) involving the issue regarding the rebate of service tax against the exported services only under Section 86 of the Finance Act, 1994, read with Section 35EE of Central Excise, 1944. The issue in the present revision application does not fall under the said proviso. Thus, the above stated Revision Application has been filed wrongly before the Government.

9. In view of the above discussions, the revision applications filed by the Applicant are dismissed as non-maintainable due to lack of jurisdiction.


(SHRAWAN KUMAR)

Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 197²⁰/2021-CX (WZ) /ASRA/Mumbai Dated 12/11/21

To,

Kamalesh Aga & Jaineel Aga,
5303/4, Crescent Bay T5,
Jerabi Wadia Road, Parel,
Mumbai-400012

Copy to:

1. The Commissioner (Appeals-II), CGST & CE, Mumbai, 3rd Floor, CGST Bhavan, Plot No. C-24, Sector-E, Bandra-Kurla complex, Bandra (east), Mumbai-400051.
2. A.C. DnVII, CGST & CE, Mumbai East, 9th Floor, Lotus Info Centre, Station Road, Parel East, Mumbai-400012.
3. Sr. P.S. to AS (RA), Mumbai
4. ~~Guard file~~
5. Notice Board.