

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : **V2(CS)21/STC-III/2015/Appeal-I**

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-005-16-17**
दिनांक Date **26.04.2016** जारी करने की तारीख Date of Issue **5/5/16**

श्री उमाशंकर, आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Uma Shankar** Commissioner (Appeals-I) Central Excise
Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं
दिनांक : _____ से सृजित

Arising out of Order-in-Original No **GNR-STX-DEM-DC-33/2015** dated : **22.05.2015** Issued by:
Deputy Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

घ अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The Appellants/Respondents

M/s. Mahisagar Weilding Works

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

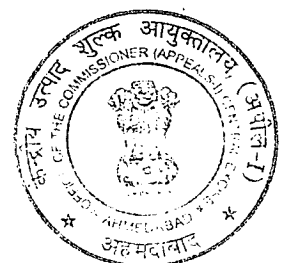
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.



(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 & (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

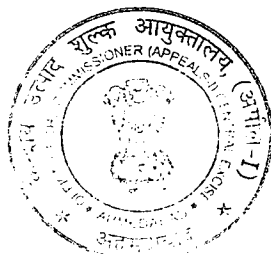
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

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

(4)(i) इस संदर्भ में, 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।

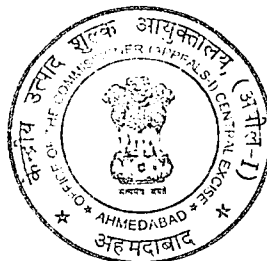
(4)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

This appeal has been filed by M/s Mahisagar Welding Works, 22 Krishna Complex, Opp. Gayatri Temple, Kalol (hereinafter referred to as "the appellant") against Order in -Original No.GNR-STX-DEM-DC-33/2015 dated 22.05.2015 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner of Central Excise, Gandhinagar Division (hereinafter referred to as "the adjudicating authority").

2. Brief facts of the case is that the impugned order was passed by the adjudicating authority on the basis Hon'ble Tribunal's order No. A/10884/WZB/AHD/2013 dated 19.07.2013, by remanding back to the lower adjudicating authority for considering the submissions of the appellant and to decide the case afresh. The case is that on the basis of information supplied by the appellant, it was noticed by the departmental officer that the appellant was providing services of laying of gas and water pipelines etc., as per contract agreement with M/s ONGC etc., under the category of "Construction Service in respect of Commercial or Industrial Building and Civil Structures". On scrutiny of invoice issued by the appellant to M/s ONGC, it was further noticed that they have carried out lay work of laying of pipe line and charged job charges, supplied materials and also charged material cost and fixing installation charges. In the invoice, the appellant had charged 33% value of the invoice after availing abatement of 67% of value under Notification No.1/2006-ST dated 1.03.2006, without adding the value of pipes supplied by the ONGC free of cost for laying of gas and water pipeline; that for the purpose of availing abatement under the said notification, value of said material used and consumed was required to be included in the gross amount charged. As the appellant has failed to include the value of the said materials provided by ONGC free of cost for the work of laying of pipe lines, it was observed that they have not entitled for the benefit of notification No.1/2006-ST dated 1.03.2006 and appropriate rate of service tax on the gross amount received from ONGC is required to be discharged. Accordingly a show cause notice dated 24.10.2011 was issued to the appellant for demanding differential amount of service tax to Rs.2,98,198/- with interest for the period 2010-1, by denying the benefit of the said notification No.1/2006-ST. The show cause notice also proposes imposition penalty under Section 76 and 77 of Finance Act, 1994. The said show cause notice was adjudicated by the adjudicating authority vide order No.AHD-STC-003-DYC-20 dated 29.06.2012 by the Assistant Commissioner of Central Excise & Service Tax, Kalol Division by confirming the show cause notice. The appellant had preferred appeal and appeal before Commissioner (A) and he has upheld the said order. Against the said order, the appellant preferred an appeal before the Hon'ble Tribunal and the Hon'ble Tribunal vide its order dated 19.07.2013 referred to above, remanded the case to the original adjudicating authority for decided the issue afresh. Accordingly, the adjudicating authority has decided the instant case vide the impugned order, by denying benefit of notification No.1/2006-ST and confirmed the differential amount of service tax with interest. He also imposed penalty under section 76 and 77 of the Finance Act, 1944 and also imposed late fee under Rule 7 C of Service Tax Rule 1944 for failure to furnish ST-3 returns.



3. Being aggrieved, the appellant had filed the present appeal on the grounds that the service provided by the appellant can be classifiable under Commercial & Industrial Construction Service or WCT service; that the appellant was working for the ONGC for laying of gas and water pipeline. The adjudicating authority has taxed all the contracts with the same theory that the appellant has not added the value of pipe supplied by the ONGC in gross value, but he has not taken into account the factual data and details while adjudicating and determining the liabilities. The appellant is involved in undertaking composite contracts of supply & construction and for the said purpose, they obtain order from their customer, take measurements at site, procure the construction material and other materials from the market and construct the site; that for the said composite contract, a lump sum consideration is charged from the customer and this was treated as a part & parcel of new civil structure. The department has denied the benefit of abatement on the basis that the appellant has not added the value of free material supplied by the ONGC; that in this case value of pipe has not been in scope, scope of work is with material, therefore, the appellant has rightly claimed the benefit of abatement. They had already discharged service tax amounting to Rs.2.24 lacs against the liability of Rs.1.72 lacs and accordingly, the liability is only Rs.51,977/-. While notification No.12/2003-ST grants exemption of the value of goods and materials sold by the service provider to the service recipient from the service tax leviable thereon (subject to furnishing documentary proof specifically indicating the value of goods and materials sold), notification No.15/2004-ST provides a generic abatement to the extent of 67% of the service tax leviable. The show cause notice does not indicate the activity undertaken by the appellant and on which ground the benefit of notification 12/2003-ST dated 20.06.2003 is sought to be denied; that they have fulfilled all the conditions of the said notification No.12/2003-ST. Since it was revealed from the documents maintained by the appellants that they have availed benefit of notification *ibid*, the allegation that there was no documentary proof for the said availment itself an incorrect allegation. Penalty under section 76 and 77 of the FA is also not imposable since there was no short payment of service tax. The appellant relied on various court citations to support their submissions.

4. A personal hearing in the matter was granted on 06.04.2016 and Shri Vipul Khandar, C.A appeared for the same. He reiterated the submissions made in the appeal memorandum.

5. I have gone through the records of the case and submissions made by the appellants. I find that the impugned order is arising out of Hon'ble CESTAT's order No. A/10884/WZB/AHD/2013 dated 19.07.2013. The Tribunal has remanded back the case to lower adjudicating authority for considering the submissions of the appellant and to decide the case afresh. The gist of Tribunal's order is as under:

"4. On perusal of the record, we find that both the lower authorities have confirmed the differential service tax liability on the ground that the appellant has claimed the benefit of Notification No.1/2006-ST and 15/2006-ST. It is the claim of the Chartered Accountant that they have never claimed the benefit of Notification No.1/2006-ST and 15/2006-ST and have only claimed the benefit of



Notification No.12/2003-ST for exclusion of the value of value of material supplied by them.

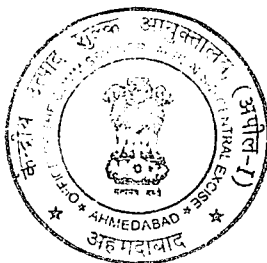
5. On perusal of the impugned order as well as order in original, we find that both the lower authorities have not adverted to this submission made by the appellant. On perusal of the submissions made by the appellant, we find that he had indeed taken this point before the lower authority.

6. Since the basic submission which goes to the root of the case has not been addressed to, we deem it fit to remit the matter back to the adjudicating authority to consider the issue afresh, after following the principles of natural justice."

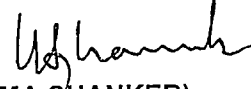
5.1 In the impugned order, I find that the adjudicating authority has again confirmed the allegation made in the show cause notice by denying the benefit of abatement under Notification No.1/2006-ST and confirmed differential amount of Rs.2,98,198/- with interest under the service category of "Commercial & Industrial Construction Service" He also imposed penalty under section 76 and 77 of the FA.

5.2 As per Tribunal's order, I find that the appellant had not contested the issue of classification of service before the Hon'ble CESTSAT. Para 1 of the Hon'ble Tribunal's order states that "this stay petition is filed for waiver of pre-deposit of the amounts which have been confirmed as differential service tax payable by the appellant under the category of Commercial and Industrial Construction Service". Hence I do not find worthy to discuss the matter again here regarding classification of service and upheld the decision of the adjudicating authority in this regard.

5.3 The other issue involved in the case is regarding eligibility of abatement. I find that the Hon'ble Tribunal has remanded back the case to the adjudicating authority to consider the appellant's submission regarding availment of benefit of Notification No.12/2003-ST. The Tribunal observed that since the basic submission which goes to the root of the case has not been addressed to, the same is to be considered afresh by the adjudicating authority. On perusal of the impugned order, I find that the adjudicating authority has considered the said submission in para 22.2.2 and 22.2.3 of the impugned order and held that since the appellant have not claimed the benefit of the said notification for exclusion of the value of materials supplied by them in their ST-3 returns, they are not eligible for the said benefit. In this context, I find that the adjudicating authority has not discussed on merit as to whether the appellant is eligible for the benefit of Notification No.12/2003-ST on the basis of their submission or otherwise inspite of specific direction by the Hon'ble Tribunal. Rejecting the benefit of notification by just not claiming in ST-3 returns is appears to be not proper, specifically when the appellant has taken the plea during the course of adjudication of the issue. Further, the basic intention to remand the case back to the adjudicating authority by the Hon'ble Tribunal is for considering appellant plea in the matter on eligibility merit. However, the adjudicating authority has not considered the issue properly and therefore, the case is again remand for considering the issue on its merit i.e whether the appellant is eligible to avail the benefit of notification NO.12/2003-ST in respect of their service provided to ONGC and if the appellant is eligible, the actual differential duty to be paid.



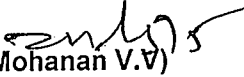
5.4 In view of above discussion, I remand back the case to the adjudicating authority for fresh decision after following principles of natural justice. The appeal is accordingly disposed off.



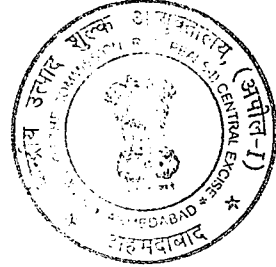
(UMA SHANKER)
COMMISSIONER (APPEALS-I)
CENTRAL EXCISE, AHMEDABAD

Attested

Date: 2/04/2016


(Mohanan V.V)
Superintendent (Appeal-I)
Central Excise, Ahmedabad
BY R.P.A.D

To,
M/s Mahisagar Welding Works,
22 Krishna Complex,
Opp. Gayatri Temple, Kalol



Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-III
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-III
4. The Dy. / Asstt. Commissioner, Central Excise, Division- Gandhinagar, Ahmedabad-III
5. Guard file.
6. P.A file.