

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-1) का कार्यालय केन्द्रीय उत्पाद शुल्क :  
सैन्ट्रल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,  
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : V2(MRS)55/STC-III/2015-16/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-118-16-17

दिनांक Date 06.10.2016 जारी करने की तारीख Date of Issue

श्री उमाशंकर, आयुक्त (अपील-1) 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 AHM-STX-003-ADC-MS-005-15-16 dated :17.07.2015  
Issued by: Additional Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

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

M/s. Shailesh H. Patel

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 :-

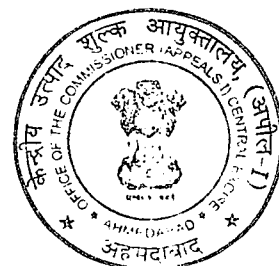
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी 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 होंगी) 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 रु 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, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1988 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 होंगे।

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 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."



3

**ORDER IN APPEAL**

M/s. Shailesh H. Patel, Plot No.181/1, Sector No. 2-B, Gandhinagar- 382 002 (for brevity-"the appellant") has filed this appeal against Order-in-Original No. AHM-STX-003-ADC-MS-005-15-16 dated 17.07.2015 (hereinafter referred to "the impugned order") passed by the Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as "the adjudicating authority")

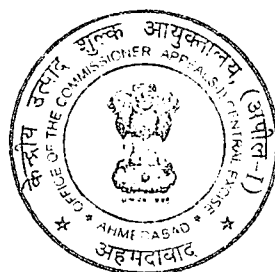
2. Briefly stated, an offence case was booked against the appellant on his failure to discharge service tax under "Site formation and clearance, excavation and earth moving and demolition service". Consequently, a show cause notice dated 9.4.2014, was issued alleging, *inter alia*, failure to pay service tax in respect of the services performed as a sub-contractor of M/s. Desai Construction Pvt. Ltd., towards the activity of filling earth and sand at the construction site of M/s. SKF Technologies (India) Private Ltd., Valsad. The show cause notice, therefore, demanded service tax of Rs. 9,20,239/- along with interest on an amount of Rs. 93,59,380/- received during the period from 01.10.2008 to 2011-2012 from the main contractor. This notice was adjudicated vide the impugned order, wherein the adjudicating authority confirmed the service tax demand of Rs. 9,20,239/- along with interest and further imposed penalty under Sections 77(1) (a) , 77(1) (e) and 78 of the Finance Act, 1994.

3. Feeling aggrieved, the appellant has filed this appeal, wherein *inter-alia*, the following grounds were raised:

- the ledger of the main contractor describes the work as 'loading, shifting, unloading and filling of earth from stock yard to site'; that this means carting of sand from stock yard or its destination to construction site; that the primary activity carried out was carting of sand; that there is no allegation that the appellant had provided labour for filling of earth; that without labour, filling of earth is not possible;
- that on going through the invoices provided with the appeal papers there is no evidence that it deals with activity in relation to site formation; that the amount has been charged for providing carting service which is outside the scope of site formation service;
- that they were informed that Service Tax would be discharged by the main contractor;
- that the definition of Site Formation does not cover within its ambit loading of sand from its base location and unloading sand at the dig of construction site;
- the services provided by them are covered under GTA; that the main contractors have paid Service Tax on the entire amount under GTA under reverse charge mechanism; that the department has accepted the service tax paid by the main contractor;
- that the service tax has been demanded on the entire income shown in the Income Tax returns; that this income includes supply of Wat mix and Machine Hours, which are not connected to the site formation service;
- CBEC vide its Circular No. 186/5/2015-ST dated 5.10.2015 has clarified that a composite service, even if it consists of more than one service should be treated as a single service based on the main or principal service;
- that there was no deliberate defiance of law; that if at all there was any liability of service tax which has remained unpaid, it is only because of the bonafide belief and not on account of any malafide intention; that the elements required for invoking larger period are not present in this case. For the purpose, they have referred to a catena of case laws on the subject.

4. Personal hearing in the matter was held on 11.08.2016 by the then Commissioner(Appeals), wherein Shri Gunjan Shah, C.A. appeared on behalf of the appellant and reiterated the submissions advanced in the appeal memorandum.

5. The appeal is being taken up as the appellant vide his letter dated 6.10.2016, has informed that the matter may be decided based on the personal hearing held before the then Commissioner(Appeals).



5.1 I have carefully gone through the facts of the case and the submissions made by the appellant in the grounds of appeal.

6. The issue to be decided in the present appeal is whether the services of carting i.e. filling of earth and sand at the construction site, provided by the appellant, falls within the ambit of 'Site formation Services and clearance, excavation and earth moving and demolition service', as defined under Section 65(97a) of the Finance Act, 1994.

7. Before dwelling on the issue, it is observed that the aforementioned appeal has been filed beyond the stipulated 60 days, the time limit specified under section 85 of the Finance Act, 1994. Relevant extracts of Section 85, *ibid*, is reproduced below for ease of reference:

**SECTION 85. Appeals to the [Commissioner] of Central Excise (Appeals). —**  
 [(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the <sup>5</sup>[Principal Commissioner of Central Excise or Commissioner of Central Excise] may appeal to the Commissioner of Central Excise (Appeals).]  
 (2) .....  
 (3) .....  
 [(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter :  
 Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.]

6. I find that the aforementioned appeal has been filed beyond the prescribed time limit of sixty days. The OIO dated 17.7.2015 was received by the appellant on 3.8.2015. The appeal, however, was filed on 25.01.2016. Further, the appeal has been filed without any application for condonation of delay. As the delay in filing the appeal is more than thirty days after the prescribed time limit of sixty days as provided under law, I am not empowered to condone the delay in filing this appeal.

7. In this backdrop, I reject the aforementioned appeal on the grounds of limitation as per Section 85 of the Finance Act, 1994, without going into the merits of the case.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

*उमा शंकर*

(उमा शंकर)

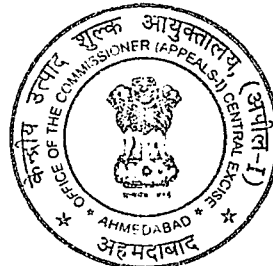
आयुक्त (अपील्स - I)

Date: 06/10/2016

Attested

*Mohan V.V.*  
(Mohan V.V.)

Superintendent (Appeal-I)  
Central Excise, Ahmedabad



BY R.P.A.D.

To,

M/s. Shailesh H. Patel,  
Plot No.181/1, Sector No. 2-B,  
Gandhindagar-382 002

Copy to:-

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III
3. The Additional Commissioner (System), Central Excise, Ahmedabad-III
4. The Deputy/ Assistant Commissioner, Central Excise, Gandhinagar Division.
- ✓ 5. Guard file.
6. P.A

