

रजिस्टर्ड डाक ए.डी. द्वारा

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

क फाइल संख्या : File No : V2(BAS)52/STC-III/2015-16/Appeal-I
V2(BAS)53/STC-III/2015-16/Appeal-I
ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-145 to 146-16-17
दिनांक Date 28.10.2016 जारी करने की तारीख Date of Issue 10/11/16

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-016-017-15-16 dated :23.11.2015
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. Effective Teleservices

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 :-

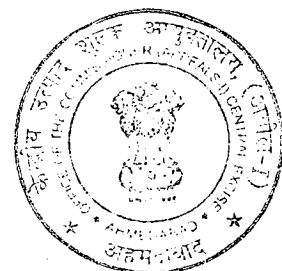
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 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 (सीस्तेत) 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, 1994 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 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

Two appeals have been filed by M/s. Effective Teleservices, 1st floor, Infocity, Nr. Indroda Circle, Gandhinagar- 382 009 [appellant-for sake of brevity] against OIO No. AHM-STX-3-ADC-MS-16-17-15-16 dated 23.11.2015 passed by Joint Commissioner, Central Excise, Ahmedabad-III Commissionerate.

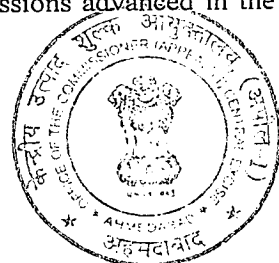
2. Briefly stated the facts are that during the course of audit, an objection was raised vide final audit report no. 104/2010-11 dated 2.5.2011, that the appellant had not discharged service tax under section 66A(1) of the Finance Act, 1994 read with notification No. 11/2006-ST dated 19.4.2006, in respect of *internet telecommunication service* provided by M/s. Verizon and Quest through M/s. Etch Inc USA. The appellant was supposed to pay the service tax under reverse charge mechanism.

3. Two show cause notices dated 8.4.2014 and 21.4.2015, covering the period from 2009-2010 to 2012-2013 and 2013-2014, respectively, were issued to the appellant, *inter alia*, seeking classification of the service provided under '*internet telecommunication services*'; proposing recovery of service tax along with interest and further proposing penalty under sections 76, 77 and 78 of the Finance Act, 1994. Vide the impugned OIO, both the notices were adjudicated wherein the adjudicating authority classified the services under '*internet telecommunication services*'; confirmed the service tax along with interest and also imposed penalties under section 77 and 78.

4. Feeling aggrieved, the appellant has filed this appeal contending that:

- service was availed by the branch situated outside India and hence no service tax is payable; that the service availed and used outside India is outside the purview of service tax and not liable for service tax under the Finance Act, 1994; that no service tax is payable in view of Circular No. 141/10/2011-TRU dtd 13.5.2011;
- the service was not received in India but by the branch of the appellant outside India; that only for the purpose of financial statement it was shown in the foreign expenditure; that it is reimbursement of expenses incurred by the associates concerned;
- they wish to rely on the case of Enso Secutrack Ltd [2011(23) STR 465 (Tri-Bang)] and Gati Ltd [2010(19) STR 877 (Tri-Bang)];
- actual reimbursement of expenses are not liable for service tax; that they wish to rely on the case of M/s. J J Intercontinental [2013(29) STR 9(Del)]; that even if the appellant was liable they were eligible for input credit /refund of service under Rule 5 of the CENVAT Credit Rules, 2004, since they are a 100% exporter of service;
- they wish to rely on the case of M/s. Tech Mahindra [2012(26) STR 344 (Tri-Bang)], Chillies Export House [2011(24) STR 40 (Tri-Chennai)], Solar Explosives Ltd [2011 (21) STR 448 (Tri-Mum)], Dineshchandra R Agarwal Infracon [2010(18) STR 39 (Tri-Abad)]
- there is nothing on record by the department regarding the service having been availed and the payment having been made by the appellant; that the payment was made by the branch office; that only reimbursement of such expenses has been done by the appellant;
- the entire demand is time barred; that they wish to rely on the case of M/s. Nizam Sugar Factory [2008 (9) STR 314 (SC)];
- penalty cannot be imposed under sections 77 and 78 of the Finance Act, 1994, in the present dispute.

5. Personal hearing in the case was held on 19.10.2016 wherein Shri Vipul Kandhar C.A., appeared on behalf of the appellant and reiterated the submissions advanced in the



grounds of appeal. He had earlier submitted reimbursement bills and a representative agreement between M/s. Etech Inc. and the appellant.

6. I have gone through the facts of the case, the grounds made in the appeal and the oral submissions made during the course of personal hearing.

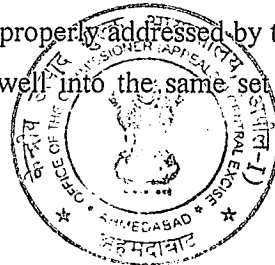
7. The issue to be decided is whether the appellant is liable for service tax in respect of the foreign expenditure reflected in their books of accounts, under *internet telecommunication service* defined under 65(57a) read with 65(105) (zzzu) of the Finance Act, 1994, under reverse charge mechanism i.e. under section 66A of the Finance Act, 1994?

8. On going through the grounds raised in the appeal, mentioned *supra*, I find that the original adjudicating authority has addressed all these issues. In-fact, the case laws cited in the appeal memorandum, were also relied upon by the appellant during the adjudication proceedings. As these issues are already addressed in the original order, the findings of the adjudicating authority, is mentioned in brief:

- that the classification issue was decided vide OIA No. 120/2011/Ahd-III/D.Singh/Comm(A)/Ahd dated 5.8.2011, wherein it was held that the services received by the appellant would fall under 'internet telecommunication service';
- the appellant has failed to produce documentary evidences in support of their claim that the services were received by the branch located outside India;
- that none of the conditions mentioned at rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, has been fulfilled by the appellant; that no documents have been produced to establish the claim that the transaction was just a transfer of money;
- the argument that no service has been received in India and the payment was in fact reimbursement of expenses to their foreign branch, is without supporting evidences;
- the plea that the appellant is even otherwise eligible for refund of service tax under rule 5 of the CENVAT Credit Rules, 2004, is not a valid argument;
- the reliance on Circular no. 141/10/2011-TRU dated 13.5.2011, to the effect that service provided outside India and used outside India were outside the purview of the levy, is not supported by any documentary evidences;
- extended period has been rightly invoked as the appellant failed to register himself for this service inspite of the earlier OIA dated 5.8.2011; that they never intimated to the department that they were receiving such services from the foreign based service provider; that the jurisdictional officer cannot be expected to presume receipt of such service;
- that no penalty under section 76 of the Finance Act, 1994, is imposable in view of the amendment in sections 76 and 78 of the Finance Act, 1994, made through Finance Act, 2015;

The adjudicating authority, distinguished the case laws relied upon by the appellant after finding the cases cited upon to be on different footing, consequently making the ratio of the judgements, not applicable to the present dispute at hand. In respect of the classification and the earlier demand, etc., the appellant is in appeal before the Hon'ble Tribunal [Appeal No. ST/636/2011]. As, the said appeal is pending, as of now, the earlier OIA dated 5.8.2011, is still in force.

9. As is already mentioned, the appeal filed contains the same set of averments raised before the adjudicating authority. As the issues raised have been properly addressed by the adjudicating authority, there appears to be no need to further dwell into the same set of



averments.

10. The appellant has however, now produced a copy of their agreement with M/s. Etech Inc., Texas, USA. The salient features of the said agreement, which are relevant for the present dispute, are enumerated below for ease of reference:

- M/s. Etech Inc. USA is engaged in the business of customer relationship management services for various companies and the appellant is providing customer relationship management services, back office operations and software development services;
- that the agreement entered on 1.8.2003 is effective for five years;
- that M/s. Etech will assist and coordinate various telephone services like telephony dialing and inbound call handling, network management services and executive management services;
- that the appellant will reimburse M/s. Etech the actual expenses incurred by them for all the services upon presentation of debit notes with a copy of invoices from 3rd party providing the services.

11. The copy of representative agreement, cited to augment the claim that services were provided outside India, the relevant portions of which are reproduced *supra*, nowhere speaks that the services were rendered outside India; that the branches to whom services are provided are outside India. The agreement only discloses that the appellant will reimburse M/s. Etech of the actual expenses upon presentation of debit notes with a copy of invoices from third party providing the services, which effectively means the third parties appointed by M/s. Etech.

12. The contentions in this regard were rejected by the original authority, on the grounds of lack of documentary evidence [refer para (vi), (ix) and (xvi) of the impugned OIO]. In fact the documents were never produced before the adjudicating authority. As the documents submitted before the appellate authority are only representative, it is difficult to draw any conclusions. It is therefore, felt that further documentary evidence, in these regard, need to be submitted by the appellant – which thereafter, needs to be examined, to decide the claim of the appellant.

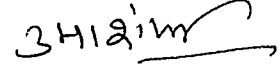
13. In view of the foregoing, the appellant is directed to submit all the evidences, documentary, etc., to support his claim that the payments were in respect of reimbursement of expenses; that it was just a money transfer; that the service was not received in India; that the services were provided outside India and used outside India - to the adjudicating authority, within 60 days of the receipt of this Order-in-Appeal. Needless to state, that any failure on part of the appellant, to satisfy the original adjudicating authority in respect of evidences, documents, within the stipulated time frame of 60 days, would render the contentions in this regard, to be rejected. The adjudicating authority is further directed to pass an order after following the principles of natural justice after thoroughly examining the documents provided by the appellant, in this regard.

13. In view of the foregoing, both the appeals are allowed by way of remand to the



original adjudicating authority who is directed to decide the matter as per the directions contained in paras, *supra*. The impugned OIO dated 23.11.2015, is set aside.

14. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
14. The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 28.10.2016

Attested



(Vinod Lukose)
Superintendent (Appeal-I)
Central Excise, Ahmedabad.

BY R.P.A.D

M/s. Effective Teleservices,
1st floor, Infocity,
Nr. Indroda Circle,
Gandhinagar- 382 009
Gujarat.

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, Service Tax Division, Gandhinagar.
5. Guard file.
6. P.A

