

रजिस्टर्ड डाक ए.डी. द्वारा

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

क फाइल संख्या : File No : V2(BAS)54/STC-III/2015-16/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-149-16-17
दिनांक Date 27.10.2016 जारी करने की तारीख Date of Issue 31/11/16

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 GNR-STX-DEM-DC-54/2015 dated :24.11.2015
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. Prime Insulators Pvt. Ltd.

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 हारिपटल कम्पाउण्ड, मेघाणी 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 प्रतियों 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 रखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर 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 (2) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2) के अंतर्गत निर्धारित फॉर्म 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 Form 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 एक आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/ पैसे का न्यायालय शुल्क टिकट लगा होगा।

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 वर्धित 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 (सीस्टैट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 39F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014) की संख्या 25; दिनांक 06.08.2014 जो कि वित्तीय अधिनियम, 1994 की धारा 43 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त 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 बशर्त 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,

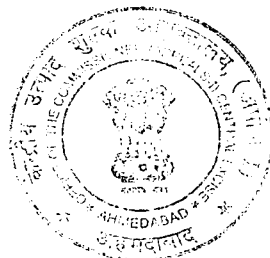
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

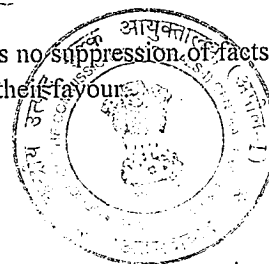
This appeal has been filed by M/s Prime Insulator Pvt. Ltd., Prantiji, Himmatnagar, Gujarat (hereinafter referred to as "the appellant") against Order-in-Original No.GNR-STX-DEM-DC-54/2015 dated 24.11.2015 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner of Central Excise, Service Tax Division, Gandhinagar, Ahmedabad-III (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the appellant is engaged in manufacturing of insulators falling under chapter 85 of Central Excise Tariff Act, 1985 and was supplying all types of HT/LT insulators to Uttar Gujarat Vij Company Ltd (UGVCL) and Pashchim Gujarat Vij Company Ltd (PGVCL) as per Purchase Order, on the basis of agreement entered with them. The appellant had collected an amount towards freight and packing charges @Rs. 6/- per unit from UGVCL and PGVCL and paid freight charges to the Goods Transport Agency (GTA). They had also discharged service tax liability under GTA, as a recipient of service. As it was observed that the appellant has not paid service tax on the entire amount of freight so collected and had retained some amount, which was shown as 'net income of outward freight' in their Personal & Ledger Account, a show cause notice dated 16.4.2015 was issued to them demanding service tax amounting to Rs.1,38,964/- with interest and penalty on the grounds that the said retained amount is nothing but a commission/remuneration/consideration/facilitation charges, for providing Business Auxiliary Service (BAS) to their clients. The said show cause noticee was adjudicated by the adjudicating authority vide the impugned order, by confirming the demand with interest and also imposed penalties under section 77 and 78 of the Finance Act, 1994 and under Rule 7C of the Service Tax Rule, 1994.

3. The appellant feeling aggrieved, has filed this on the following grounds:

- The demand issued for covering the service in business auxiliary service is totally outside the purview of the definition mentioned in the notice dated 16.4.2015;
- The amount alleged to be collected is pertaining to outward transportation or transport expenses towards clearance of goods from the factory to buyer; that it cannot be treated as commission/remuneration/consideration/facilitation charges;
- The excess amount being additional income is considered as profit as held by the Hon'ble Supreme Court in the case of Baroda Electric Meters Ltd [1997(94) ELT 13(SC)]; that any excess amount collected by the appellant from their customers would be a profit made on transportation and hence such amount would not be includable in the assessable value of the goods since duty of excise was a tax on manufacture and not on any profit made on transportation;
- There is no allegation in the show cause notice that the appellant has received as commission/remuneration/consideration/facilitation charges from the buyer;
- If the activity is covered under the definition of the BAS, they would be covered under exemption notification Nos. 6/2005 and 33/2012 since their taxable value is less than Rs. 10 lacs;

Penalty under section 78 is not imposable since there is no suppression of facts on the part of the appellant. The appellant has cited various case laws in their favour.



4. A personal hearing in the matter was granted on 17.10.2016 and Shri N.K.Oza, Advocate appeared before me and reiterated the grounds of appeal mentioned in the appeal memorandum.

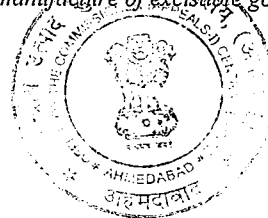
5. I have carefully gone through the facts of the case on records and submissions made by the appellant.

6. From the facts of the case, I observe that the appellant had entered into an agreement with UGVCL and PGVCL for supply of electrical insulator etc. and in order to supply goods to buyer's premises, they made an arrangement of transportation of goods by road with Goods Transport Agency and recovered transportation charges in addition to the amount of GTA; that they had discharged service tax under GTA, being a recipient of GTA service; that they had not discharged tax liability for the entire amount charged from the buyers but retained the additional amount charged towards transportation. The adjudicating authority contented that the amount so retained by the appellant is nothing but a commission/facilitation charges etc. for providing service to their clients and hence, falls within the ambit of BAS. On the other hand, the appellant has contended that such amount is an 'income from transportation service' and not a 'commission income'; hence it cannot be taxed under BAS as the said amount is a profit from their business.

7. I observe that there is, however, no dispute that some extra amount other than the amount of GTA service was received by the appellant during the disputed periods and shown as 'net income of outward freight' in their P & L account. The said income received by the appellant is based on the commercial factors which are also not disputed. In the instant case, it is an admitted fact that the appellant is not a GTA engaged in providing transportation service but facilitating transportation of goods from the factory to buyers premises and charges transport expenses for the same, in addition to freight expenses collected for discharging service tax towards GTA as a recipient of service. Looking into the facts, obviously, the buyer casts the responsibility of arranging transportation on the appellant and paid money/consideration for getting the work done. The said activities of the appellant are synonymously an input service to their client. In the instant case, service tax demand was raised only on the differential amount which was retained by the appellant after making payment towards GTA service, as extra consideration of their activities.

8. As per Section 65 (19) of the Finance Act, 1994, "Business auxiliary service" means any service in relation to-

- (i) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or
 - (ii) Promotion or marketing of service provided by the client; or
 - (iii) Any customer care service provided on behalf of the client; or
 - (iv) Procurement of goods or services, which are inputs for the client; or
 - (v) Production or processing of goods for, or on behalf of, the client
 - (vi) Provision of service on behalf of the client; or
 - (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision and includes services as a commission agent, [but does not include any activity that amounts to manufacture of excisable goods.
- Explanation. —



the removal of doubts, it is hereby declared that for the purposes of this clause, -

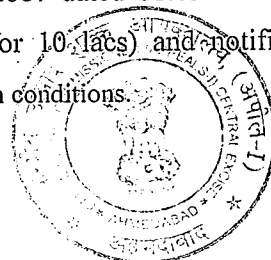
(a) "Commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

8. In the instant case, the appellant supplies goods to UGVCL and PGVCL and in order to supply of such goods to the buyer's premises, they made an arrangement of transportation of goods by road with Goods Transport Agency and recovered transportation charges in addition to GTA amount. The said differential amount earned by them was recorded under the head "net income on outward transport" in their P & L Account. As per definition of Business Auxiliary Service referred to above, a service incidental or auxiliary to any activity in relation to provision of service on behalf of the client falls within in the ambit of service tax under the said category. In the instant case, the activity of providing transportation facilities is to support the business of their clients and charging additional amount in excess of what they collected for the payment towards GTA is extra consideration. In other words, the additional amount so collected pertains to the service element over and above the actual cost of freight and the said amount is obviously, a consideration in lieu of services provided by them and cannot be termed as 'profit'. Therefore, the amount so realized by them and mentioned under the head 'net income of outward freight' in their P & L Account during the relevant period is nothing but an income by way of providing service to their clients and is therefore, taxable under BAS.

9. I observe that the appellant has cited case law in the case of Baroda Electric Meters Ltd reported at 1997 (094) ELT 013 (SC), supporting their argument that any excess amount collected from the customers would be a profit and such amount would not be includable in assessable value. Looking to the facts and discussion hereinabove, I observe that the said decision has no relevancy to the matter on hand as it relates to demand of excise duty on manufacture of goods.

10. In view of above discussion, I am of the opinion that the activities of the appellant fall within the ambit of definition of BAS and is liable for payment of service tax.

11. The appellant further further contended that even if the activities fall within the ambit of definition of BAS for the said period, the taxable value is less than exemption limit of Rs. 10 lakhs and therefore, they are entitled to claim such benefit under the relevant notification. The notification No.06/2005-ST dated 01.03.2005 exempts taxable services of aggregate value not exceeding four lacs rupees in any financial year from the whole of the service tax leviable thereon under section 66B of the said Finance Act. The said notification was further amended by notification No.04/2007 dated 01.03.2007 (for Rs. 8 lacs), notification No.8/2008-ST dated 01.03.2008 (for 10 lacs) and notification No. 33/2012 -ST dated 20.06.2012 subject however, to certain conditions.



12. Clause (3) of the notification No. 6/2005-ST dated 01.03.2005 as amended from time to time mentioned above states as follows:-

"for the purposes of determining aggregate value not exceeding four lakh (ten lakh vide amended notification) rupees, to avail exemption under this notification, in relation to taxable service provided by a goods transport agency, the payment received towards the gross amount charged by such goods transport agency under section 67 of the said Finance Act for which the person liable for paying service tax is as specified under sub-section (2) of section 68 of the said Finance Act read with Service Tax Rules, 1994, shall not be taken into account".

As per the aforesaid clause, for determining the aggregate value of Rs.10 lacs to avail exemption under the notification, supra, in relation to the taxable value provided by GTA, the payment received towards gross amount charged by such GTA, shall not be taken into account. In the instant case, I observe that the period of demand is from 2009 to 2014. I further observe the claim of eligibility under the said exemption notification was not made before the adjudicating authority. The appellant's contention in this regard, needs to be re-examined by the adjudicating authority in view of above discussion and consequential benefit, if any, thereof is to be given to the appellant.

13. In view of above discussion, I remand the case to the adjudicating authority for examining the claim of the appellant with regard to benefit of exemption notification, supra. While remanding the case, I rely on the order in the case of M/s Associated Hotels Ltd [2015 (37) STR 723-Guj].

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

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 27/10/2016

Attested

Mohanan V.V.

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

To
M/s Prime Insulator Pvt. Ltd.,
Ceramic Zone, Block No.134/P-2,
AT & Post Dalpur, TA: Prantiji,
Himmatnagar, 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, S T Division- Gandhinagar, Ahmedabad-III
5. Guard file.
6. P. A. file