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(MRS)4/STC-III/2016/Appeal-I**

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-192-16-17**
दिनाँक Date **22.12.2016** जारी करने की तारीख Date of Issue

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 ___
_____ दिनाँक : _____ से सृजित
Arising out of Order-in-Original No **AHM-STX-003-ADC-MSC-025 to 027-15-16** dated **31.12.2016** Issued by: Additional Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

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

M/s. Avaya Global Connect

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 विरूद्ध 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां 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 वहां 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 शर्तो 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 होगे।

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 s.dwR me.,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

M/s. AGC Networks Limited, E-1/1, Electronic Estate, Gandhinagar- 382 004 (for short – '*appellant*') has filed this appeal against OIO No. AHM-STX-003-ADC-MSC-25 to 27-15-16 dated 31.12.2015, passed by the Additional Commissioner, Central Excise, Ahmedabad–III Commissionerate(for short – '*adjudicating authority*').

2. Briefly stated, the facts are that during the course of audit, it was observed that the appellant was supplying electronic private automatic branch exchange equipment [EPABX] which they had purchased from a foreign based supplier; that the EPABX was embedded with two types of software, viz. [a] basic system software, which is a pre-requisite for the basic functioning of the system; and [b] feature related software, which is application dependent; that the use of this software was possible on payment of separate charges for activation of the software. The appellant imported EPABX and supplied to their customer on payment of Sales Tax/VAT. The foreign based supplier of EPABX raised invoice on the appellant for activation charges and the appellant in turn raised an invoice to the buyer for collection of activation charges. Show cause notice(s) were therefore, issued to the appellant alleging that though they had rendered service of software activation, taxable under Business Auxiliary Services [BAS], they had not discharged the service tax. Three show cause notices dated 24.6.2008, 18.4.2013 and 17.10.2013, covering period from November 2006 to November 2007 and April 2011 to March 2012, were adjudicated vide the aforementioned OIO wherein the adjudicating authority, held that the service of activation of feature software on behalf of their foreign vendors were taxable under BAS. He confirmed the demand of Rs. 28.95 lacs along with interest and also imposed penalty under Sections 76, 77 and 78 of the Finance Act, 1994.

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

- that no service tax could be levied and collected on transaction of sale of goods;
- in the case of BSNL [2006(2) STR 161] and Tata Consultancy Services [2004(178) ELT 22], the Hon'ble Supreme Court has held that a transaction of sale of an equipment that suffered levy of sales tax could not be subjected to levy of service tax;
- activation charges were included in the value/price of equipment on which sales tax/VAT was paid;
- transaction of sale of software in the present case could not have been brought under the levy of service tax; that the jurisdictional AC has also confirmed that the appellant was trading software and sales tax was paid on the value of such software;
- that the AC has confirmed that invoices of equipment inclusive of the activation charges on which sales tax was paid were found to be matching with the amount of software activation charges shown in the appellant's P&L account;
- sales tax had already been paid on the value of software already embedded in the equipment sold to the customers ;
- reliance placed by the adjudicating authority on the case of Idea Mobile Communication [2011(23) STC 433 (SC)] is erroneous;
- that as payment of sales tax was made on the value of the equipment, inclusive of the activation charges, it was not open to the adjudicating authority to hold the nature of the transaction was that of providing a service upon recovering commission;
- use of features of operative software was permissible only after activation by the supplier on payment of separate activation charges;

- that sales tax was paid on such activation charges considering them as part of value of price of equipment sold to the customers;
- no commission was ever charged or collected by the appellant and the vendors located in the foreign countries; that no commission was paid to the appellant for conveying the specific requirements of the customers to them;
- that the activity was not in the nature of procurement of service which were inputs for the client;
- the appellant's business activity was that of conveying the requirements of customers to the vendors for enabling the supplier to activate the required features and thereafter collecting activation charges from the Indian customers and transferring the same to the vendors after retaining a part of such activation charges;
- that adjudicating authority erred in ignoring the fact that sales tax was remitted on the value of equipment;
- that no competent authority has decided in the present case that VAT was wrongly paid;
- that the basic function of the appellant is of a distributor of telecom equipment;
- that there is no deliberate suppression of facts on the appellants part regarding their business activities;
- the show cause notice dated 24.6.2008, issued invoking extended period is not justified since the department was aware of the facts;
- penalty is not imposable as there was a clear doubt about the service tax liability on part of the appellant.

4. Personal hearing in the matter was held on 20.12.2016. Ms. Shilpa Dave, Advocate, appeared on behalf of the appellant and reiterated the arguments made in the grounds of appeal. She further stated that all the three show cause notices in respect of the impugned OIO were issued after invoking extended period.

5. I have gone through the facts of the case, the appellant's grounds of appeal, and submissions made during the course of personal hearing. I find that primary issue to be decided is whether the appellant is liable for service tax on the activation charges collected from the customers under BAS.

6. The adjudicating authority has confirmed the demand of service tax on the basis of the following:

- in case the activation charges were to be considered as part of the value of the goods, applicable customs duty ought to have been paid at the time of importation of the goods;
- activation charges are not goods as per the definition of 'goods' under the Gujarat VAT Act/CST Act, hence the contention that they had purchased the software/license and sold it to the customers on demand and paid VAT/CST on the software activation charges by terming it as transfer of right to use, is not a tenable argument;
- that mere payment of VAT/CST on software activation charges shall not change the characteristic/nature of the activity; that activation of featured software is a service; that activation charges/value recovered from the customers should form part of the taxable value without activation, the software featured card was of no use which was embodied in the equipment for providing the service;
- that the appellant has acted as a agent for the foreign based supplier; that they were making provision of service of activation of software on behalf of their customers as per the customer's requirements;
- that their activity is a taxable service covered under clause (iv) and (vi) of BAS;
- that show cause notices dated 18.4.2013 and 17.10.2013 were issued within the normal period of eighteen months.

7. To put things in perspective, the appellant imports EPABX system after discharging due customs duty. Once a customer is located, the appellant executes two

separate agreements/purchase orders one for selling equipment/system and other for activation of additional features of software already embedded in the EPABX. As per the choice of feature by the customer, the appellant intimates the foreign supplier who will activate the software. Once the system is activated this foreign based supplier raises an invoice on the appellant, for activation charges. The appellant, thereafter, raises an invoice to the customer for recovery of activation charges. There is a price difference between the price charged by the foreign based supplier to the appellant and the price charged by the appellant from the customer. This profit is reflected in the balance sheet as *software activation income*. It is on this income that the department is demanding service tax under BAS.

8. The appellant's argument is that the activation done was a transaction of sale; that since the activation charge had already suffered sales tax/VAT, it could not be further subjected to service tax; that as per the Hon'ble Supreme Court's judgement in the case of BSNL and TCS, *ibid,* transaction of sale of an equipment which had already suffered levy of sales tax and hence, could not be again subjected to service tax.

8.1 The procedure followed by the appellant clearly depict that sales tax/VAT, is paid on EPABX on which the software is embedded The argument of the appellant, holding this sales tax/VAT paid on the EPABX as including the activation charges is not a correct argument. During the course of sale, the appellant may or may not be aware of the requirement of customer. The customer may put forth a requirement of activation of a particular service after the sale. Even otherwise, a separate billing is made for the activation purpose. No documentary evidence has been produced that VAT/Sales Tax is paid in respect of this bill pertaining to activation charges. Hence, the contention that sales tax was included in activation charges is not tenable since [a] the billing was separate and [b] at the time of sale, it was not known what software activation was needed by the customer and [c] in case the entire charges of all software activation was taken, there was no need to issue a separate invoice, as was the case.

8.1.1 The argument of the appellant that since the software activation charges had suffered sales tax/VAT, the question of demanding service tax does not arise, is not a valid argument since in the case of M/s. Idea Mobile Communication Limited [2010 (19) STR 18] the Hon'ble Apex Court has held as follows:

> *"But we cannot accept a position in law that even if tax is wrongly remitted that would absolve parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee."*

Hence, first it needs to be determined as to whether the income generated from software activation charges is in respect of trading of goods or provision of service. Commercially speaking, the appellant imports EPABX and then sells it to customers.

There is no doubt that this activity is purely a business activity with a motive for profit. Thereafter, the appellant performs one more function i.e. helping the customer in activation of functions of software, as required/indented by the customer. Surely, this has nothing to do with the sale of the product. Had this been a part of sale, the appellant would not have charged extra amount from the customer. This extra amount charged is the amount charged for the service made available. Nobody engaged in commercial activity would perform any activity for free. The contention of the appellant is that what he has done is a trading activity and the amount charged extra – depicted in his books of accounts as *software activation income*, is his profit out of this trading activity. The argument lacks merit, as there is no goods involved in the said transaction. By the appellant's own contention, the software which is activated - was embedded in the goods [i.e. EPABX], sold to customers. Therefore, it is not understood as to how this software activation income becomes, sale of goods – when actually it is only activation of software – which was embedded in the EPABX, which is already sold.

8.2 The other argument is that activation of software is technically known as right to use basis. The Hon'ble Supreme Court in the case of M/s. BSNL [2006(2) STR 161(SC)] has in para 91 stated what constitutes a transaction for transfer of right to use of the goods. The argument fails since the first contention spelt out by the Hon'ble Court, is that there must be goods available for delivery. The activity involved in this dispute is activation of software. The goods have already been delivered by way of sale of EPABX which was embedded with software. Hence, by no stretch of imagination can activation of software in respect of the EPABX already owned by customer, be termed as transfer of right to use the goods. The argument is therefore not tenable.

8.3 Even otherwise, activation of software which has already been sold, is not sale of goods. This argument has already been discussed and rejected by the Apex Court in the case of M/s. Idea Mobile Communication Limited [2011(23) STR 433(SC)]. The issue in the said case was that the department was demanding service tax on SIM cards and activation charges. The Apex Court in this case upheld the order of the Kerala High Court , which had concluded that both selling of SIM card and process of activation are services provided by the mobile cellular telephone companies, to the subscriber squarely fell within the definition of taxable services. In-fact, in para 19, the Apex Court holds that "*The appellant also accepts the position that activation is a taxable service*". Activation of a software, therefore by no stretch of imagination can be held as sale of goods. Therefore, the argument that activation of software is sale of goods, is not a legally tenable argument more so since the issue is no longer *res integra*.

8.4 It is thus, evident that the appellant has acted as an agent of the supplier; that he has procured services which are inputs for the client where inputs mean all services intended for use by the client; that they have provided the service on behalf of the client.

9. The appellant has thereafter raised an argument that all the three show cause notices were issued invoking extended period and was therefore, liable to be set aside in light of the Hon'ble Supreme Court's order in the case of Nizam Sugar Factory [2006(197) ELT 465 (SC)]. As far as show cause notice dated 18.4.2013 and 17.10.2013, are concerned, I find that it has been issued within the normal period. The appellant has ignored the fact that vide Section 143, Chapter V of the Finance Act, 2012, Section 73 of the Finance Act, 1994, was amended, the relevant extracts of which are reproduced below;

> *(K) in section 73,—*
> *(i) for the words "one year", wherever they occur, the words "eighteen months" shall be substituted;*

In-fact, it is relying on this amendment that the adjudicating authority in para 37.6, has held that these two notices were issued within normal period of eighteen months. Therefore, in respect of the notices dated 18.4.2013 and 17.10.2013, the argument that extended period cannot be invoked, is without basis as no extended period is involved.

As far as the notice dated 24.6.2008 covering the period from 1.11.2006 to 30.11.2007 is concerned, it is evident that the notice has been issued invoking extended period. The appellant's contention is that since the matter was known to the department, extended period could not have been invoked. To substantiate his point he has relied on the case of M/s. Nizam Sugar, *ibid.* I find that in this case, duty was demanded on the production of impure carbon dioxide, emanating as a by-product during the process of fermentation of molasses. The Apex Court in the said case held as follows [relevant extracts]:

> *9.Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.*

I however, find the reliance on the above case law by the appellant, misplaced, since in this case the process of fermentation of molasses always resulted in production of impure carbon dioxide while in the present dispute at hand, collection of activation charges was [a] never disclosed in the returns filed with the department and [b] was never a compulsory consequence to sale of EPABX, since it was always depended on whether the customer required any software activation or otherwise. The EPABX could function even without software activation, as is given to understand. It was only when some separate additional function were needed that the activation was requested on payment of certain charges. Therefore, the argument that the department was aware is not correct. Surely, the department cannot be aware of what activation was required by which customer or for that

matter whether any activation was required at all. As facts were suppressed, it goes without saying that the notice was issued invoking extended period. Therefore, the contention that the notice dated 24.6.2008 could not have been issued invoking extended period, since the department was aware of the matter, lacks merit and is therefore rejected.

10. In view of the foregoing, I do not find any need to interfere with the impugned OIO dated 31.12.2015. The appeal filed the appellant is therefore, rejected.

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

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

(उमा शंकर)
आयुक्त (अपील्स - I)

Date: 22/12/2016

Attested

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

BY RPAD.

To,

M/s. AGC Networks Limited,
E-1/1,
Electronic Estate,
Gandhinagar- 382 004

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