

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(GTA)22/STC-III/2016/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-223-16-17
दिनांक Date 25.01.2017 जारी करने की तारीख Date of Issue 6/2/17

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-056-15-16** dated **29.02.2016** 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. Vikas Construction

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 :-

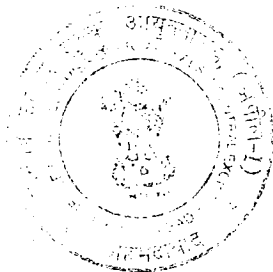
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 (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, 1994 की धारा 35F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) 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 अर्जी 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,

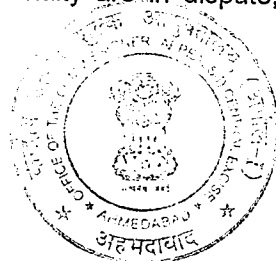
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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।

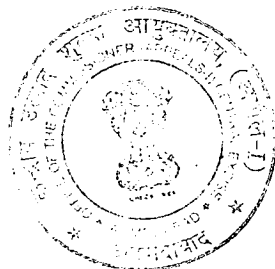
(4)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

M/s Vikas Construction Co., Shop No.17 & 18, Palika Bazaar, Rajmahal Road, Patan (hereinafter referred to as 'the appellant') has preferred the present appeal, being aggrieved by the Order-in-Original No. AHM-STX-003-ADC-MS-056-15-16 dated 29/02/2016 (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated, the facts of the case are that on the basis of information that the appellant was not paying appropriate Service Tax, a search was conducted at the above mentioned premises by the Preventive officers of the department. It was revealed that the appellant was a partnership firm engaged in construction of road and other work related to roads like widening, strengthening and repair for Department of Roads and Buildings of the Government of Gujarat and Panchayat as per work order issued by them. Such work was undertaken on their own as well as in the capacity as sub-contractors to other main contractors. They had filed NIL ST-3 returns as the construction of roads were exempted from payment of Service Tax under Works Contract service and as no Service Tax was paid on any other service. During the course of search operations it was noticed from the Books of Accounts that the appellant had incurred expenses for transportation of asphalt and other materials required for construction work and it had appeared *prima facie* that the appellant was liable to pay Service Tax on Goods Transport Service (hereinafter referred to as 'GTA') as recipient of such service. On the basis of investigations and statements tendered by the partner of the appellant firm, it had appeared that Service Tax amount of **Rs.13,49,244/-** not paid during the period of **2009-10 to 2013-14** by way of suppression of facts and in contravention of the provisions of Finance Act, 1994 (hereinafter referred to as 'the Act') and Service Tax Rules, 1994 was recoverable by invoking extended period under proviso to Section 73(1) of the Act, along with interest under Section 75 of the Act and an amount of Rs.5,00,000/- paid up by the appellant during the course of investigations was required to be appropriated towards the said Service Tax liability. It had further appeared that the non-payment of Service Tax by way of suppression of facts and contraventions with intent to evade Service Tax had rendered the appellant liable to penalty under Section 78 of the Act. It had also appeared the appellant was liable to penalty under Section 76 of the Act for failure to pay Service Tax; liable to penalty under Section 77(1) of the Act for failure to obtain Service Tax registration and under Section 77(2) of the Act for failure to file returns. Therefore, a Show Cause Notice F.No.IV/16-72/PI/Gr.IV/2013-14 dated 15/10/2014 (hereinafter referred to as 'the SCN') issued to the appellant demanding Service Tax under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act and proposing to impose penalty on the appellant under Section 76, 77(1)&(2) and Section 78 of the Act.

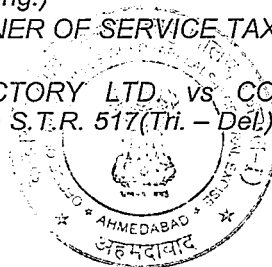


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3. The SCN was adjudicated by the adjudicating authority who issued the impugned order holding that the services relating to transport of goods provided by all transporters involved in this case would qualify as 'Transport of Goods by Road' service under Section 65(15)(zzp) of the Act and accordingly the appellant was liable to pay Service Tax as recipient of GTA service in terms of Section 68(2) of the Act read with Notification No.35/2004 and Rule 2(1)(d)(v) of Service Tax Rules, 1994; confirming the demand of Service Tax amounting to **Rs.13,49,244/-** under proviso to section 73(1) of the Finance Act, 1994, invoking extended period of five years and appropriating the amount of Rs.5,00,000/- already deposited by the appellant during investigation; confirming interest under Section 75 of the Act; imposing penalty on the appellant under Section 78 of the Act; dropping the proposal for penalty under Section 76 of the Act while imposing a penalty of Rs.200/- per day under Section 77(1) of the Act as well as penalty of Rs.10,000/- under section 77(2) of the Act.

4. The main grounds invoked by the appellant in the present appeal are as follows:

- The adjudicating authority had erred by confirming the demand under the category of GTA for the period 01/07/2012 on services provided by individual truck owners and operators despite the Finance Minister's speech on budget clearly showing the intention of the Government and various judgments, including judgment of Hon'ble Karnataka High Court in the case of COMMISSIONER OF SERVICE TAX, BANAGLORE vs LAKSHMINARYAN MINING CO.- 2012 (26) str 517 (KAR.) in favour of the appellant.
- The adjudicating authority had erred by confirming the demand on services of transportation of goods by road on or after 01/07/2012 from individual truck owners and truck operators ignoring the clear provision of Section 66D(p) of the Act which specifically excludes such service from levy of Service Tax.
- The adjudicating authority had erred by confirming the demand invoking extended period of limitation despite the fact that issue involved was subject to interpretation of statute and appellant had acted on a *bona fide* belief as held in its favour by various judgments.
- The adjudicating authority had erred in imposing penalty under Section 78 despite the fact that issue of interpretation was involved and in advancing the benefit of reduced penalty under Section 78 of the Act on the condition that entire demand was paid up within thirty days whereas there was no such condition in the provisions of Section 78 of the Act.
- The adjudicating authority had erred in imposing penalty under Section 77(1)(a) of the Act for non-registration ignoring the fact that the appellant was registered with Service Tax department even before the visit by Preventive wing of the department and section 77(1) (a) ibid was amended before the said visit and issuance of SCN.
- The appellant has relied on the following case laws:
 - COMMISSIONER OF SERVICE TAX BANGALORE vs LAKSHMINARAYANA MINING CO. – 2012 (26) S.T.R. 517 (Kar.)
 - NANDGANJ SIHORI SUGAR CO. LTD. vs COMMISSIONER OF CENTRAL EXCISE, LUCKNOW – 2004 (34) S.T.R. 850 (Tri.-Del.)
 - BELLARY IRON & ORES PVT. LTD. vs COMMISSIONER OF CENTRAL EXCISE, BELGAUM – 2010 (18) S.T.R. 406 (Tri. – Bang.)
 - CAPS & PRINTS (P) LTD. vs COMMISSIONER OF SERVICE TAX, KOLKATA – 2013 (30) S.T.R. 426 (Tri. – Kolkata)
 - BAZIPUR CO-OPERATIVE SUGAR FACTORY LTD. vs COMMISSIONER OF CENTRAL EXCISE, MEERUT-II – 2012 (27) S.T.R. 517 (Tri. – Del.)



5. Personal hearing in the appeal was held on 09/01/2017. Shri Punit Prjapati, C.A. appeared on behalf of the appellant and reiterated the grounds of appeal. He pointed out that submissions were made before the adjudicating authority, which was not considered. He also pointed out that the details of non-GTA bills are submitted from page no. 102 in the grounds of appeal.

6. I have carefully gone through the facts of the case on records and submissions made by the appellant. The issue for decision before me is whether expenses incurred by the appellant towards transportation of Asphalt and other materials required for construction work can be treated as payments made for availing GTA services and whether as recipients of such services, the appellant was liable to pay Service Tax under the reverse charge mechanism. The appellant had failed to assess or pay Service Tax on GTA services during the impugned period of 2009-2010 to 2013-2014. However, after the search operation and during the course of investigation, the appellant admitted that they were liable to pay Service Tax in such cases where the transporters had issued consignment notes but were not liable to pay Service Tax in such cases where consignment notes were not issued. Accordingly, during the course of investigations, the appellant has paid up an amount of Rs.5,00,000/- as recipient of GTA service during the impugned period as against the demand amount of Rs.13,49,244/- confirmed in the impugned order.

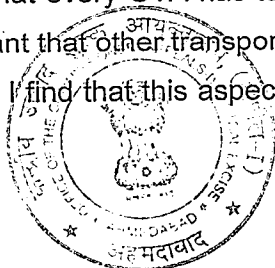
7. Shri Dineshkumar B. Patel, partner of the appellant, in a statement dated 15/09/2014 that is relied upon in the impugned order, had admitted to the liability and had paid up Service Tax in the matter of eight transporters who had issued consignment notes. On being asked for reasons for not including the freight paid to other transporters for tax liability, he had stated that other transporters are individual truck owners and they do not issue any consignment note but only raise bills. As per Rule 4B of Service Tax Rules, 2004, GTA service provided shall issue consignment note to the customer. The contents are reproduced as follows:

'4B Issue of consignment note. - Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the customer:

Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note.

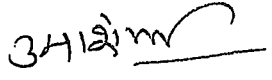
Explanation - For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.'

It is clear from the above that every GTA has to issue a consignment note. As regards the argument of the appellant that other transporters are individual truck owners and are not GTA service providers, I find that this aspect has to be examined at the level of the




adjudicating authority in view of the settled position of law and the documents submitted by the appellant as evidence. There is no reasoning given in the impugned order to distinguish the facts of the present case from the ratio given in the decision of Hon'ble High Court of Karnataka in the case of *COMMISSIONER OF SERVICE TAX BANGALORE vs LAKSHMINARAYANA MINING CO. – 2012 (26) S.T.R. 517 (Kar.)*. It is also not explained as to how the bills / challans are treated as consignment notes in the case of disputed transporters. Therefore, I remand the case back to the adjudicating authority to reconsider the case on the basis of the settled legal position as well as the documents and evidences submitted by the appellant to arrive at a reasoned order establishing whether the service provided by each and every transporter involved in the present case can be considered as GTA service attracting payment of Service Tax. The appellant must be provided ample opportunity to present their case during the course of de novo adjudication.

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


(उमा शंकर)
आयुक्त (अपील्स - I)

Date: 25/01/2017

Attested


(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.

To
M/s Vikas Construction Co.,
Shop No.17 & 18, Palika Bazar,
Rajmahal Road,
Patan – 384 265.

Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner, Central Excise (System), Ahmedabad-III.
4. The Deputy Commissioner, Service Tax, Gandhinagar Division, Ahmedabad-III.
5. Guard File.
6. P.A. FILE

