

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(BAS)20/STC-III/2016/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-264-16-17

दिनांक Date 28.02.2017 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 _____
दिनांक : _____ से सृजित

Arising out of Order-in-Original No **AHM-STX-003-ADC-MS-049-15-16** dated **25.02.2016** Issued by:
Additional Commissioner, Central Excise, Din: Mehsana, A'bad-III.

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

M/s. Tanu Motors private Limited

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 :-

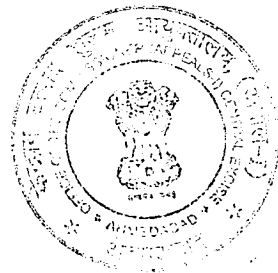
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 रूपर 5 लाख या उससे कम है वहाँ रूपर 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 5 लाख या 50 लाख तक हो तो रूपर 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 50 लाख या उससे ज्यादा है वहाँ रूपर 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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) 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 हैं

- (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 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."



ORDER-IN-APPEAL

M/s. Tanu Motors Private Limited, Opposite Dharti Resort, Abu highway, Palanpur, Gujarat [for short - 'appellant'] has filed this appeal against OIO No. AHM-STX-003-ADC-MS-049-15-16 dated 25.02.2016, passed by the Additional Commissioner, Central Excise, Ahmedabad-III Commissionerate[for short - 'adjudicating authority'].

2. Briefly stated, a show cause notice dated 24.10.2014, was issued to the appellant, *inter alia* alleging that they had not discharged the service tax under Business Auxiliary Service [BAS] in respect of services rendered to various clients during the financial years 2009-10, 2012-13 and 2013-14 and further that they had in the FY 2010-11, wrongly availed CENVAT credit on purchase of vehicles. The notice therefore, proposed [a] classification of the service rendered by the appellant under BAS; [b] recovery of service tax along with interest on the services rendered under BAS; [c] proposed penalty under sections 77 and 78 of the Finance Act, 1994; and [d] proposed recovery of CENVAT credit, wrongly availed, along with interest.

3. This notice, was adjudicated vide the impugned OIO dated 25.02.2016, wherein the adjudicating authority classified the services rendered by the appellant to their various client as BAS; confirmed the service tax along with interest; denied the CENVAT credit wrongly availed and ordered recovery of interest; imposed penalty under sections 77 and 78 of the Finance Act, 1994.

4. Feeling aggrieved, the appellant, has filed this appeal against the impugned OIO wherein he has raised the following averment:

- (a) that the show cause notice has been issued within three days from the visit on the premises;
- (b) the show cause notice itself admits that income shown in the P&L account as 'income from purchase and sale of used/pre-owned car'; that purchase and sale is a trading activity and the profit from the purchase and sale of goods is not taxable under service tax;
- (c) that when a customer approached to buy a new vehicle in exchange of his old and used vehicle, the company purchases the old vehicle at a mutually agreed price and the buyer pays the amount of new vehicle after deducting the price of the old vehicle; that when they get a customer for the old vehicle they sell it at a mutually agreed price; that some time the selling price is higher and some time the selling price might be lesser than the price at which the vehicle was purchased depending upon the prevailing market condition;
- (d) that on sale of the used cars, they paid VAT on the same;
- (e) that in the activity of buying and selling they were not promoting or marketing of goods for a third party and have not received any commission from anybody; that income in the P&L account is the actual profit/loss incurred in the buying and selling of used cars;
- (f) the used cars were purchased under an agreement and sold under a sale deed;
- (g) the notice nowhere states that the appellant had marketed or promoted or sold goods on behalf of any other person;
- (h) that they wish to rely on the case of Behr India Limited [2014(35) STR 637], Ace Calderys Limited [2012(27) STR 484], Kerala State Beverages Corporation [2011 (23) STR 640] and [2014(33) STR 484];
- (i) that the CENVAT credit of Rs. 3,30,941/- is not in relation to the trucks; that it was pertaining to some equipments installed in our workshop; that due to heavy rain some of our records got damaged and hence we are unable to produce the documentary evidence;
- (j) that the CENVAT credit has been denied on the ground that the supplier had wrongly classified the vehicle under heading 8704; the adjudicating authority has travelled beyond the scope of show cause notice while deciding the issue which is not permissible under law;



[Handwritten signature]

- (k) the vehicles on which CENVAT credit was availed is registered in their name and was used for providing taxable service specified in sub clause [zzp] of clause (105) of Section 65 of the Finance Act, 1994 for providing transportation of goods by road; that they had shown income from goods transportation in their profit and loss account; that since the liability to pay service tax on GTA service is on the recipient of service, they were not required to pay service tax and hence it was not reflected in their ST-3 return;
- (l) that the demand is hit by limitation;
- (m) that the CENVAT credit availed on capital goods were reflected in the ST-3 returns, hence suppression cannot be invoked;
- (n) that no penalty is imposable in this case.

5. Personal hearing in respect of this appeal was held on 17.1.2017, wherein Shri M.H.Raval, Consultant, appeared on behalf of the appellant and reiterated the submissions advanced in the grounds of appeal. He also submitted a letter dated 17.1.2017, reiterating the grounds of appeal.

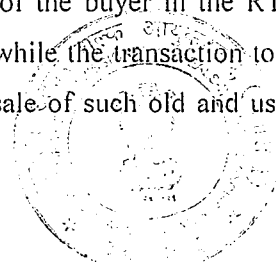
6. I find that there is a delay of three days in filing this appeal. The appellant has filed a condonation application in this regard. In terms of proviso to Section 85(3A) of the Finance Act, 1994, I condone the delay in filing the present appeal.

7. I have gone through the facts of the case, the appellant's grounds of appeal, submissions dated 17.1.2017 and the oral submissions made during the course of personal hearing. The questions to be decided in the present appeal are:

- [a] whether the appellant is liable for service tax under BAS;
- [b] whether the appellant has wrongly availed the CENVAT credit.

The rest of the issues raised by the appellant are concomitant to the aforementioned two questions.

8. Briefly, the facts to the present dispute are that the appellant [an authorized dealer] for new cars manufactured by M/s. Maruti Suzuki India Limited [MSIL], is also engaged in the sale of spares of MSIL. In order to promote/market the sale of new models of cars, they also offer services relating to exchanging the old vehicle. Now inherent in the first question at [a], supra, is whether the appellant is engaged in sale and purchase of cars, as claimed by them or is engaged in providing the services to such new buyers [i.e. clients] by finding prospective customers for pre-owned cars among other services. The appellant has vehemently stated that they purchase the old cars from the customers after fixing a price for their old cars; that the agreed price is adjusted in the value of the new car. However, the adjudicating authority has held that the purchase and sale of cars are governed by the Motor Vehicles Act, 1988; that there is no purchase and sale of cars from such customers; that in the present case the pre-owned vehicle is never registered in the name of the appellant, a mandatory condition for a new buyer; that the vehicles get transferred from the name of their client/customer to the name of the buyer in the RTO records; that the appellant has never acted as a mercantile agent while the transaction took place; that they had not accounted for the stock, purchase, and sale of such old and used



cars in their financial records like balance sheet and in profit and loss account. The adjudicating authority has further held that the dealers only take possession of the vehicle by giving a delivery receipt, a blank sale letter without mentioning the buyers name and address and obtain an authorization from the original owner of pre-owned vehicles, to sell the vehicle. The adjudicating authority therefore, concluded that the sale actually took place between the original RC owner and the prospective buyer only and that the appellant was merely acting as an intermediary or as a broker and the difference in price is the value of service provided by them in the said transaction. The adjudicating authority therefore, held that the service was akin to promotion or marketing or sale of goods belonging to the client as they have identified the prospective buyers for owners of the pre-owned cars and hence, it would appropriately fall under the definition of BAS.

9. I find that this issue has already been dealt by the Tribunal in the case of M/s. Sai Service Station Limited [2016(37) STR 516 (Tri-Bangalore)], wherein it was held as follows

"..... The conclusion that appellants are rendering a service and it is not a transaction of sale and purchase is coming only because registration certificate remains in the name of the owner and he provides blank forms enabling transfer of the vehicle as required under the Motor Vehicles Act. Therefore, the only point that arises for consideration is whether non-transfer of registration at the time of transferring possession of the old vehicle by the owner cannot be considered as a sale as held by the Commissioner or not. In this connection, we find that the decision of the Hon'ble High Court of Kerala relied upon by the learned counsel is applicable to the facts of this case. Hon'ble High Court of Kerala in para-15 has made the following observations which in our opinion is relevant and therefore is reproduced below :

"15. It is quite surprising and shocking to note that the lower Court had noticed that Ext. B5 cannot be accepted because it is not registered and sufficiently stamped as required under the Registration Act and Transfer of Property Act. It appears that the lower Court has omitted to notice that the transaction involved in this case is the sale of vehicle which is a movable article and it is governed by the provisions of the Sale of Goods Act. Section 4 of the Sale of Goods Act read as follows :

4. Sale and agreement to sell. - (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

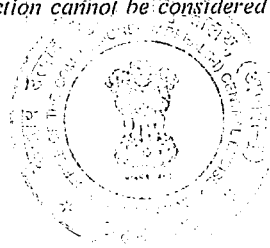
(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Once the price is received and the property is delivered, the sale is complete. Going by the definition of sale, when the property is delivered for a price, the sale is complete. The Trial Court seems to be under the impression that unless the registration is effected there is no complete sale. The sale does not depend upon registration at all. Registration before the RTO is a consequence of sale. Therefore, the Trial Court was not justified in discarding Ext. B5 for the reason mentioned by it."

7. As can be seen, the observations are very clear and for considering a transaction as to whether it is a sale or not, what is required to be seen is not the aspect of registration but whether the price has been received and the property has been delivered or not. In this case, as observed by the Commissioner himself in paragraph 55, the property is delivered and the price has been received by the seller of the old car. Therefore, the first transaction cannot be considered as the one which is not a sale....."

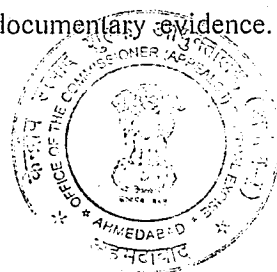


[Handwritten signature]

9.1 This view was also upheld by the Principal Bench of the Tribunal in the case of My Car Pvt. Ltd. [2015(40)STR 1018]. In view of the foregoing, the activity of purchase and sale of pre-owned car does not fall within the purview of Business Auxiliary Service and hence the demand in this regard is not sustainable and the appellant is not liable for service tax under BAS in respect of this activity.

10. As far as the second question is concerned, as to whether the appellant has wrongly availed the CENVAT credit, the facts are that the appellant has availed and utilized the credit in respect of purchase of 25 trailers. As far as availment of CENVAT credit in respect of capital goods are concerned in respect of motor vehicles, the definition as was in vogue during the year 2010-2011, stated that motor vehicles registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause 105 of section 65 of the Finance Act, 1994, was eligible for CENVAT credit. However, I find that the Director of the appellant has in his statement dated 22.10.2014, stated that the vehicles purchased by them on which CENVAT credit was taken were never used for providing the services of repair, maintenance and servicing of vehicles which is the only output service provided by the appellant; that these vehicles have been given on rent/freight to their sister concern M/s. Shree Transport, a GTA service provider. The appellant however, in the grounds of appeal, claims that they were registered with the department for providing GTA service; that since they had provided services covered under sub clause [zzp] of clause (105) of Section 65 of the Finance Act, 1994, they were eligible for CENVAT credit. However, I find that the adjudicating authority has confirmed the demand on the grounds that the appellant has wrongly availed the CENVAT credit on such goods which are neither capital good nor inputs. The original order is silent on the contentions raised by the appellant, as mentioned *supra*. It is therefore felt that this portion of availment of CENVAT credit, needs to be remanded back to the adjudicating authority with a direction to carry out a verification on the claim made by the appellant of having provided services covered under sub clause [zzp] of clause (105) of Section 65 of the Finance Act, 1994, by going through his returns filed with the department and thereafter pass a suitable order by adhering to the principles of natural justice.

11. I find that though the demand in respect of wrong availment of CENVAT credit was of Rs. 30,69,255/-, the adjudicating authority after going into the details confirmed only Rs. 18,35,428/- which was the credit availed in respect of the vehicles. The appellant is however disputing the confirmation of CENVAT credit of Rs. 3,30,941/- out of the total figure, stating that it is not in relation to the trucks but was pertaining to some equipments installed in their workshop and that due to heavy rain the records were damaged and hence they were unable to produce the documentary evidence. Without



1

documentary evidence to disprove the finding of the adjudicating authority, I find it difficult to accept the contention of the appellant. Hence, the argument stands rejected.

12. The appellant has questioned the invocation of extended period. The appellant has relying on various case laws held that there was no suppression, that the returns did not mention about BAS since they were of the firm belief that this activity was not liable for service tax. I do not find any merit in the argument. In-fact the appellant is a dealer of MSIL and any prudent dealer would definitely know what constitutes sale and purchase of cars and what does not. the service do not find any merit. The appellant has further stated that since the CENVAT credit was reflected in the ST-3 returns, suppression cannot be invoked. I do not find any merit in the argument since just mention of an amount would in no way make the department aware of the fact, that the credit was availed on an item, which was not valid as per the CENVAT credit Rules. The appellant has further questioned imposition of penalty under Section 78. However, since I have already held that the dispute has elements for invocation of extended period, the imposition of penalty under Section 78, appears to be proper and I find no need to interfere in this regard.

13. In view of the foregoing, the appeal is allowed in respect of question raised at para 7(a) supra and the matter is remanded back to the original authority in respect of question mentioned at para 7(b), above.

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

(उमा शंकर)

आयुक्त (अपील्स - I)

Date : 28.02.2017

Attested

Vinod

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

By RPAD.

To,

M/s. Tanu Motors Private Limited,
Opposite Dharti Resort,
Abu highway, Palanpur,
Gujarat.



Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Commissioner, Central Excise, Ahmedabad-III.
3. The Deputy/Assistant Commissioner, Central Excise, STR Mehsana, Service Tax Division, Gandhinagar, Ahmedabad-III.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad-III
- ✓ 5. Guard File.
6. P.A.