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

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क	फाइल संख्या : File No : V2(CICS)46/STC-III/2016/Appeal-I
ख	अपील आदेश संख्या : Order-In-Appeal No.: <u>AHM-EXCUS-003-APP-273-16-17</u> दिनाँक Date <u>23.03.2017</u> जारी करने की तारीख Date of Issue
	श्री उमाशंकर , आयुक्त (अपील-1) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित
	Passed by <u>Shri Uma Shankar</u> 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 <u>AHM-STX-003-ADC-AJS-001-16-17</u> dated <u>29.06.2016</u> Issued by Additional Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

अ<u>पीलकर्ता</u> / प्रतिवादी का नाम एवं पता Name & Address of The Appellants/Respondents

M/s. Tirupati Sarjan Limited

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति छिचत 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 वहां रूपए 1000/— फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे ज्यादा है वहां रूपए 1000/— फीस भेजनी होगी। 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 धांरा 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 सकेंगी 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 स्थान 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 आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भगतान 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 Tirupati Sarjan Limited, 5, 1st Floor, M.K.Patel Market, Kansa Char Rasta, Visnagar (Gujarat)(hereinafter referred to as "the appellant) has filed this appeal against Order-in-Original No.AHM-STX-003-ADC-AJS-001-16-17 dated 29.06.2016 (impugned order) passed by the Additional Commissioner of Central Excise, Ahmedabad-III (adjudicating authority).

- 2. Briefly stated, the facts of the case is that based on CERA Audit objection, a show cause notice dated 15.011.2015 was issued to the appellant, alleging for short payment of service tax amounting to Rs.40,31,092/- with interest amounting to Rs.6,64,463/-, leviable on Construction of Commercial/Industrial Buildings, Construction of Residential Complex, Work Contracts and Renting of Immovable Property for the period from October 2012 to March 2013. The said show cause notice also proposes for imposition of penalty amounting to Rs.11,45,258/- under Section 76 of the Finance Act, 1994 (FA); 40,31,092/- under Section 78 of FA and Rs.9600/- under Rule 7C of Service Tax Rules, 1994. The appellant has paid the service tax amounting to Rs.40,31,092/- with interest of Rs.5,18,419/- and penalty of Rs.9600/-. Vide the impugned order the demand was confirmed with interest and imposed penalty under Section 78 of FA and Rule 7C of Service Tax Rules, 1994.
- 3. Being aggrieved, the appellant has filed the present appeal on the grounds that:
 - The delay in payment of service tax was taken due to shortage of fund as their customers
 were not paying service tax and also if the customer cancels their booking of the unit then
 the entire considered is required to be returned without deducting service tax amount.
 - The amount of service tax with interest has been paid before issuance of show cause notice; that no suppression of facts involved in the matter as the appellant has been under regular supervision and control of service tax department.
 - Demand for penalty under work contract service and renting of immovable property is not leviable as they were liable to pay service tax on reverse charge mechanism which was a newly introduced system; that the appellant were not aware of the same.
 - Penalty under Section 78 and 77 of FA is not imposable; that benefit of Section 80 of FA is applicable to them.
- 4. Personal hearing in the matter was held on 21.02.2017. Shri Jamit Shah, Chartered Accountant appeared for the same and reiterated the grounds of appeal. He further admitted that the appellant were conducting normal business during non payment period and payments are used to be made and received for business purpose during that period. He submitted additional submissions regarding non imposition of penalty under Section 78 and also cited various case laws.
- 5. I have carefully gone through the facts of the case and submission made by the appellant in the appeal memorandum as well as during personal hearing.
- 6. At the outset, I observe that in the instant case the undisputed fact reveals that the appellant had accepted the short payment of service tax with interest leviable for the services rendered and penalty for non filing of returns. The disputed fact remains only with regard to imposition of penalty under Section 78 of FA. I observe that for ignorance of payment was pleaded by the appellant that the payments received is not inclusive of service tax and financial



hardship prevented them from discharging tax liability from their pocket. I further observe that the adjudicating authority had a lengthy discussion on this contention of the appellant at para 30 to 36 in the impugned order. According to the provisions of statute, the point of taxation is the point in time when the service is deemed to have been provided. In this case, the tax liability is admitted and accepted by the appellant and accordingly they have paid the same with applicable interest and penalty for non filing of return as referred to above. Therefore, I do not find any merit to discuss the said issue further. They appellant has vehemently argued for non imposition of penalty under Section 78 of FA that since they have paid the duty with interest before issuance of show cause notice penalty is not imposable under Section 78 of FA in view of Section 73(3) of the Act.

- 7. Looking into the facts involved in the present case, the said argument is not tenable in terms of sub section (4) of Section 73 of FA. In the instant case, I observe that non-payment of service tax for the relevant period i.e from October 2012 to March 2013 came into the notice of the department only on the basis of audit of the records conducted by the officer in the month of November 2013. Such situation indicates a clear intention for evading payment of tax. The said provisions of section 73(3) of FA is not applicable in case of non-levy, short payment etc, involving suppression of facts with intent to evade tax liability, wilfull mis-statement etc. Looking into the apt of the case, the penalty under Section 78 imposed by the adjudicating authority is proper and accordingly, I find that no interference is required in this regard. Therefore I uphold the order of the adjudicating authority.
- 8. The appellant has cited various case laws in support of their arguments. On going through the said decisions, I observe that the ratio of the said cases is not applicable to the instant case as this case involves evasion of service tax. The appellant further argued for the benefit of Section 80 of the Act. Looking into the huge amount of service tax evaded by them intentionally, I do not find any merit to consider the said request.

8. In view of above discussion, I reject the appeal filed by the appellant and uphold the impugned order. The appeal stands disposed of accordingly.

(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 2303.2017

Attested

(Mohanan V.V)
Superintendent (Appeals-I)
Central Excise, Ahmedabad

By R.P.A.D
To
M/s Tirupati Sarjan Limited,
5, 1st Floor, M.K.Patel Market,
Kansa Char Rasta, Visnagar (Gujarat)(



Copy to:-

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

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