

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)21/STC-III/2016/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-292-16-17**

दिनांक Date **29.03.2017** 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-059-15-16** 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. Nanda Automobiles 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 :-

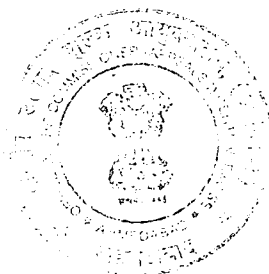
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल
कम्पाउण्ड, 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 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 रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी
होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए
5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और 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 (सीस्टेट) 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 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 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. Nanda Automobiles Private Limited, Plot No. 1003, Sector 28, Gandhinagar, Gujarat 382 028 [for short - 'appellant'] has filed this appeal against OIO No. AHM-STX-003-ADC-MS-059-15-16 dated 29.02.2016, issued on 21.4.2016, passed by the Additional Commissioner, Central Excise, Ahmedabad-III Commissionerate [for short - 'adjudicating authority'].

2. Briefly stated, a show cause notice dated 22.10.2014, 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 period from April 2009 to March 2013. 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.

3. This notice, was adjudicated vide the impugned OIO dated 29.02.2016, wherein the adjudicating authority classified the services rendered by the appellant to their various client as BAS; confirmed the service tax along with interest; 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 adjudicating authority erred in not dealing with the contentions raised before him and not considering the judicial pronouncement cited before him;
- (b) no penalty ought to have been imposed in the said case.

5. Personal hearing in the matter was held on 17.2.2017, wherein Shri Darshan Shah, CA, appeared on behalf of the appellant and reiterated the submissions advanced in the grounds of appeal. He also submitted a detailed reply during the course of personal hearing, raising the following averments:

- that customers bring their old/used cars to the showroom; that they may be interest to buy a new car; the old cars are purchased from the customer and the value is deducted from the sale price of new cars and balance payment is accepted from the customers; the old car is thereafter reconditioned/refurbished to make them saleable and is kept in display for prospective buyers; the activity so carried out is merely trading in used/old cars;
- the procedure of transfer as per RTO provision has no relevance since as per VAT, sale of second hand cars is considered as transfer and hence VAT is levied @ 1% on entire sale value of used car;
- that they wish to rely on the decision of Hon'ble High Court of Kerala in the case of Premshankar KG [2014(4) KHC 895] wherein it was held that once price is received and the property is handed over, the sale is complete;
- that they wish to rely on the case of Sai Service Station Limited [2014(4) TMI 640-CESTAT Bangalore] and My Car Private Limited [2015(40) STR 1018];
- that the service tax audit was already done upto 2009-2010 before the present inquiry was taken up and no objection on this count was raised in the said audit report;



- that it is has been held in a number of cases that where there is a bona fide belief doubt about chargeability of service tax, extended period cannot be invoked;
- Penalty under section 78 has been invoked erroneously.

6. I have gone through the facts of the case, the appellant's grounds of appeal, submissions dated 16.2..2017 and the oral submissions made during the course of personal hearing. The only question to be decided in the present appeal is, whether the appellant is liable for service tax under BAS.

7. 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 exchange of the old vehicle. Now inherent to the question, *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 is 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.



8. 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.

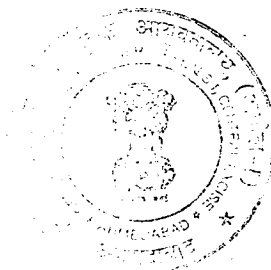
Once the price is received and the property is delivered, the sale is complete. Going by the definition of sale, when the property is delivered for a price, the sale is complete. The Trial Court seems to be under the impression that unless the registration is effected there is no complete sale. The sale 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. 85 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....."

9. 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. In view of the foregoing, the appeal is allowed and the impugned OIO dated 29.2.2016, is set aside.

[Signature]



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
(उमा शंकर)
आयुक्त (अपील्स - I)

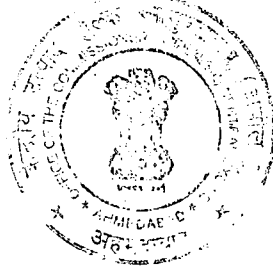
Date : 29.03.2017
Attested

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

By RPAD.

To,

M/s. Nanda Automobiles Private Limited,
Plot No. 1003,
Sector 28,
Gandhinagar,
Gujarat 382 028



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 Gandhinagar, Service Tax Division, Gandhinagar, Ahmedabad-III.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad-III
5. Guard File.
6. P.A.