

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)12/STC-III/2015/Appeal-I
V2(GTA)27/ST-4/STC-III/2015/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-083 to 084-16-17
दिनांक Date 09.08.2016 जारी करने की तारीख Date of Issue 10.8.2016

श्री अभय कुमार श्रीवास्तव, आयुक्त (अपील-1) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by Shri Abhai Kumar Srivastav 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-JC-34-14-15 dated : 30.03.2015 issued by:
Joint Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

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

M/s. New Vir Teja Roadlines

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 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) 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 संदर्भ में, 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

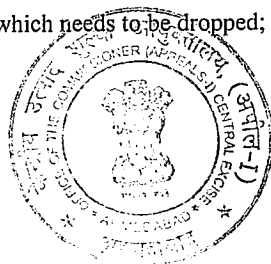
M/s New Vir Teja Roadlines, Near Krishana Oil Mills, Kalo-kadi Road, Tal. Kadi, Dist. Mehsana (*appellant* for the sake of brevity) has preferred this appeal against OIO No. AHM-STX-003-JC-34-14-15 dated 30.3.2015, passed by the Joint Commissioner, Central Excise, Ahmedabad-III Commissionerate. An appeal has also been filed by the Deputy Commissioner, Service Tax Division, Gandhinagar, Ahmedabad-III, under section 84 of the Finance Act '94 [FA '94 for sake of brevity] against the aforementioned OIO. Both these appeals are being disposed of vide this appellate order.

2. Briefly stated, the facts are that a case was booked against the appellant based on an intelligence that they were not depositing the service tax collected by them, to the Government; that investigations revealed that the appellant, a service provider registered with the department under the 'Good Transport Agency' service was taking vehicles on commission basis from vehicle owners and issuing bilties for GTA; that they were paying service tax [ST] in respect of those bilties wherein the bilties contained a tick mark against the column 'transporter'; that as per the worksheet prepared on the basis of documents resumed from their premises, the appellant had collected service tax of Rs. 34,85,519 during the period from October 2007 to March 2012 but assessed and paid service tax only of Rs. 3,85,829, as per the ST-3 returns, filed with the department. Thus, there was a short payment of Rs. 30,99,690/-. Investigations further revealed that the appellant had assessed his ST liability only in respect of part of the actual gross amount received by him; that the actual amount of ST collected by the appellant was not shown in the ST 3 returns and suppressed by the way of maintaining and recording the same in parallel records and by issuing parallel consignment notes.

3. Subsequent to completion of investigation, a notice was issued vide F. No. IV/16-44/PI/HQ/2009-10 dated 19.8.2013, *inter alia*, asking the appellant to show cause as to why the ST amount collected, but not deposited be not demanded and recovered u/s 73A(3) along with interest u/s 73B of the Finance Act, 1944. The notice also proposed penalties u/s 76, 77 & 78 of the Finance Act '94 in addition to proposing appropriation of the amount already paid towards the liability.

4. This notice was adjudicated by Joint Commissioner, Central Excise, Ahmedabad-III, who held as follows:

- the consigner/consignee [mentioned in bilties issued by the appellant] are proprietary concerns [who have paid freight] and hence as per rule 2(1)(d)(v) of STR '94, it is the appellant who is liable to discharge the ST liability;
- the appellant had collected Rs. 30,99,690 in excess of the ST paid during the relevant period; that the proprietor of the appellant had confessed that they had not maintained any ledgers; that no balance sheet or profit and loss account was prepared for the years 2007-08 to 2011-12;
- the amount claimed to have been paid towards the service tax liability was discharged after the department pointed out the evasion;
- the appellant has collected the amount of ST under the cover of consignment notes/bilty after having assessed & determined the tax correctly; the appellant had not collected the amount of ST in excess of their tax liability which was required to be collected while providing the taxable service; that the case does not fall under clause 73(A)(2) of FA '94;
- the notice deserves to be dealt in light of provisions of Section 73(1) *ibid*, and not 73(A)(3) of FA '94;
- that since provisions of Section 73(1) *ibid*, is applicable the demand in respect of Rs. 12,48,515 pertaining to 2007-08 is time barred & therefore set aside;
- that there is a calculation excess/error of Rs. 1,35,425/- which needs to be dropped;



- the ST demand of Rs. 17,15,750/- was confirmed along with interest ; and
- penalties were imposed u/s 76,77 & 78 of the FA '94.

5. Feeling aggrieved, the appellant has filed this appeal raising the following averments:

- the liability to pay service tax in terms of Rule 2(1)(d)(v) of STR '94 is on the person who pays the freight; that since in this case the consignor or consignee had paid the freight, the service provider was not liable to pay service tax;
- the department failed to verify with the transporters who transported the goods and collected freight as to whether they collected freight with or without service tax;
- a mere tick mark in the column in consignment notes does not suggest collection of service tax; that there was no collection of service tax by the service provider since he had only received his commission;
- that the statements were taken from the partner [now proprietor] under duress; and
- that penalty under section 76 could not have been imposed even for the period prior to 9.5.2008 since the provision granting relief from simultaneous penalties u/s 76 & 78, is retrospective.

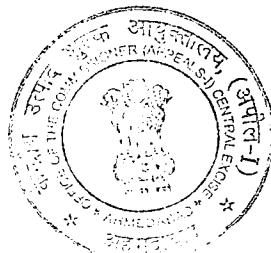
6. Commissioner, Central Excise, Ahmedabad-III, reviewed the aforementioned OIO under Section 84(1) of the FA '94 and directed the Deputy Commissioner, Service Tax, Gandhinagar Division, Ahmedabad-III to file an appeal wherein, *inter alia*, the following points have been raised:

- part 8(b) of the 'Self assessment memorandum' of the ST-3 returns [Not. No. 35/2001-ST dated 20.10.2005, refers] clearly states that the document for assessment in respect of ST liabilities is the ST-3 returns;
- that there is no doubt that the appellant had collected Rs. 30,99,690/- in excess of the amount shown as assessed in their ST-3 returns;
- that even Circular No. 887/7/2009-CX dated 11.5.2009, speaks of scrutiny of assessment - the logical inference of which is that the ST-3 return is the assessment document;
- since ST-3 return is the assessment document & an amount was collected in excess of what was shown as assessed in ST-3 return by the appellant, the case is squarely covered under Section 73(A)(1) of the FA '94 in as much as the service provider has collected service tax in excess of the tax paid by them & the recovery is covered under Section 73(3) *ibid* & therefore the recourse taken to 73(1) of the FA '94 is erroneous;
- since the case is covered under Section 73A & not under Section 73(1), the period of limitation, as provided under Section 73(1) of the FA '94, would not be applicable.

7. Personal hearing was held on 26.7.2016 wherein Shri Rahul Gajera and Shri R.K.Jain, both advocates, appeared on behalf of the appellant and reiterated the submissions made in the appeal memorandum. They also submitted the cross objection in respect of the departmental appeal, contending that section 73A of the Finance Act, 1994 empowers the Central Excise officer to serve notice only upon the person liable to pay service tax and since the appellant was not liable to pay service tax, the said section is not applicable.

8. I have carefully gone through the facts of the case on record and the submissions made in the appeal memorandum and the oral averments made during the course of personal hearing.

9. Firstly, I would like to discuss the averments raised by the appellant, the primary contention being that; [a] they were not liable to pay service tax, since the onus of discharging tax is on the person who pays the freight; and [b] the statements were recorded under duress.



10. I find that these arguments were raised before the original adjudicating authority who has dealt with both the contentions in *paras 31(vi)* and *31(xix)(bi)* of his impugned OIO. As the averments raised herein stand addressed in the original order, nothing further needs to be added and hence, I concur with the findings recorded by the original adjudicating authority.

11. The appellant in the grounds has pointed out the lack of investigation at the transporters end, etc. and that nowhere have they submitted one document/proof to dispel the allegation that the service tax amount was collected. In fact, it is on record by none other than the proprietor himself that no records were maintained. What is intriguing is that even the balance sheet and the profit and loss accounts in respect of the period in dispute, were never prepared. It is a fact that the allegation of the department is based not only on documentary evidence but is supported by the statement of none other than the proprietor wherein he has admitted the charges. Not once have the statement been refuted. Now at this stage, to aver that the statements were recorded in duress, can at best be termed as an afterthought.

12. Before moving to the departmental appeal, on revisiting the factual position, the adjudicating authority, has:

- [a] confirmed the demand under 73(1) - while the demand was raised under section 73A(3) ;
- [b] demanded interest under section 75 , when the interest was proposed to be demanded under section 73B ;
- [c] confirmed only Rs. 17,15,750/- while the demand was for Rs. 30,99,690/- ;
- [d] set aside the demand of Rs. 12,48,515/- on limitation of time as provided under section 73 of the FA '94; and
- [e] set aside the demand of Rs. 1,35,425/- on the grounds that there was a calculation error/there was repetition.

13. Now coming to the departmental appeal, I find that the department has primarily contended that; [a] the adjudicating authority erred in confirming the demand under Section 73(1) when the case was covered under section 73A of FA '94; and [b] since the demand was erroneously confirmed under 73(1), the question of time bar under Section 73 was also wrongly applied to the present proceedings.

14. Coming to the first point, I agree with the contention raised in the departmental appeal that the adjudicating authority erred in holding that the provisions of section 73(1) of the FA '94 would apply instead of Section 73A *ibid*. For the sake of ease of understanding, relevant portions of Section 73A is reproduced below:

SECTION 73A. Service tax collected from any person to be deposited with Central Government. —

- (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made there under, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.



(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.

(3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

On going through the departmental contention, it is amply clear that as per part 8(b) of the 'Self assessment memorandum' of the ST-3 returns, the document for assessment in respect of ST liabilities is the ST-3 returns and that the amount in dispute, collected in excess of what was shown as assessed in ST-3 return, was in fact collected by the appellant; and therefore, the case is squarely covered under Section 73(A)(1) of the FA '94. The service provider has collected service tax in excess of what was assessed and deposited in the treasury. Thus, Section 73A comes into play which states that since the appellant, who was liable to pay service tax, had collected Rs. 30,99,690/-, in excess of the service tax assessed and paid on the GTA services from the recipients, he is liable to pay the amount so collected to the credit of the Government. Therefore, the recourse taken to section 73(1) of the FA '94 by the adjudicating authority is erroneous.

15. Consequently, the reliance placed on Section 73 in holding that the demand pertaining to the period 2007-08 amounting to Rs. 12,48,515/- is barred by limitation, is also not legally tenable. As no limitation of time is prescribed under Section 73A, the order of dropping demand of Rs. 12,48,515/- by the adjudicating authority is not legally tenable and is therefore, set aside.

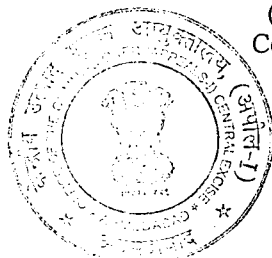
16. The demand confirmed stands revised from Rs. 17,15,750/- to Rs. 29,64,265/-, in view of the foregoing. Accordingly, penalty of Rs. 29, 64, 265/- is imposed under section 78 of FA '94. Further, while calculating the penalty under Section 76 of FA '94 until 9.5.2008, the revised demand that stands confirmed should also be taken into consideration.

17. Further, in this backdrop, the interest is also liable to be paid by the appellant under Section 73B of the FA '94.

18. As the departmental appeal has not disputed the dropping of demand of Rs. 1,35,425/- on account of the same being wrongly calculated /calculated being repetition [sic], with any concrete averments, except for the fact that in the prayer the entire amount dropped is included, I do not find any necessity to interfere with the findings of the adjudicating authority in as far as this amount is concerned, which has been dropped on account of mis-calculation.


19. I view of the foregoing discussions, I reject the appeal filed by the appellant. The departmental appeal is allowed to the extent mentioned in paras above. Both the appeals are disposed off accordingly.

Date: 09.08.2016



Abhai
09.08.2016
(Abhai Kumar Srivastav)
Commissioner (Appeals-I)
Central Excise
Ahmedabad

Attested


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

BY R.P.A.D.

M/s. New Vir Teja Roadlines,
Near Krishna Oil Mills,
Kalol-Kadi Road,
Dist. Mehsana,
Gujarat.

Copy to:-

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III
3. The Assistant Commissioner, Central Excise, Gandhinagar Division.
4. Guard file.
5. P.A. file

