

 सत्यमेव जयते	केन्द्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, वस्तु एवं सेवा कर भवन सातवीं मंजिल, पोलिटिकनिक के पास, आम्बावाडी, अहमदाबाद-380015	 GST Building, 7 th Floor,, Near Polytechnic, Ambavadi, Ahmedabad- 380015
	079-26305065	टेलीफैक्स : 079 - 26305136

क फाइल संख्या : File No : **V2(72)72/STC-III/2016-17 / 1592 & 1596**
 ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-0129-17-18**
 दिनांक Date : **25.09.2017** जारी करने की तारीख Date of Issue: **12-10-17**
 श्री **उमाशंकर** आयुक्त (अपील) द्वारा पारित

C. Jide

Passed by **Shri Uma Shanker** Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश :
GNR-STX-DEM-DC-28/2015 दिनांक : **29.12.2016** से सृजित

Arising out of Order-in-Original: **GNR-STX-DEM-DC-28/2015**, Date: **29.12.2016** Issued by: Assistant Commissioner, Central Excise, Div: Gandhinagar, Ahmedabad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता
 Name & Address of the **Appellant** & Respondent
M/s. Mahisagar Welding Works

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
- (C) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d). Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- ए0बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरण की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ 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 होंगे।

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.

(6)(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।

(6)(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

This appeal has been filed by M/s. Mahisagar Welding Works, 22 Krishna Complex, Opp. Gayatri Temple, Kalol, Dist. Gandhinagar (hereinafter referred to "as the appellants") against the Order-in-Original number GNR-STX-DEM-DC-28/2016 dated 29.12.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Central Excise, Gandhinagar Division (hereinafter referred to as "the adjudicating authority").

2. Brief facts of the case are that the appellants are engaged in providing taxable service under the category of "Construction Services in respect of Commercial or Industrial Building and Civil Structure" and are holding Service Tax registration number ABFPR4232BST001. On the basis of investigation conducted by the Preventive Section, it was revealed that they were carrying out the work of laying of gas and water pipeline to M/s. ONGC. It was further noticed that they had calculated their Service Tax liability by bifurcating the single work order into three parts viz. (i) where there was only service; (ii) where there was service provided by them and also there was supply of material by them and (iii) where there was only supply of material. They had given 100% weightage to the value received towards the work where only service been provided by them. Where there was element of service present along with the supply of material, they had given 33% weightage to the value and availed the benefit of abatement of 67% of the gross value as available under Notification number 01/2006 dated 01.03.2006 and paid Service Tax on the 33% value. Further, when there had been only material supply and no service was provided, they had given zero percent weightage to such value. Thus, it was noticed that the appellants, in a single work/invoice, used to simultaneously avail benefits of Notification number 01/2006 dated 01.03.2006 as well as Notification number 12/2003-ST dated 20.06.2003 by giving nil percent weightage to the cost of materials supplied by them during the course of execution. Therefore, it was concluded that the appellants had contravened the conditions of the Notification number 15/2004-ST dated 10.09.2004 (up to 01.03.2006) and Notification number 01/2006-ST dated 01.03.2006 (w.e.f. 01.03.2006). Thus, a show cause notice dated 22.10.2010, for the period from 2005-06 to 2009-10, was issued to the appellants. Said show cause notice was adjudicated by the adjudicating authority, vide the impugned order. The adjudicating authority, vide the impugned order, confirmed the demand of Service tax of ₹ 2,11,746/- under Section 73 and ordered for payment of interest under Section 75 of the Finance Act, 1994. He also imposed penalty under Sections 76 and 77 of the Finance Act, 1994. He further ordered the appellants to pay late fee amount specified under Rule 7C of the Service Tax Rule, 1994 for their failure to furnish ST-3 returns.



3. Being aggrieved, the appellants have filed the present appeal. The appellants argued that they had taxed all the transactions with the same theory that they had not added the value of pipes supplied by the ONGC in the gross value. But the adjudicating authority had not taken into account the factual data and details while determining the tax liability. The appellants, according to them, are involved in undertaking composite contracts for supply and construction involved in the projects. For the said composite contract, a lump sum consideration is being charged from the customers. Thus, the services rendered by the appellants fall under the category of "Works Contract Service" only which came into effect from 01.06.2007. Thus, during the impugned period, the appellants were not liable for Service Tax. In fact, they had wrongly classified their service under the category of "Construction of Commercial and Industrial Service" and paid the duty as they were unaware of the intricacy of the classification and law applicability. The appellants further stated that the department had made calculation mistake in the show cause notice while calculating Service Tax liability in Bill number 04 and 07. However, they did not submit copy of the said invoices before me.

4. A personal hearing in the matter was held on 21.08.2017 and Shri Vipul Khandhar, Chartered Accountant appeared for the same and reiterated the grounds of appeal.

5. I have carefully gone through the facts of the case on records, appeal memorandum and submissions made by the appellants at the time of personal hearing. At the very onset, I would like to quote that Notification No. 01/2006 dated 1st March 2006 lists out abatements for the Commercial or industrial construction service and Construction of Complex services under entry no. 7 & 10 of the said notification. The Rate of abatement was 67% of the gross amount charged for providing the said taxable services. The entitlement for the abatement was conditional upon the following two aspects;

- One of the preconditions for availment of the abatement was that the service provider shall not take CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service.
- The other condition was that the service provider shall not avail benefit of exemption notification no. 12/2003 whereby value of goods and materials sold by the service provider to the recipient of service was exempted for calculating the taxable service.

Further in both the entries, the Explanation provides that,



"The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider".

The Central Board of Excise & Customs, vide its Circular 80/10/2004 dated 17.09.04, clarified as:-

"The gross value charged by the building contractors includes the material cost, namely, the cost of cement, steel, fittings and fixtures, tiles etc. Under the Cenvat Credit Rules, 2004, the service provider can take credit of excise duty paid on such inputs. However, it has been pointed out that these materials are normally procured from the market and are not covered under the duty paying documents. Further, a general exemption is available to goods sold during the course of providing service (Notification No. 12/2003-ST) but the exemption is subject to the condition of availability of documentary proof specially indicating the value of the goods sold. In case of a composite contract, bifurcation of value of goods sold is often difficult. Considering these facts, an abatement of 67% has been provided in case of composite contracts where the gross amount charged includes the value of material cost. (refer notification No.15/04-ST, dated 10.09.2004) This would, however, be optional subject to the condition that no credit of input goods, capital goods and no benefit (under notification no. 12/2003-ST) of exemption towards cost of goods are availed".

In this case of *Jaihind Projects Ltd. vs. Commissioner of Service Tax, Ahmedabad* ([2010] 25 STT 196 (AHD. - CESTAT) the Tribunal had the same view. In terms of Notification No. 15/2004-ST, dated 10-9-2004 as amended from 16-6-2005, the assessee was paying service tax on 33 per cent of the gross amount charged from the service receiver. The department relying upon *Explanation* to said notification took view that since the assessee did not include the value of the pipes provided by the customers for arriving at the 'gross amount charged' under the Notification No. 15/2004-ST, it was not entitled to the benefit of the Notification No. 15/2004.

The Tribunal Held that;

"What the Explanation does is that it makes it clear that irrespective of the source of supply, if some material or goods have been used in providing the service, the value of such goods also has to be included. Therefore, the Explanation is really in the nature of Explanation and brings clarity to the provisions of notification and it is the choice of the assessee to avail exemption or not. In view of the observations that the Explanation is in consonance with the main part of the notification and actually clears the ambiguity with



regard to the goods supplied or provided or used, it could not be accepted that the interpretation given by the department explained or added to the scope of the notification.

The words 'supplied' and 'provided' have the same meaning. By using the word 'or' between the words 'provided' and 'used', legislative intent seems to be to ensure that whether it is supplied or provided or used, the value of such goods and materials irrespective of source is to be included.

On the basis of discussion above, it was to be concluded that if the value of the pipes which was used for laying pipelines was not included, the assessee would not be eligible for abatement under Notification No. 15/04-ST as amended".

Thus, I conclude that the adjudicating authority has rightly confirmed the demand.

6. Now, I find that the appellants, in their grounds of appeal have not technically contested the views of the adjudicating authority. Instead, they have submitted a very lame excuse. They stated that they fall in the category of Works Contract Service (effective from 01.06.2007) but wrongly classified themselves under the category of Construction of Commercial and Industrial Services (effective from 10.09.2004) and have paid duty in that head. They further stated that this happened as they were unaware about the intricacy of the classification and law applicability. This is a clear cut case of lame excuse and afterthought on the part of the appellants. They have opted for and received the Service Tax registration certificate under the category of Construction of Commercial and Industrial Services. During the process of obtaining the registration certificate, they could have got themselves clarified from the departmental officers in case of any ambiguity. They stated that even they were paying duty on the said category, so they could have amended their registration certificate at a later stage. It seems to me that after the department confirmed their case, they have invented this excuse and using it as an escape route. Thus, I find their argument absolutely not acceptable and consider it as an afterthought.

They have further stated before me that the department made some calculation mistake, in the show cause notice, on invoice number 04 and 07 while counting the tax liability. If that was the case, then why they did not present the matter before the adjudicating authority, in writing? Now that they have submitted the issue before me, why they have not produced copy of the said bills? Any argument, unless accompanied by documentary evidence, would not be considered, treating the same as afterthought.



7. In view of above discussions, I up held the impugned order passed by the adjudicating authority and reject the appeal filed by the appellants.
8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
8. The appeals filed by the appellant stand disposed off in above terms.

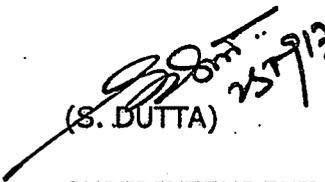


(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED


(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.

BY R.P.A.D

To,
M/s. Mahisagar Welding Works,
22 Krishna Complex, Opp. Gayatri Temple,
Kalol, Dist. Gandhinagar

Copy to:-

1. The Chief Commissioner, Central Tax Zone, Ahmedabad.
2. The Commissioner, Central Tax, Gandhinagar.
3. The Dy. / Asstt. Commissioner, Central Tax, Division- Kalol.
4. The Addl./Joint Commissioner, (Systems), Central Tax, Gandhinagar.
5. Guard file.
6. P.A file.

