केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

वस्तु एवं सेवा कर भवन, सातवीं मंजिल,पोलिटेकनिकके पास, आम्बावाडी, अहमदाबाद-380015

GST Building ,7th Floor, Near Polytechnic, Ambavadi, Ahmedabad-380015

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क फाइल संख्या : File No : **V2(BAS)12/AHD-III/2017-18** /h0c3 to h0e7

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-0138-17-18**

दिनाँक Date :**23.10.2017** जारी करने की तारीख Date of Issue: 6-11-17

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

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

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **STX-GNR-II-SUPDT-PNG-001-16-17** दिनाँक : **04.05.2017** से सृजित

Arising out of Order-in-Original: **STX-GNR-II-SUPDT-PNG-001-16-17,** Date: **04.05.2017** Issued by: Superintendent, Central Excise, Div:Gandhinagar, Ahmedabad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Sabar Cables Pvt. Ltd.

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 पूवोक्त 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 मामलें 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 डयूटी केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

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 न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर 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 ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत 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. Registar 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 ओदश 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 हैं।

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 not withstanding the fact that the one appeal to the Appellant 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 रू.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 beer a court fee stamp of Rs.6.50 paisa 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 in 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, 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 अर्धीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

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 Sabar Cables Private Ltd, Opposite Sahakari Gin, Survey No.783, P.N.H.S Kaknol, Himatnagar (hereinafter referred to as "the appellant") against Order-in-Original No.STX-GNR-II-SUPDT-PNG-001-16-17 dated 04.05.2017 (hereinafter referred to as "the impugned order" passed by the Superintendent of Service Tax Range-II, GandhinagarI Division, Ahmedabad-III (hereinafter referred to as "the adjudicating authority).

2. Briefly stated, the appellant is engaged in manufacturing of electric wires, cable and aluminum conductors; that they had entered into agreements with buyers such as Uttar Gujarat Vij Company Ltd (UGVCL) and Pashchim Gujarat Vij Company Ltd (PGVCL) for supply of electric cables and other goods. In terms of relevant agreements/purchase order, the appellant has paid packing and freight charges as mentioned therein. It was further observed that Rs.6/- per unit had been agreed to be paid upon by the buyers, in addition to the assessable value of freight and packing charges. It was observed that during April 2015 to March 2016, the appellant had received an amount of Rs.14,03,019/- as freight charges and out of the said freight charges, they had paid certain freight charges to the Goods Transport Agency (GTA) and had discharged service tax liability under GTA as recipient of service. However, it appeared that they had not paid the entire amount collected as freight from the buyers to the GTA but retained some amount with them and shown as 'net income of outward freight' in their Personal & Ledger Account. As it appeared that the appellant is not a GTA engaged in providing transportation service but facilitating freight booking for the buyers; that the differential amount earned by the appellant is nothing but the commission/remuneration /consideration/facilitation charges for providing Business Auxiliary Service (BAS), a show cause notice dated 14.07.2016 was issued to them for recovery of Rs.51,917/- for the disputed period with interest and imposition of penalty. Vide the impugned order, the said show cause notice was decided by confirming the demand of Rs.47,912/-with interest and imposed penalty under Section 78, 77(1)(a), 77(1)(b), 77(1)(e), 77(2) of the Finance Act, 1994 and under Rule 7C of Service Tax Rules, 1994.

3. Being aggrieved, the appellant has filed the present appeal on the grounds that the appellant is selling goods to the client for which transportation is undertaken by GTA appointed by them; that they pays freight charges and recovers the amount of freight from its client which is higher than the actual freight amount paid to GTA. Thus, in order to fall under the category of BAS, it is important that they have to act an agent while facilitating transportation facility. The amount collected by them is towards facilitating transporting of goods, be called as 'income from transportation service' and not 'commission income, hence it cannot be taxed under the head of BAS. The appellant has arranged transportation facility on principal to principal basis and not principal to agent basis to their buyers. The appellant has recovered higher freight amount from buyers than the actual freight

amount payable to GTA which clearly signifies profit earned by them from transportation facility given to their clients. Thus demand raised on profit earned by them is illegal as service tax can only be charged on gross amount of service rendered and not on profit earned. The appellant also submitted that based on the above argument, they are not liable to pay service tax and penalty imposed. The appellant has cited various case laws in their favour.

4. A personal hearing in the matter was held on 07.09.2017. Ms Bhagyashree Bhatt and Shri Ajit Boricha, Chartered Accountants appeared for the same. They reiterated the grounds of appeal and submitted citation in case of M/s Dhanshree [2016-TIOL-1939-CFS and M/s Bafna Motor Transport Co. [2016 (4) TMI 154]

5. I have carefully gone through the facts of the case on record and submissions made by the appellant. The short issue to be decided in the appeal is as to whether the extra transportation charges received by the appellant from their client other than the actual cost incurred by them is taxable or otherwise.

5 In the present case, I find that the appellant is paying service tax under GTA, being recipient of service. They had entered with an agreement with UGVCL and PGVCL for supply of electrical cables etc and in order to supply such goods to buyer's premises, they made an arrangement of transportation of goods by road with Goods Transport Agency and recovered transportation charges higher than the amount paid to GTA. However, the appellant has not discharged tax liability for the entire amount charged from the buyers but retained some additional amount charged towards transportation. The department's contention is that the amount so retained by the appellant is nothing but the commission/facilitation charges etc for providing BAS. On other hand, the appellant stated that such amount incurred by transporting of goods be called as 'income from transportation service' and not 'commission income, hence it cannot be taxed under the head of BAS; that the appellant has arranged transportation facility on principal to principal basis and not principal to agent basis to their buyers and the said amount is a 'profit' of their business.

6. I observe that, the issue involved in the instant case for the period involved prior to April 2015 has already been decided by me vide OIA No. AHM-EXCUS-003-APP-034/16-17 dated 27.05.2016. In the said OIA, it has been held that the extra amount collected by the appellant pertains to the service element over and above the actual cost of freight; that the amount is a consideration they received in lieu of services provided and since such additional mark-up money received by them is in the nature of consideration, it cannot be classified as 'profit' but chargeable to service tax under Business Auxiliary Service.

7. I observe that the period involved in the instant case is from April 2015 to March 2016. In this case also, I observe that there is no dispute that some extra amount other than the amount paid to GTA service was received by the appellant

during the disputed periods. Further, it is also not disputed that the income shown in their P & L account under the head of 'net income of outward freight' is an extra amount received from their clients towards facilitating transportation of goods at the rate at which the same was fixed. Besides, I observe that the differential amount received is based on commercial factors. It is fact that the appellant is not a GTA engaged in providing transportation service but they are facilitating the activities of freight booking for their buyers. Looking into the fact, I observe that the buyer had cast their responsibility of arranging transportation on the appellant, instead of going to the GTA freight booking and paid money for getting the work done. The said activities are tantamount to procurement of service which is also an input for their client. In the instant case, the department has demanded service tax only on the differential amount which was retained by the appellant after making payment towards GTA service. The amount so realized by them and mentioned under the head 'net income of outward freight' in their P & L Account is nothing but the income from the service provided to their clients. In view of this, such service has to be categorized under BAS. In other words, such service comes under the ambit of BAS.

8. Notwithstanding above, I observe that the service provided by the appellant is to support the business of their clients. They have charged amounts from their clients in excess of what they collected for the payment of GTA. I observe that the extra amount collected is a consideration pertains to the service element over and above the actual cost of freight and the said consideration is the value of taxable service provided by them. Therefore, such additional mark-up money received by the appellant from its clients in the nature of consideration cannot be classified as 'profit' as in the process of rendering such service they had earned such consideration, which is chargeable to service tax under the category of BAS in view of above discussion.

9. I observe that the appellant has cited case laws in the appeal memo, however looking to the facts and discussion hereinabove, the said citation have no relevancy to the matter on hand. Further, they also relied on citations in case of M/s Dhanshree Ispat [2016-TIOL-1939-CFS and M/s Bafna Motor Transport Co. [2016 (4) TMI 154] during the course of personal hearing. I have perused the same. The case of M/s Dhanshree Inspat referred the issue relating service tax on availment of service of GTA paid and claimed as reimbursement of such charges with tax thereon from their clients. In the case of M/s Bafna Motor Transport Co., the party is engaged in the service of GTA and being paid the service tax under the said category as a recipient. In the instant case, the appellant is a registered manufacturer and entered with an agreement with UGVCL and PGVCL for supply of electrical cables etc and in order to supply such goods to buyer's premises, they made an arrangement of transportation of goods by road with Goods Transport Agency and recovered transportation charges higher than the amount paid to GTA.

Therefore, the facts involved in both the cases are different from the facts of the instant case, hence not applicable.

10. In view of above discussion, by following my earlier decision, vide OIA dated 27.05.2016, I am of the opinion that the activities carried out by the appellant is a service which are correctly classifiable under the category of BAS and service tax is chargeable for the amount received by them on such service. Therefore, I do not find any merit to interfere the impugned order which is totally upheld. In the circumstances, the service tax demanded in the disputed period is recoverable from the appellant with interest. Since the appellant has violated the provisions of the Finance Act, 1994 as discussed in the impugned order, the adjudicating authority has rightly imposed the penalty under Section 78, 77(1)(a), 77 (1) (b), 77(1) (e), 77 (2) of Finance Act, 1994 and under Rule 7C of Service Tax Rule 1994

5.6 In view of above discussion, I reject the appeal filed by the appellant and up held the impugned order. The appeal is disposed of accordingly.

(उमा शंकर)
आयुक्त (अपील्स)
Date: 23/10/2017.

Attested

(Mohanan V.V)
Superintendent (Appeals)

By R.P.A.D.

To
M/s Sabar Cables Private Ltd,
Sahakari Gin, Survey No.783,
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Copy to:-.

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