केंद्रीय कर आयुक्त (अपील)
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय उत्पादशुल्कभवन, Floor, Central Excise Building,
सत्यमेव जयते सातवीं मंजिल,पोलिटेकनिककेपास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015
☎ : 079-26305065. टेलेफैक्स : 079 - 26305136

क फाइल संख्या : File No : **V2(SAS)64/STC-III/2016-17/Appeal and V2(SAS)18/ST-4/STC-III/16-17**

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-061 TO 062-17-18**

दिनाँक Date :**25.07.2017** जारी करने की तारीख Date of Issue:

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

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

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनाँक : 8/8/17 से सृजित

Arising out of Order-in-Original: **AHM-STX-003-ADC-AJS-030-16-17** Date: **27.09.2016** Issued by: Additional Commissioner, Central Excise, Din:Gandhinagar, G'nagar-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Shree Ghanshyam Enterprises

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 ur der 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 amourt 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 नूल 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 अपीलीय 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 order covers two appeals filed against **O.I.O. No. AHM-STX-003-ADC-AJS-030-16-17 dated 27/09/2016** (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as 'the adjudicating authority'), the details of which are as follows:

i. Appeal filed by **M/s Shree Ghanshyam Enterprise,** 09, Motibaug Society, Motipura, Himmatnagar, District: Sabarkantha (hereinafter referred to as 'the appellant')

ii. Appeal filed by the Assistant Commissioner, Service Tax Division, Gandhinagar. (hereinafter referred to as the 'departmental appeal'.)

2. Briefly stated, the facts are that a inquiry was initiated by the department at the end of M/s Sabarkantha District Co-op. Milk Producers Union Ltd., Himmatnagar ('M/s Sabar Diary' for brevity) during the course of which, a statement of Shri Jayantibhai Dahyabhai Patel, General Manager of M/s Sabar Diary was recorded on 08/04/2015, wherein it was revealed that various labour contractors had provided unskilled laborers to execute job allotted as per agreement under the supervision of the contractors and the overall supervision regarding quality of work by the officials of M/s Sabar Diary during the period from **2010-11 to 2014-15**. One of the such contractors happened to be the appellant who was rendering services falling under the category of **'MAN POWER RECRUITMENT & SUPPLY AGENCIES SERVICES'** M/s Sabar Dairy. Further, in a statement recorded on 09/04/2015, Shri Manubhai Hirabhai Patel, proprietor of the appellant deposed, *inter alia* that he had provided specific number of laborers on the strength of one contract with M/s Sabar Dairy for processing of cans, cleaning of cans and loading / unloading activity at Cooling center situated at Shamlaji and the work was to be done as per the instructions of the in-charge of the cooling centre of M/s Sabar Dairy. He further stated that he had not obtained Service Tax registration for providing such services and had neither obtained service tax registration nor paid service tax nor filed service tax returns. He agreed with the deposition made by the General Manager of M/s Sabar Diary and admitted that he had received payments towards supply of laborers during 2010-11 to 2014-15. The payment received by the appellant and the Service Tax worked out on such payments are as shown in the table below:

Year	Gross Income	Total Service Tax
2010-11	Rs.13,95,813/-	Rs.1,43,769/-
2011-12	Rs.16,37,174/-	Rs.1,68,629/-
2012-13	Rs.16,34,259/-	Rs.2,01,994/-
2013-14	Rs.16,84,106/-	Rs.2,08,156/-
2014-15 (up to Sep.-2014)	Rs.7,31,147/-	Rs.90,370/-
	Total Service Tax	Rs.8,12,918/-

The appellant had further stated that he had not entered into any contract for the supply of laborers with any other firms or earned any other income for supply of laborers apart

from his contract with M/s Sabar Diary and that he had not maintained any books of accounts and had paid no service tax for supply of laborers since M/s Sabar Dairy was not paying him the same. He also admitted that he had not given any intimation to regarding the supply of laborers to the Service Tax department in any manner. It appeared that the appellant had failed to disclose their activity of providing taxable service under the category of 'Man Power Recruitment or Supply Agency' and had failed to follow procedures and pay Service Tax. Accordingly, a Show Cause Notice F.No.V.ST/15-115/OFF/OA/13 dated 22/04/2015 (hereinafter referred to as 'the SCN') was issued to the appellant proposing to classify the impugned activities as "Man Power Recruitment or Supply Agency" and treat the receipts of Rs.70,82,499/- during the period 2010-11 to 2014-15 (up to Sept.2014) as taxable value; demanding Service Tax amount of **Rs.8,12,918/-** under proviso to sub-section 1 of Section 73 of the Finance Act, 1994, invoking extended period along with interest under Section 75 of the Finance Act, 1994 and proposing to levy late fees under Rule 7C of Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 and impose penalty on the appellant under Section 76, Section 77(1)(a), Section 77(2) and Section 78 of the Finance Act, 1994. The SCN was adjudicated vide the impugned order, where the activities undertaken by the appellant was held to be taxable **only w.e.f. 01/07/2012 in terms of Section 65 B(44) of the Finance Act, 1994 holding that the activities during the period prior to 01/07/2012 did not merit classification as "Man Power Recruitment or Supply Agency".** The demand of Service Tax amounting to **Rs.4,67,131/- was confirmed** under the provisions of Section 73(1) of the Finance Act, 1994 invoking extended period along with interest under Section 75 ibid. The demand amounting to **Rs.3,45,787/- was vacated** for the period from 01/04/2010 to 30/06/2012. A penalty of Rs.10,000/- was imposed on the appellant under Section 77(1)(a) of the Finance Act, 1994. Late fees was confirmed to be recovered from the appellant under Rule 7C of Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 for non-filing of ST-03 returns. A penalty of Rs.2,33,565/- was imposed on the appellant under Section 78 of the Finance Act, 1994 and a penalty of Rs.10,000/- was imposed on the appellant under the provisions of Section 77(2) of the Finance Act, 1994. The proposal for penalty under Section 76 ibid was dropped.

2. The department appeal has been preferred mainly on the following grounds:

1) Manpower Recruitment Service was introduced w.e.f. 07/07/1997 and up to 16/06/2005, Service Tax was leviable on services provided by Manpower Recruitment Agencies in relation to recruitment of manpower. Thereafter, scope of services has been expanded by the legislature by substituting the words 'Recruitment or supply of Manpower, temporarily or otherwise', whereby Labour Contractors are also covered under the Service Tax net w.e.f. 16/06/2005. The taxable service "Man Power Recruitment or Supply Agency" services defined under Section 65 (105) (k) of the Finance Act, 1994 and as amended w.e.f. 16/06/2005 reads: ***"any service provided or to be provided to a client, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner, is a 'taxable***

service'. "A Man Power Recruitment or Supply Agency" service has been defined under Section 65 (68) of the Finance Act, 1994 (as amended w.e.f. 16/06/2005, which reads: ***"any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise to a client."*** This definition is effective from 16/06/2005 and as was clarified by C.B.E.C. vide letter F.No. B1/6/2005-TRU dated 27/07/2005 and Circular No. 96/7/2007 dated 23/08/2007. Prior to 16/06/2005, the definition read as: ***"Taxable service is a service provided to a client, by a manpower recruitment agency in relation to the recruitment of manpower, in any manner."*** The Service Tax law nowhere defines the term 'service'. The term 'service' has been defined under Section 2(o) of the Consumer Protection Act, 1986, which reads: ***"(o) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"*** . The American Heritage Dictionary defines the **"recruitment"** as supply with new members of employees; **"supply"** as to make available for use; provide; to furnish or equip with; to fill sufficiently; satisfy; to make up for a deficiency; to serve temporarily as a substitute, to fill a position as a substitute and **"manpower"** as power in terms of the workers available to a particular group or required for a particular task. Thus recruitment or supply of manpower means making available persons to an organization by way of recruitment or supply thereof.

2) On considering the conditions enumerated in the contracts entered between the Labour Contractor and M/s Sabar Diary, Condition 4 stipulates that that the Labour Contractor shall deploy the adequate numbers of skilled and experience labours / workers as per the direction of Section Head of M/s Sabar Diary in order to complete the assigned tasks within time schedule under the direct supervision and control of M/s Sabar diary. Condition No.5 stipulates that M/s Sabar Diary will deduct 14% amount from the fills raised by Labour Contractor on which no interest would be payable. The Labour contractor shall pay Bonus etc. to the laborers as per the provisions of 'the Payment of Bonus Act, 1956 and the Factory Act, 1948. Condition No.6 stipulates the Contractor is required to keep records like Attendance Register, Salary Register, Bonus Register, Overtime Register, ESI Register & PF Register etc.; Condition No. 14 also pertains to timely payment of Bonus etc.; Condition no. 18 stipulates that the Contractor shall obtain insurance of all the laborers deployed as per Workman Compensation Act; Condition No. 20 stipulates that the Contractor shall issue identity card to each laborer and the same shall be shown by laborers to the gate keeper at the time of entering the premises; Condition No. 21 stipulates that uniform shall be supplied to all the laborers working with the Union through the Contractor; Condition No. 47 stipulates that M/s Sabar Dairy will make payment of Service Tax to Labour Contractor on submission of challan showing payment of Service Tax by the Contractor; Condition No. 48 stipulates the penal clause of deduction of Rs.5,000/-, Rs.10,000/- and cancellation of contracts for irregularities in respect of amounts payable to the laborers / workers employed. These conditions makes in explicitly clear that the essential character of the contract is to supply manpower only. This aspect is corroborated by the statements of the statement of the proprietor of the appellant and the General Manager of M/s Sabar Dairy. The adjudicating authority had not appreciated these facts and had passed the impugned order, which is not proper or legal. As per CBEC Circular No. 341/27/2005-TRU dated 27/07/2005, services rendered by commercial concerns for supply of manpower to clients would be covered within the purview of service tax and what is relevant is that the staff are not contractually employed by the recipient but come under his direction. The employer-employee relationship that exist between the agency and the individual and not between the individual and the person who uses the services of the

individual are covered within the scope of the definition of taxable service [section 65(105)(k)] and since they act as supply agency, they fall within the definition of "Man Power Recruitment or Supply Agency" [section 65(68)] and are liable to service tax. The adjudicating authority in the impugned order for the period of 01/04/2010 to 30/06/2012 had considered the incorrect plea of the appellant that it had been given work orders on the basis of tender floated by M/s Sabar Dairy and as per the work order, it had to complete a series of activities / tasks in the Dairy and they were no paid according to the number of labour employed but the payments were made in lump sum depending on the quantum of work completed by them. The adjudicating authority had failed to appreciate the essential requirement of the contracts and nature of the services rendered by the service providers and also in view of the facts that the activity of production and clearance of the goods are being controlled and supervised by M/s Sabar Dairy themselves and sole object and purpose of the contract was to bridge the demand supply of manpower in adequate numbers by the independent contractors with the expectation, requirement and satisfaction of M/s Sabar Dairy. The process of chilling the milk and activity of storage are being undertaken by M/s Sabar Dairy themselves through the automatic plant & machinery. However, for undertaking some other activity such as timely collection of milk from nearby village area, timely transportation of milk cans from the chilling plant to Dairy located at Himmatnagar cleaning, weighing-checking, loading, unloading, housekeeping, maintenance etc, M/s Sabar Dairy requires more manpower besides their staff. Therefore, on one part, M/s Sabar Dairy being potential user had agreed to receive the services of laborers employed by the appellant under the direct control and supervision of M/s Sabar Dairy who undertakes, manages and controls all the activities of production, clearance and dispatch. Mere receiving of payments based on quantum of work cannot be construed that there was work order unless other specific terms and conditions of the Contracts executed with Sabar Dairy are verified in depth which clearly stated that the labour contractor have to supply the requisite manpower as per requirement and direction of Sabar Dairy. In the general terms and conditions of the Labor Contracts nowhere it is apparently specified or indicated that the contracts executed by them are for actual quantum of work and mere condition with regard to the consideration cannot be considered or claimed by any one that the contracts are composite contract and therefore outside the purview of service tax.

3) The adjudicating authority's reliance upon the decision in the case of Divya Enterprises – 2010 (19) STR 370; Shriram Sao TVS Ltd. – 2015 (39) STR 75 (T); Shivshakti Enterprises – 2016 (41) STR 648 (T); Seven Hills Construction – 2013 (31) STR 611 and Hemant V Deshmukh – 2015 (35) STR 602 is not found to be correct, proper and legal as the facts of the instant case are different from the cases relied upon as in the cited cases the emphasis was on the essence of contract, which was execution of work as per contract and there was no agreement for utilization of services of an individual and therefore in those cases it was held that lump sum work or job is not covered under Manpower Recruitment or supply agency service. Whereas in the instant case it is evident from the contract that the appellant had agreed for utilization of individual / unskilled labours deployed by the independent contractors for a consideration but subject to payment of quantum of work and the essence of contract was not for execution of work but to bridge the demand supply of manpower. Further, Board has made amendments to levy service tax on temporary supply of manpower by manpower recruitment agencies and the scope of services has been expanded by substituting the words "supply of manpower either temporarily or otherwise' and labour contractors are covered under service tax net following this amendment. The case law that is squarely applicable to the facts of the instant case is the decision of Hon'ble Tribunal in the case of Charanjeet Singh – 2011 (021) STR 0635 (Tri.-Del.); Future Focus Infotech India (P) Ltd. vs Commissioner of Service Tax, Chennai – 2010-TIOL-835-CESTAT-MAD; Azur Cyber Pvt. Ltd. – 2009 (13) STR 294 (Tri.-Ahmd.). In the case of Renu Singh & Co. vs CCE – (2007) 11 STT 123, it was held that the supply of labour for the activity of loading

and unloading is chargeable to service tax under the category of Manpower Recruitment or supply agency service and not under cargo handling agency services. Also in the case of K.K. Appachan vs CCE – 2007 7 STR 230, it was held that supply of labour for the activity of packing, loading and unloading is chargeable to service tax under the category of Man Power Recruitment or Supply Agency service and not under the category of cargo handling agency services. In the case of Jivanbhai Makwana – 2010 (18) STR 06 (Tri.Ahmd.), it has been held that as the actual quantum of work to be done is not indicated in the contract where the provisions relate to number of laborers supplied, the terms of the contract are very clear that it was about supply of manpower and is covered under the definition of such service.

4) In view of the above, the order passed by the adjudicating authority **for the period 01/04/2010 to 30/06/2012** stating that activities undertaken by the appellant prior to 01/07/2012 does not merit classification under the taxable category of Man Power Recruitment or Supply Agency is incorrect and is required to be set aside.

3. The main grounds of appeal filed by the appellant, briefly, are as follows:

1) The learned adjudicating authority had erred in holding that the services provided by the appellant for the period 01/07/2012 to 30/09/2014 were taxable services in terms of the provisions of section 65B(44) of the Finance Act, 1994 and in holding that Rs.37,79,371/- was taxable amount. The adjudicating authority had erred in not considering its submission that it was not engaged in 'Manpower supply'. It ought to have been considered that the appellant was engaged in providing services to M/s Sabar Dairy which was engaged in manufacturing milk and milk products and the services provided by the appellant was part of series of activities carried on by M/s Sabar Dairy for such manufacture and therefore, in terms of clause (f) of section 66D of Negative List of Services, the appellant was not liable to service tax on services provided by M/s Sabar Dairy. The adjudicating authority had erred in charging interest.

2) The adjudicating authority had erred in assuming jurisdiction for extended period beyond limitation specified under Section 73(1) of the Finance Act, 1994. The appellant had not suppressed facts, nor was there any fraud or willful mis-statement or collusion on its part and the learned adjudicating authority had failed to bring on record any findings which justify extended period under proviso to section 73(1) ibid. An earlier O.I.O. No. V.ST/15-51/Off/OA/2010 dated 27/07/2010 had been issued to the appellant and hence the department was aware of the activities carried on by the appellant for M/s Sabar Dairy. The appellant was regularly filing returns of service tax with the department for the period under consideration, though it was not charging or paying service tax in respect of services provided to M/s Sabar Dairy.

3) As no suppression of facts or willful misstatement was brought on record, the conditions laid down in Section 78 for levy of penalty was not fulfilled and the same deserved to be set aside. The appellant was holding registration and hence penalty imposed under Section 77(1)(a) was not justified. Similarly, the adjudicating authority had erred in imposing penalty under section 77(2) on ground of failure to self-assess tax liabilities. Since separate penalty under Section 78 was leviable under section 78, the question of laying penalty under Section 77(2) did not arise.

4. Personal hearing in the case was held on 20/06/2017. The common hearing for Appeal No.63 filed by the appellant; Appeal No. 62 filed by Shree Krishna Enterprises; Appeal No.64 filed by Shree Ghanshyam Enterprises and the departmental appeal filed in the matter of M/s Shree Krishna Enterprises was attended by Shri A.P. Sandesara,

Chartered Accountant. The learned C.A. reiterated the grounds of appeal in the appeals filed by M/s Shree Ganesh Enterprises, M/s Shree Krishna Enterprises and the appellant and filed additional written submission. In the case of departmental appeal in the matter of M/s Shree Krishna Enterprises he submitted that the contract was on the basis of quantity and a number of decisions are in their favour. Further, 7 days time was allowed for additional submissions. Thereafter, a personal hearing with regards to the departmental appeal in the matter of the appellant as well as M/s Shree Ganesh Enterprises was held on 20/07/2017. Shri A.P. Sandesara, C.A. appeared on behalf of M/s Shree Ganesh Enterprises and the appellant. The learned C.A. explained that they are labour contractors and not manpower suppliers and that the matter in M/s Shree Krishna Enterprises was also related to that of the appellant and M/s Shree Ganesh Enterprises.

5. In the written submissions, the appellant has reiterated that the activities carried on by the appellant were covered under negative list of services as per clause (f) of section 66D as manufacture or production of goods also includes processes incidental and ancillary to completion of manufacture of goods. The appellant has referred to the decision of Hon'ble Tribunal in the case of New Era Handling Agency vs Commissioner of Service Tax, Panaji-Goa – 2015 (37) STR 344 that even packing constituted 'manufacture' under the Central Excise Law and such activity carried out by a job worker was not liable to service tax; that the activities carried out by the appellant at Chilling Centre of the Dairy were covered under Negative list of services as per clause (f) of section 66D of the Finance Act, 1994. As regards the invoking of extended period and levy of penalties, the appellant has reiterated the grounds of appeal and cited various decisions. The appellant has also filed cross-objections against the departmental appeal pleading that its activity did not consist of the essential characteristics of supply of manpower but pertained to execution of work contract, where the execution of contract was based on quantum of work basis or lump sum basis and not on 'man-hour' basis or 'number of persons deployed' basis. The supply of manpower was incidental and necessary for completion of the contract work. The terms and conditions related to the laborers, as per the contract with M/s Sabar Dairy were only to regulate the laborers and to ensure proper payment to laborers by the contractors. In the statements of the appellant it was clearly mentioned that it was engaged in the work relating to processing of Milk on works contract basis. The statement of the General Manager of M/s Sabar Dairy has been misinterpreted by the adjudicating authority as even in this statement the emphasis is on work contract and completion of job allotted. The Circulars relied upon by the learned adjudicating authority were not applicable in the present case as these circulars are issued with respect to Business or Industrial Organizations engaged in services of manpower recruitment or supply agencies. M/s Sabar Dairy invites independent contractors to carry out such tasks which are part and parcel of its activity of manufacturing and it

cannot be inferred that contracts awarded by the Dairy to its contractors was for supply of manpower. The definitions of Labour Contractor under section 2(c) & 2(b) of the Contract Labour Regulation and Abolition Act, 1970 defines 'contractor' and workman' working under the contractor. These definitions are to protect the rights of the laborers and it has nothing to do with the law related to service tax in which classification has been made for each specific service. There was no substantiation for the argument that contract under consideration was to bridge the demand supply of manpower in adequate numbers to the Dairy. The contract was for completion of job and not for supply of specific number of laborers. The appellant has also argued that the citations in the impugned order relied upon were not relevant to the facts of the present case.

6. The appeal filed by the appellant is delayed by 5 days from regular period allowed for filing appeal. The appellant has filed an application for condonation of delay on the ground that the delay was owing to Deepawali festival and demonetization. The delay is condoned and the appeal of the appellant is taken up along with the departmental appeal for decision.

7. I have carefully gone through the show cause notice, the impugned order, the grounds of appeal filed by the appellant, the grounds of appeal in the departmental appeal along with the cross objections filed by the appellant. In the impugned order, the activities undertaken by the service provider are held to be taxable under the category of 'Man Power Recruitment or Supply Agency' w.e.f. 01/07/2012 in terms of the provisions of Section 65 B (44) of the Finance Act, 1994, thereby dropping the demand prior to 01/07/2012. The departmental appeal challenges the dropping of demand prior to 01/07/2012 whereas the appeal of the appellant challenges the confirmation of the demand from 01/07/2012 onwards on the ground that the impugned activities were not taxable service by virtue of the same falling in the negative list under Section 66D(f) of the Finance Act, 1994.

8. In the impugned order, the demand has been dropped for the period 01/04/2010 to 30/06/2012 on the ground that the billing was on lump sum basis based on quantity of work executed and that it has been held in various decisions that in such a situation the service cannot be classified as 'Manpower Recruitment or Supply Agency' service. On considering the case laws relied upon in the impugned order to drop the demand for the period 01/04/2010 to 30/06/2012, it is seen as follows:

1) In the case of M/s DIVYA ENTERPRISES vs COMMISSIONER OF CENTRAL EXCISE, MANGALORE - 2010 (19) S.T.R. 370 (Tri.Bang.), it has been clearly brought out in paragraph 9 as follows:

"9. On a careful consideration of the above reproduced letter and facts from the entire case papers, we find that the contract which has been given to the appellants is for the execution of the work of loading, unloading, bagging, stacking destacking etc., **In the entire records, we find that there is no whisper of supply manpower to the said M/s. Aspin Wall & Co. or any other recipient of the services in both these appeals.** As can be

seen from the reproduced contracts and the invoices issued by the appellant that the entire essence of the contract was an execution of work as understood by the appellant and the recipient of services."

The case law deals with a situation where there is not even a whisper of supply of manpower. The ratio of this decision is not relevant to the facts of the present case because it has been clearly brought out in the departmental appeal that conditions of the contract between the appellant and M/s Sabar Dairy clearly indicates deployment of adequate numbers of laborers / workers; payments to be made by the Labour Contractor; license under Contract Labour (Regulation and Abolition) Act, 1970 to be obtained by the Labour Contractor; maintenance of records regarding provident fund, Attendance, Salary, Bonus, Overtime, ESI etc.; sanction of casual leave, sick leave etc.; obtaining insurance of the laborers; issuance of identity cards and uniform to the laborers and payment of Service Tax. Thus in the present case the tenor of the contract between the appellant and M/s Sabar Dairy clearly indicates supply of manpower by the appellant.

2) In the case of COMMISSIONER OF CENTRAL EXCISE, KOLHAPUR vs SHRIRAM SAO TVS LTD. - 2015 (39) S.T.R. 75 (Tri. - Mumbai.), the demand was issued to and confirmed against the respondent M/s Shriram Sao Tvs Ltd. and not against the Labour Contractors hired by M/s Shririam Sao Tvs Ltd. This is clear from paragraph 3 of this case law reproduced below:

3. The issue involved in this case is regarding the service tax liability of the respondent under the category of "Manpower Recruitment and Supply Agency Service". The lower authorities came to a conclusion that the respondent who is registered under co-operative society; service tax liability gets confirmed for undertaking the activities of cutting/harvesting and transporting of sugarcane to Sugar factory as the assessee is functioning on behalf of the farmers enters into a contract with labour contractors for arranging manpower for the purpose of harvesting/cutting and transporting of sugarcane to sugar factories. Coming to such a conclusion, show cause notices were issued to the respondent and the adjudicating authority confirmed the demands on the respondent.

In the present case, the notice was issued to the appellant who is the Labour Contractor and not to M/s Sabar Dairy, who is the recipient of the service. Therefore, the reliance placed on this case law to hold that the services were not in the nature of 'Manpower Recruitment or Supply Agency' is misplaced.

3) In the case of SHIVSHAKTI ENTERPRISES vs COMMISSIONER OF CENTRAL EXCISE, PUNE – 2016 (41) S.T.R. 648 (Tri.-Mumbai), the facts were that M/s Shivshakti Enterprises, the appellant was undertaking specific job work on behalf of M/s Tata Motors in the factory of M/s Tata Motors. This fact has been brought out in paragraph 5 of the case law as follows:

5. We find that facts are not much in dispute. Appellant had deployed his employees in the factory premises of Tata Motors for doing specific job work in accordance with

the purchase order placed by Tata Motors. We perused the sample/specimen of purchase orders of Tata Motors Ltd. **We find that Tata Motors Ltd. had agreed to pay consideration to the appellant based upon the number of pieces that would be manufactured by appellant in the factory premises of Tata Motors.**

In the present case, the appellant is a service provider and there is no claim on its part that it had undertaken job-work on behalf of M/s Sabar Dairy. The payment in the present case is not the basis of units manufactured but on lump sum basis. Therefore, the facts in the present case are distinguished from the facts decided upon in the case law.

4) In the case of HEMANT V. DESHMUKH vs COMM SSIONER OF CENTRAL EXCISE, GOA – 2014 (35) s.t.r. 602 (Tri.-Mumbai)

"2. The brief facts of the case are that the appellant before us have entered into agreement with their principal to do certain work with the help of their assurance of production of big mill and small mill **and the payment of the same is to be made per Metric Ton.** The appellant executed the work and paid the same amounts towards Service Tax."

In the above case law the payment was per Metric Ton basis indicating job work or processing whereas in the present case the payment was on lump sum basis for services provided and hence the facts are distinguished.

5) In the case of SEVEN HILLS CONSTRUCTION vs COMMISSIONER OF SERVICE TAX, NAGPUR – 2013 (31) S.T.R. 611 (Tri-Mumbai, M/s Seven Hills Construction was engaged in the activity of crushing of stones and supplying the same to the customers of their clients and the payment was on lump sum basis. In the present case the workers / laborers supplied by the appellant were as per the specific request of M/s Sabar Dairy and worked under the strict supervision of M/s Sabar Dairy. The entire responsibility of wage and welfare requirement of the man power supplied by the appellant was cast on the appellant as per the contract between the appellant and M/s Sabar Dairy.

On appreciating the facts of all the above case laws along with the conditions stipulated in the contract between the appellant and M/s Sabar Dairy, it is seen that the number of workers supplied by the appellant was as per the requirement of M/s Sabar Dairy. As per the contract, M/s Sabar Dairy is steadfast on the condition that even though the workers would work under its overall supervision, all the wage related and welfare related matters pertaining to the workers including identity cards and uniform were to be strictly looked after by the Labour contractor. Further, there were penal provisions built into the contract for lack of adherence on part of the contractor. In case of a contract for particular type of work, M/s Sabar Dairy would not be ins sting on the number of workers or the compliance of the regulatory provisions such as the Contractor having to obtain the necessary Licence under the Contract Labour (Regulation and Abolition), Act, 1970;

having to deduct and keep records of Provident Fund under Employ Provident Fund, 1952 and sanction every type of leave to the worker as per Factory Act, 1948. Thus the essential character of the contract is supply of manpower. Thus the adjudicating authority has erred in holding that the services rendered during the period 01/04/2010 to 30/06/2012 do not fall under the category of 'Manpower Recruitment or Supply Agency' and the departmental appeal in this regard is liable to be allowed.

9.. On considering the portion of demand confirmed for the period 01/07/2012 to 30/09/2014, it is seen that in paragraph 17, 17.1, 17.2 and 17.3 of the impugned order it has been held that w.e.f. 01/07/2012, any activity which is carried out for another person for a consideration qualifies as a service in terms of Section 65B(44) of the Finance Act, 1944. It has also been held that post 01/07/2012, the concept of classification of a service has been done away with and the measure of taxability of service is that the activity should be a 'service' as per section 65B(44) and the same should not be covered under the negative list of exemption Notification No. 25/2012-ST. The demand from 01/07/2012 has been confirmed on the ground that the activities carried out by the appellant for a consideration were not covered under the negative list as specified under Section 66D of the Finance Act, 1994. The appellant has contested that its service to M/s Sabar Dairy was falling in the Negative List under Section 66 D (f) of the Finance Act, 1994. The services in the negative list under Section66 D (f) ibid are as follows:

> *"services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption"*

The appellant claims that it had a contractual agreement with M/s Sabar Dairy to carry out activities at the 'Chilling Centre' of M/s Sabar Dairy and unload raw materials, shift goods from the production floor to the godown, handle goods etc. for M/s Sabar Dairy, which were all activities incidental and ancillary to completion of manufacture of goods. This argument is not sustainable because the activities such as cleaning of vessels, unloading of raw materials or shifting of goods or handling of goods cannot be termed as processes amounting to manufacture or production of goods. Such activities cannot be termed as processes incidental or ancillary to manufacture as these activities are in the form of services and not processes in the course of manufacture of goods. Section 66 D (f) ibid specifically pertains to ***'any process amounting to manufacture or production of goods'.*** Therefore, the impugned activities by the appellant during 01/07/2012 to 30/09/2014 were taxable services and the demand confirmed for this period is liable to be upheld. As regards the invoking of extended period of limitation, as admitted by the proprietor, the appellant had clearly failed obtain Service Tax registration and it had never filed any returns or any intimation regarding its activities to the department, which amounts to suppression of facts with intent to evade payment of

tax. Therefore, the invoking of extended period and the imposition of penalty is also justified and sustainable in the present case.

10. In view of the above findings, the appeal filed by the appellant for dropping of demand confirmed for the period 01/07/2012 to 30/09/2014 along with interest and penalties is rejected. As for the period prior to 01/07/2012, the dropping of demand, interest and penalties in the impugned order is set aside and the departmental appeal is allowed.

11. अपीलकर्ता एवं डिपार्टमेंट द्वारा किए गए अपीलों का निपटारा उपरोक्त तरीके से किया जाता हैं.

The appeals filed by the appellant and the department stand disposed of in the above terms.

(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date 25/07/2017

Attested

(K. P. Jacob)
Superintendent
Central Tax (Appeals),
Ahmedabad.

By R.P.A.D.
To
M/s Shree Ghanshyam Enterprise,
9 Motibag Society, Motipura,
Himmatnagar,
District: Sabarkantha.

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad.
2. The Commissioner of Central Tax, Gandhinagar.
3. The Additional Commissioner, Central Tax (System), Gandhinagar.
4. The A.C. / D.C., Central Tax Division, Gandhinagar.
5. Guard File
6. P.A.