



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,  
केंद्रीय कर भवन,  
सप्तवीं मंजिल, पॉलिटेक्निक के पास,  
आम्बावाडी, अहमदाबाद-380015

7<sup>th</sup> Floor, Central Excise Building,  
Near Polytechnic,  
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- क फाइल संख्या : File No : V2(SAS) 63/STC-III/16-17  
V2(SAS) 17/ST-4/STC-III/16-17 *4813*  
*4817*
- ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-069 to 070-17-18  
दिनांक Date 27.07.2017 जारी करने की तारीख Date of Issue 16/8/17  
श्री उमाशंकर, आयुक्त (अपील) केन्द्रीय कर, अहमदाबाद द्वारा पारित  
Passed by Shri Uma Shankar Commissioner (Appeals) Central Tax, Ahmedabad
- ग Additional Commissioner, Central Excise, Gandhinagar द्वारा जारी मूल आदेश सं AHM-STX-003-ADC-AJS-028-16-17 दिनांक : 27.09.2016 से सृजित  
Arising out of Order-in-Original No AHM-STX-003-ADC-AJS-028-16-17 दिनांक : 27.09.2016 Issued by Additional Commissioner, Central Excise, Gandhinagar
- घ अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The Appellants/Respondents

M/s. Shree Ganesh Enterprises

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 मेंटल 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल हैं

- (iv) धारा 11 डी के अंतर्गत निर्धारित रकम
- (v) सेनवैट जमा की ली गई गलत राशि
- (vi) 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 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:

- (iv) amount determined under Section 11 D;
- (v) amount of erroneous Cenvat Credit taken;
- (vi) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(4)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

This order covers two appeals filed against O.I.O. No. AHM-STX-003-ADC-AJS-028-16-17 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 Ganesh Enterprise**, 13, Motibaug Society, Behind A-One Society, Motipura, Himmatnagar, District: Sabarkantha 383001 (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 Dairy' for brevity) during the course of which, a statement of Shri Jayantibhai Dahyabhai Patel, General Manager of M/s Sabar Dairy 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 Dairy 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' to M/s Sabar Dairy. Further, in a statement recorded on 09/04/2015, Shri Hitesh Nathabhai Patel, partner of the appellant deposed, *inter alia* that he had provided specific number of laborers on the strength of seven to eight contracts with M/s Sabar Dairy for can handling work such as receiving can from different villages, unloading cans and emptying it out, cleaning of cans and loading the cans on to the trucks for which they receive Rs.2.12 per can for can handling work that takes around 15-20 minutes from emptying the cans to washing the cans and loading them in the trucks. He further stated that the appellant had obtained Service Tax Registration for providing man power / labor in this fashion and the appellant had filed S.T.-3 returns from time to time as per advice of their advocate. However, the appellant had not paid Service Tax into government account so far because initially, they had mentioned service tax amounts in the bills submitted by them to the dairy, which were returned and hence they had not charged Service Tax. He also affirmed that if M/s Sabar Dairy pays them the Service Tax amounts then the appellant is willing to pay the Service Tax. He agreed with the deposition made by the General Manager of M/s Sabar Dairy 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.43,08,783/-	Rs.4,43,805/-
2011-12	Rs.48,53,765/-	Rs.4,99,938/-
2012-13	Rs.20,50,506/-	Rs.2,53,443/-
2013-14	Rs.13,16,146/-	Rs.1,62,676/-
2014-15 (up to Sep.-2014)	Rs.7,35,688/-	Rs.90,931/-
Total Service Tax		Rs.14,50,792/-

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 Dairy 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 had not paid the same to the appellant. He also admitted that since the appellant had not paid any service Tax, they had mentioned '0' against income, service tax payable and service tax paid etc. in the S.T.-3 returns filed by them and that they had not intimated the department regarding their activity of supply of labor either through the returns filed by them or through any other correspondence. Thus, 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 failed pay Service Tax. Accordingly, a Show Cause Notice F.No.V.ST/15-114/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.1,32,64,888/- during the period 2010-11 to 2014-15 (up to Sept.2014) as taxable value; demanding Service Tax amount of Rs.14,50,792/- 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.4,28,411/- 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.10,22,381/- was vacated for the period from 01/04/2010 to 30/06/2012. A penalty of Rs.2,14,205/- was imposed on the appellant under Section 78 of the Finance Act, 1994. Late fees was confirmed to be recovered from the appellant under Rule 7C of Service Tax Rules, 1994

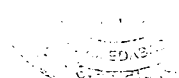
read with Section 70 of the Finance Act, 1994 for non-filing of ST-03 returns till 1/04/2013. A penalty of Rs.10,000/- was imposed on the appellant under Section 77(2) of the Finance Act, 1994 and a penalty of Rs.10,000/- was imposed on the appellant under the provisions of Section 77(2) of the Finance Act, 1994. The proposal for penalty under Section 76 and Section 77(1)(a) *ibid* were dropped in the impugned order.

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 bills 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 that the Contractor has to obtain license from competent authority under the Contract Labour (Regulation and

Abolition) Act, 1970 and in case he fails to have such a license or fails to renew such a license then the contract with the contractor shall be treated as cancelled; Condition No.8 stipulates that it is the responsibility of the Contractor to deduct PF of laborers, keep records of the same under the provisions of Employ Provident Fund, 1962; that Condition no. 09 stipulates that as per Factory act, 1948 the Contractor is liable to sanction leaves like casual leave, sick leave etc. to his laborers; Condition No. 13 stipulates that the Labour Contractor shall be responsible to make all the payments like Bonus, Gratuity etc. to the laborers; Condition No. 17 stipulates that the Contractor shall obtain insurance of all the laborers deployed as per Workman Compensation Act; Condition No.19 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. 20 stipulates that uniform shall be supplied to all the laborers working with the Union through the Labour Contractor; Condition No.46 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. 47 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 it 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 misstatement 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 Ghanshyam Enterprises was held on 20/07/2017. Shri A.P. Sandesara, C.A. appeared on behalf of M/s Shree Ghanshyam 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 Ghanshyam 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 the conditions of the contract between the appellant and M/s Sabar Dairy pertain to 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 Shriram 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 COMMISSIONER 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 insisting 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. Further, Shri Hitesh Nathabhai Patel, partner of the appellant had clearly admitted in his statement that he had obtained Service Tax registration under the category of 'Manpower Recruitment or Supply Agency' for the purpose of supply of manpower but as M/s Sabar Dairy had returned the bills with Service Tax component, he had not paid Service Tax and that he would pay Service Tax if M/s Sabar Dairy would reimburse the amount of Service Tax. This statement has never been retracted by the proprietor of the appellant. Therefore, it is clear that the appellant was aware that he was liable to pay Service Tax under 'Manpower Recruitment or Supply Agency'. 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 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 Section 66 D (f) *ibid* are as follows:

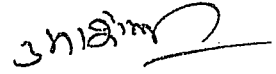
*"services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption"*

The appellant claims that it had a contractual agreement with M/s Sabar Dairy to carry out engineering work and 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 unloading of cans, cleaning of cans and loading of cans 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 partner, the appellant knew that it was liable to pay Service Tax under 'Manpower Recruitment or Supply Agency' and accordingly had obtained registration under the same category. However, the value of the said services were never reflected in the periodical returns filed with the department because admittedly the appellant was showing '0' value of services, which was wrong because the appellant was getting payments from M/s Sabar Dairy towards the value of services provided. This clearly amounts to suppression of facts and mis-declaration with intent to evade payment of tax. Therefore, the invoking of extended period and the imposition of penalty is 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 है.


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



(उमा शंकर)  
आयुक्त  
केन्द्रीय कर (अपील्स)

Date 27/07/2017

Attested

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

By R.P.A.D.

To  
M/s Shree Ganesh Enterprise,  
13, Motibag Society, B/h A-One 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.