
 <p>केंद्रीय कर आयुक्त (अपील)</p> <p>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX</p> <p>दस्तावेज एवं सेवा</p> <p>कार भवन</p> <p>सातवीं मंजिल पोलिटिकलिक के पास</p> <p>आम्बावाडी, अहमदाबाद-380015</p> <p>079-26305065</p>		 <p>GSI Building 7th Floor</p> <p>Near Polytechnic</p> <p>Ambavadi, Ahmedabad</p> <p>380015</p> <p>टेलिफोन 079-26305136</p>
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क फाइल संख्या : File No : V2(RIP)74/AHD-III/2016-17/1057 to 1061

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-086-17-18

दिनांक Date : 30.08.2017 जारी करने की तारीख Date of Issue:

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश :
GNR-STX-DEM-DC-05/2017 दिनांक : 24.01.2017 से सृजित

Arising out of Order-in-Original: GNR-STX-DEM-DC-05/2017, Date: 24.01.2017 Issued by: Assistant Commissioner, Central Excise, Div: Gandhinagar, Ahmedabad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Johnson Controls -Hitachi Air Conditioning India Ltd.

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

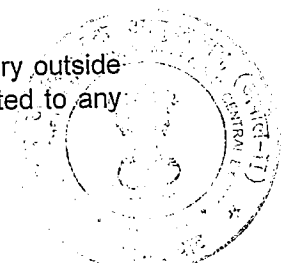
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the 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 रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1998 की धारा 43 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

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

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

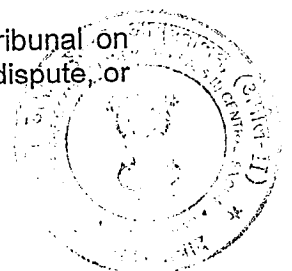
For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

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

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

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



ORDER-IN-APPEAL

This appeal is filed by M/s. Johnson Controls –Hitachi Air conditioning India Limited [formerly known as Hitachi Home and Life Solutions (India) Limited]. Karannagar. Ashima Complex, Kadi, Mehsana – 382 727 [hereinafter referred to as the 'appellant'] against OIO No. GNR-STX-DEM-DC-05/2017 dated 24.1.2017, passed by the Assistant Commissioner, Service Tax Division, Gandhinagar of the erstwhile Ahmedabad-III Commissionerate[for short - '*adjudicating authority*'].

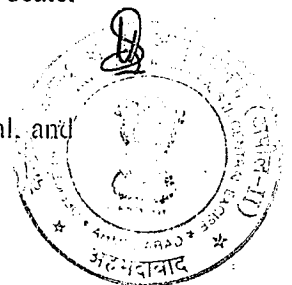
2. A show cause notice dated 29.6.2016, was issued to the appellant, based on audit objection, that the appellant was recovering notice pay from employees who were leaving job without giving the notice for the stipulated period: that the appellant had not paid service tax on the said amount received. The notice therefore, *inter-alia*, demanded service tax of Rs. 11,96,594/- along with interest and further proposed penalty under sections 76, 77 and 78 of the Finance Act, 1994, on the appellant.

3. The aforementioned notice dated 29.6.2014, was adjudicated vide the impugned OIO dated 24.1.2017 wherein the adjudicating authority confirmed the demand along with interest and further imposed penalties under section 77 and 78 of the Finance Act, 1994. Feeling aggrieved, the appellant has filed this appeal, raising the following averments:

- that the matter is directly covered by the decision of Commissioner(Appeals), Vadodara in the case of M/s. Nirma Limited;
- that no services are rendered when the notice pay deductions are made when the employee leaves the organization;
- the notice pay is not covered under the definition of declared service;
- payment of notice pay is in terms of agreement & not in the nature of compensation and therefore is not covered under declared service;
- that there is a contract with employee which gives an option to both parties to terminate the employment by either rendering a service for a specified notice period or to pay specified amount, in lieu of not working during the notice period;
- the notice pay is in terms of contract and not for any other consequent action for breach of contract: that the condition of the contract, giving option to party to the contract cannot imply breach of the contract; that the termination of the contract is not a breach of the contract when it is in terms of the contract itself;
- that despite specific submission made prior to issuance of the notice, it is silent as to how the transaction is covered under section 66E(e) of the Finance Act, 1994;
- that extended period is not invocable since the show cause notice dated 29.6.2016 covers the period from July 2012 to 2015-16;
- that the disputed transactions are not even service: that the question of paying tax thereon or giving information never arose: that extended period is not invocable;
- that since the tax is not payable the question of penalty or interest does not arise;
- that penalty is not imposable in the present case.

4. Personal hearing was held on 17.8.2017, wherein Shri S.J.Vyas, Advocate, appeared for the appellants and reiterated the grounds of appeal.

5. I have gone through the facts of the case, the appellant's grounds of appeal, and the oral submissions made during the course of personal hearing.



6. The issue to be decided is whether the appellant is liable to pay service tax on the amount collected as *notice pay*, in terms of Section 66E(e) of the Finance Act, 1994.

7. I have already decided this issue in the case of Nirma University, Ahmedabad. vide my OIA No. AHM-SVTAX-000-APP-022-17-18 dated 26.5.2017. I would like to reproduce the operative portion of the said OIA:

"6. To start with, I find that the adjudicating authority has confirmed the demand of Service Tax amounting to ₹ 3,74,816/- stating that as per the definition of service as envisaged under Section 65B(44)(b) of the Finance Act, 1994, the activity was carried out by one person to another for a consideration which is tolerating the act of the employees to leave the job without giving notice for the stipulated period and allowing the employees to leave the job. In view of the above, I find that the adjudicating authority has towed to the lines as prescribed in the amendments made in the Act w.e.f. 01.07.2012. In the new system, the word 'service' has been redefined under Section 65B(44) of the Finance Act, 1994. However, CBEC, in the month of June 2012, had introduced an 'Education Guide' in light of the new system. The said guide clarifies many queries that were supposed to erupt at the time of the amendments made in the Act w.e.f. 01.07.2012. I would like to quote below a concerned paragraph from the said guide for clarification;

"2.9 Provision of service by an employee to the employer is outside the ambit of service;

2.9.1 Are all services provided by an employer to the employee outside the ambit of services?

No. Only services that are provided by the employee to the employer in the course of employment are outside the ambit of services. Services provided outside the ambit of employment for a consideration would be a service. For example, if an employee provides his services on contract basis to an associate company of the employer, then this would be treated as provision of service.

2.9.2 Would services provided on contract basis by a person to another be treated as services in the course of employment?

No. Services provided on contract basis i.e. principal-to-principal basis are not services provided in the course of employment.

2.9.3 Would amounts received by an employee from the employer on premature termination of contract of employment be chargeable to Service Tax?

No. Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would not be chargeable to Service Tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act".

In view of the above, it is now very clear that any payment made by either of the party to the other one would not be chargeable to Service Tax.

7. Thus, from the above, I conclude that the process of payment made by the employees to the appellants, for termination of job before the completion of the agreed upon period, is not to be treated as a service nor any act of consideration for refraining from an act or tolerating an act. Therefore, I hold that the impugned order should be set aside in the interest of justice and the appellants should be given relief from payment of Service Tax along with interest and penalty.

①



8. In view of above, I set aside the impugned order with consequential relief to the appellants."

8. In view of the foregoing, the appeal is allowed and the impugned OIO is set aside with consequential relief to the appellants.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
9. The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date : 30.08.2017

Attested

(Vinoj Lukose)
Superintendent,
Central Tax(Appeals),
Ahmedabad.

By RPAD.

To,

M/s. Johnson Controls –Hitachi Air conditioning India Limited
[formerly known as Hitachi Home and Life Solutions (India) Limited].
Karannagar, Ashima Complex,
Kadi, Mehsana – 382 727

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Gandhinagar Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division Kadi, Gandhinagar Commissionerate.
4. The Additional Commissioner, System, Central Tax, Gandhinagar Commissionerate.
- ✓ 5. Guard File.
6. P.A.

