



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

क फाइल संख्या :File No : V2/161,162&163/GNR/2018-19

ख अपील आदेश संख्या :Order-In-Appeal No.: AHM-EXCUS-003-APP-185-187-18-19

दिनांक Date :28-02-2019 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 :16/D/GNR/NK/2018-19
दिनांक : 13-11-2018 से सृजित

Arising out of Order-in-Original: 16,17&18/D/GNR/NK/2018-19, Date: 13-11-2018 Issued by: Assistant Commissioner, CGST, Div:Gandhinagar, Gandhinagar Commissionerate, Ahmedabad.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Amulfed Dairy

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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.

घ 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- षोबी/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 दूसरा मंजिल, बहुमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

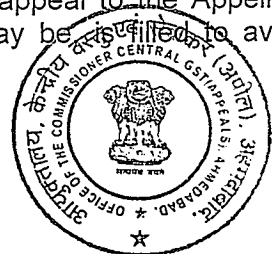
To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-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 वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से 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 पढी कार्य से बचने के लिए यथारिथति 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, it is suggested 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 83 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 रुपए 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 होंगे।

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

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

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

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

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

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.



:: ORDER-IN- APPEAL ::

M/s. Amulfed Dairy(Formerly Mother Dairy), a unit of Gujrat Co-operative Milk Marketing Federation Ltd. (GCMMF), Plot No. 35, Near Indira Bridge, Bhat, Gandhinagar-382428 (*hereinafter referred to as the 'appellants'*) have filed the present appeals against the following Orders-in-Original (*hereinafter referred to as 'impugned orders'*) passed by the Assistant Commissioner, CGST, Gandhinagar Division, Gandhinagar (*hereinafter referred to as 'adjudicating authority'*);

| Sr. No. | Order No. & date | Appeal No. | Period covered | Notice Pay Amount (collected by the appellants) | Amount Confirmed in OIO (₹) |
|---------|--------------------------------------|-------------------|----------------|---|--|
| 1 | 16/D/GNR/NK/2018-19 dated 13.11.2018 | V2/161/GN R/18-19 | 2015-16 | Rs. 1,02,072/- | ST- Rs. 14,679/-, Interest- at appropriate rate on Rs. 14,679/- and Penalty- Rs. 14,679/- |
| 2 | 17/D/GNR/NK/2018-19 dated 15.11.2018 | V2/162/GN R/18-19 | 2015-16 | Rs. 9,32,236/- | ST- Rs. 1,30,513/-, Interest- at appropriate rate on Rs. 1,30,513/- and Penalty- Rs. 1,30,513/- |
| 3 | 18/D/GNR/NK/2018-19 dated 16.11.2018 | V2/163/GN R/18-19 | 2015-16 | Rs. 7,76,069/- | ST- Rs. 1,15,904/-, Interest- at appropriate rate on Rs. 1,15,904/- and Penalty- Rs. 11,590/- |

2. Briefly stated the facts of the case are that the appellants are engaged in providing taxable services under the category of "GTA Service, Legal Consultancy Service and Business Auxiliary Service" and are registered with the Service Tax department. The appellants are also availing benefit of Cenvat Credit as per the provision of Cenvat Credit rules, 2004. During the course of audit, it was noticed that the appellants were recovering 'Notice Pay' from the employees who were leaving the job without giving notice for the stipulated period, and thereby permitting the concerned employees to leave the job. In this process, the appellants had recovered the amount (as shown in the above table) for the period 2015-16. It was deduced by the audit team that by recovering the notice pay, the appellants were tolerating the act of the employees to leave the job. This activity of the appellants falls



under the category of 'declared services' as envisaged under Section 66E(e) of the Finance Act, 1994. On being pointed out by the audit party, the appellants did not agree with the objection and accordingly Show Cause notices were issued to them. The show cause notices were adjudicated by the adjudicating authority vide the impugned orders, wherein the adjudicating authority confirmed the demand along with interest and penalty.

3. Feeling aggrieved, the appellants have filed the present appeals against the impugned orders, on the grounds *which are inter alia mentioned* that:

(a) the impugned orders were passed without taking into consideration the facts and legal aspects of the issue.

(b) the amount recovered as notice pay from the employees was not in connection with waiving any action or letting employee free from consequences. The amount recovered was in connection with administrative overheads to be incurred for finding a new candidate.

(c) when an employee terminates the service the notice pay recovery cannot be regarded as service. The resignation tendered by employee puts an end to the relationship of the employer with the employee. It results in complete and absolute cessation of agreement of service. Therefore, the act of terminating service and recovery of notice pay cannot be called rendering of service by the appellants.

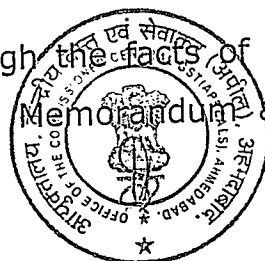
(d) the allegation of suppression of facts cannot be held against the appellants. With respect to non-disclosure of amount received as notice pay recovery, the appellants were having bonafide view that such recovery does not fall under the ambit of service.

(e) no one is tolerating an act or situation in the present case and only the terms of the employment agreement are getting fulfilled.

(f) In support of their claim, they cited various case laws.

4. Personal hearing in the case was granted on 14.02.2019 wherein Shri P. G. Mehta, Advocate along with Shri Ankit Nahar appeared before me on behalf of the appellants and reiterated the contents of appeal memorandum.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions



made by the appellants at the time of personal hearing. Now, let me examine the reasons of confirming the demand and the defense reply given by the appellants.

6. To start with, I find that the adjudicating authority has confirmed the demand of Service Tax stating that the activity of the appellants correctly falls under the category of 'declared services' under section 66E(e) and as per the definition of 'service' as envisaged under Section 65B(44) 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;

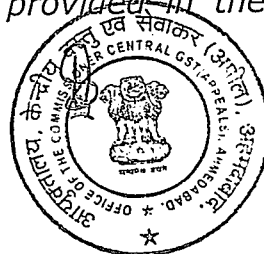
"2.9 Provision of service by an employee to the employer is outside the ambit of service;

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 orders 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.

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

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeals filed by the appellants stand disposed off in above terms.

D. I. S. M.



U. S. K.

(उमा शंकर)

प्रधान आयुक्त (अपील्स)

S. S. S. S.
दस. दुता/SABYASACHI DUTTA
अधीक्षक/SUPERINTENDENT

केन्द्रीय वस्तु एवं सेवाकर (अपील), अम्हेराबाद,
CENTRAL GST (APPEALS), AMHERABAD.

Attested

(S. Dutta)
Superintendent (Appeals)
Central Tax, Ahmedabad



To,

M/s. Amulfed Dairy (Formerly Mother Dairy),
A unit of GCMMF Ltd., Plot No. 35,
Near Indira Bridge, Bhat, Gandhinagar-382428.

Copy to:

- (1) The Chief Commissioner, Central GST, Ahmedabad Zone.
- (2) The Commissioner, Central GST, Gandhinagar.
- (3) The Assistant Commissioner, Central GST, Gandhinagar Division.
- (4) The Assistant Commissioner (RRA), Central GST, Gandhinagar.
- (5) The Asst. Commissioner (System), Central GST, Gandhinagar.
- (6) Guard file.
- (7) P.A. file.