केंद्रीय कर आयुक्त (अपील)

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

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

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

☎ 079-26305065 टेलेफैक्स : 079-26305136

क फाइल संख्या : File No : **V2/15/RA/GNR/2018-19** S734 to S738

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-059-18-19**

दिनाँक Date :**31.07.2018** जारी करने की तारीख Date of Issue: 1/8/2018

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

G. file

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

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **37/AC/EX/MEH/17-18** दिनाँक : **13-03-2018**से सृजित

Arising out of Order-in-Original: **37/AC/EX/MEH/17-18,** Date: **13-03-2018** Issued by: Assistant Commissioner, Central Excise, Div:Mehsana, Ahmedabad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Shah Foods Ltd

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

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

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

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

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

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

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

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

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

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।
Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

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

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी 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 appeal has been filed by the Assistant commissioner of CGST, Kalol Division, Gandhinagar [*for short-department*], in view of Review Order No.04/2018-19 dated 04.06.2018 of Commissioner, CGST, Gandhinagar, against Order-in-Original No.37/AC/EX/Meh/17-18 dated 13.03.2018 [*for short-impugned order*] passed by the Assistant Commission of CGST, Mehsana Division [*for short-adjudicating authority*] in case of M/s Shah Foods Ltd, 453/1, Kalol-Mehsana Toll Road, Chhatral Taluka, Kalol [*for short- respondent*].

2. The brief facts of the case are that based on an Audit observation, a show cause notice dated 16.06.2016 was issued to the respondent, alleging that they had received services of Manpower Supply from M/s Setu Consultancy, a proprietorship firm; that as per notification No.30/2012-ST dated 20.06.2012, the respondent has to pay 75% of the Service Tax under Reverse Charge Mechanism (RCM) and 25% was to be paid by the service provider, whereas, 100% service tax was paid by the service provider; that by not paying 75% of service tax amounting to Rs.5,69,286/- during December 2013 under RCM, the respondent has contravened the provisions of Section 70 of the Finance Act, 1994 and Rule 7 of the Service Tax Rule, 1994. Vide the impugned order, the adjudicating authority has dropped the allegations raised against the appellant.

3. Being aggrieved, the department has filed the instant appeal on the grounds that:

- The service tax chargeable by the adjudicating authority is against the provisions of Rule 2(d)(i)(F)(b) of STR which defines the person liable to pay Service Tax under RCM; that the adjudicating authority has totally ignored the provisions of Notification No.30/2012-ST dated 20.06.2012, wherein service tax to be paid by the service recipient is clearly prescribed.
- Over and above the prescribed percentage of service tax paid by the service provider is without authority of law and it is in nature of deposit and not considered as duty. Therefore, there is no double taxation as held by the adjudicating authority.
- As per decision of Hon'ble High Court of Mumbai in case of Idea Cellular reported at 2016(42) ST 823 tax shall be levied if it is relatable to statutory power emanating from a statute; that notification clearly stipulates to pay 25% and 75% by the service provider and service recipient respectively and therefore, there should not be any reason to by-pass the clear provisions.

4. The respondent has filed their cross-objection to the appeal filed by the department, wherein, they inter-alia, stated that the exercise proposed under the department appeal is revenue neutral in character, in as much as it is an admitted fact that in the given instance, 100% tax is paid by the service provider and the respondent has taken credit only of the amount paid by them to the service

provider; that the ax in question cannot be demanded again. They further contended that the show cause notice hits by time barred as no suppression of facts involved. The respondent relied on various case laws in support of their arguments. The respondent has relied on various cases viz. 2018 (6) TMI CESTAT Ahmedabad in case of M/s Gujarat Technocasing Pvt Ltd;2018(5) TMI 1127-CESTAT Bangalore in case of M/s Lohagiri Industries Pvt Ltd; 2018 (2) TMI 719-CESTAT Allahabad in case of M/s K.V Enterprides

5. Personal hearing in the matter was held on 24.07.2018. Shri Gunjan Shah, Chartered Accountant appeared for the same on behalf of the respondent and reiterated the facts of the department appeal.

6. I have carefully gone through the facts of the case and submissions made by the department in the grounds of appeal and also the submissions made by the respondent in their cross-objection. The issue to be decided in the instant case is to whether the service recipient i.e respondent is liable to pay 75% of the service tax under RCM in terms of notification No.30/2012-ST supra, when the tax in full is paid by the service provider.

7. At the outset, I observe that the case is relating to non- payment of service tax on taxable service viz. Manpower Supply by the appellant under RCM as stipulated under notification No.30/2012-ST. I further observe that as per provisions of the said notification in respect of Man Power supply service under RCM, 75% of the service tax burden is to be borne by the respondent, being a service recipient and the remaining is to be paid by the service provider. In the instant case, 100% service tax liability has been paid by the service provider. The adjudicating authority has vacated the allegation raised in the audit objection as well as in the show cause notice, vide the impugned order that demanding service tax again from the appellant would lead to double taxation and further contended that the exchequer is never at loss as the revenue has not been suffered but revenue neutrally is maintained. However, non-payment of service tax under the said provisions is only a procedural lapse.

8. I observe that during the disputed period, vide the notification No.30/2012-ST supra, the liability of paying service tax @75% was on the appellant and not on the service provider. Hence, for the disputed period, the amount paid by the service provider has no relevancy in respect of payment to be made by the appellant. In the instant situation, the service provider is having all right to apply refund of excess payment made by them. In the circumstances, the said argument of the respondents leads to double payment and revenue neutrality is not tenable.

9. Further, the charging Section 66B of the Finance act, 1994 which states that

"SECTION 66B.Charge of service tax on and after Finance Act, 2012.—There shall be ***levied*** *a tax and* ***collected in such manner*** *as may be prescribed."*

10. Section 68(1) makes it mandatory for service provider to pay tax. Section 68(1) is reproduced as below

> *"(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed."*

11. Section 68 (2) makes it mandatory for Notified services that the receiver or receiver and provider on shared basis to pay the service tax. Section 68(2) is reproduced as below-

> *"(2) Notwithstanding anything contained in sub-section (1), in respect of [such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.*
>
> *Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider."*

The analysis of above section 68(1) gives a vital point that tax shall be paid in such manner as may be prescribed. In the In the instant case, as per RCM under notification *supra* the service tax @75 % is required to be collected from the appellant i.e the service recipient and remaining is required to be collected from the service provider. However, 100% service tax has been paid by the service provider which contravened the provisions of Section 66B as well as Section 68 *supra*. The analysis of above section 68(2) gives us vital points tax shall be paid in *such manner as may be prescribed* . Notification 30/2012-ST issued under section 68(2) stipulates that for the service in question, the services tax liability shall be shared between provider and receiver of service to the extent of percentage prescribed in notification.

12. The mandate of this section 68(1) and 68(2) is very clear and does not give any scope of interpretation leading to the conclusion that the tax liabilities cast on one person could be discharged by any other person in the manner which is not prescribed by the law. The plain and simple reading of section 68(1) and 68(2) is that the person on whom the tax liability is cast, he only should discharge it and also in the manner specified. Tax collected through any other person will be a violation of Article 265 of Constitution of India as well as statutory provision of Section 66B ibid read with section 68(1) and 68(2).

13. Hon'ble High Court of P & Hi has interpreted it in case of Idea Cellular [2016(42)STR 823]. Hon'ble High Court has very clearly stated that the rules must

> *"..... As postulated by Article 265 of the Constitution of India a tax shall not be levied except by authority of law i.e., a tax shall be valid only if it is relatable to statutory power emanating from a statute. The collection of VAT*

on the sale of SIM cards, not being relatable to any statutory provision, must be held to be without authority of law and as a consequence non est.... " (para 12).

The Hon"ble Court further held that

"The mere fact that orders have been passed levying and collecting tax would not confer legitimacy, on the acts of the State of Haryana in seeking to retain the amount of tax collected and retained, without authority of law. The State of Haryana would have been justified in raising such a plea if the judgment in Bharat Sanchar Nigam Limited (supra) had been held to be prospective. A perusal of the aforesaid judgment reveals that the declaration of law is not prospective and like all general declarations of law, would be deemed to apply from the inception of the statute. The judgment having clearly held that VAT cannot be collected on activation of SIM cards, the assessment orders levying and collecting VAT, are from their inception a nullity and, therefore, the levy and collection of VAT is without authority of law and violative of Article 265 of the Constitution of India." (para 22)

14. In view of the Constitutional and statutory provisions, I am of the opinion that appellant has not discharged his tax liability. The situation of the instant case make it clear that when the notification stipulates the payment of service tax @75% by the service recipient and @25% by the service provider, there should not any reason to by-pass the said celar provision by the service provider by paying 100% service tax, especially they are having all right to claim refund of excess payment made. In view of the above discussion, I am of the opinion that the liability of paying service tax @75% was on the appellant and not on the service provider. Therefore, the appellant is liable for payment of service tax for the disputed period under the category of taxable service of "Manpower Supply" as specified under the said notification. Further, I observe that appellant has not declared this receipt at any time to the department such receipt is revealed by department and therefore it can be construed as suppression of facts from department.

15. I view of above discussion, I uphold the demand of duty with interest and penalty under Section 78(1) of FA, as alleged in the impugned show cause notice.

16. In the forgoing discussion, I set aside the impugned order and allow the appeal filed by the department. The appeal stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)
Date : .07.2018

Attested

(Mohanan V.V)
Superintendent (Appeals)
Central GST, Ahmedabad

F No.V2/15/RA/GNR/18-19

By R.P.A.D
To
M/s Shah Foods Ltd,
453/1, Kalol-Mehsana Toll Road,
Chhatral Taluka, Kalol

The Assistant Commissioner of CGST
Mehsana Division

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Commissioner, Central GST, Gandhinagar.
3. The Assistant Commissioner, System-Gandhinagar
4. Guard File.
5. P.A. File.