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

सत्यमेव जयते

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क फाइल संख्या :File No : **V2/50/RA/GNR/2018-19**

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-37-19-20** | 12832-36

दिनाँक Date : **18-10-2019** जारी करने की तारीख Date of Issue: 23/10/19

C-file

आयुक्त (अपील) द्वारा पारित

Passed by Commissioner (Appeals) Ahmedabad

ग आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **AHM-CEX-003-JN-007-17-18** दिनाँक : **31-12-2018** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-JN-007-17-18,** Date: **31-12-2018** Issued by: Assistant Commissioner,CGST, Div:Kadi, Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Shako Flexi Pack Pvt. 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।

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 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– ण0बी/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 **दूसरा मंजिल, बहूमाली 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 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."

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

The Asstt. Commissioner of CGST & Central Excise, Kadi Division, Gandhinagar Comm'rate, (hereinafter referred to as the 'Department'), in view of the Review Order No.39/2018-19 dated 12.03.2019 issued by the Principal Commissioner of CGST & Central Excise, Ahmedabad, has filed this appeal against the Order-in-Original No.AHM-STX-003-ADC-JN-007-18-19 dated 31.12.2018 (hereinafter referred to as the "impugned order") passed by the Addl. Commissioner of CGST, Gandhinagar Comm'rate (hereinafter referred to as the "adjudicating authority") in case of M/s. Shako Flexipack Pvt. Ltd., Survey No. 1023/P/13, 1024/14, Ghumasan, Near Sandvik Asia Ltd., Ahmedabad-Mehsana Highway, Village Rajpur, Tal-Kadi, District-Mehsana, Gujarat-382715 (hereinafter referred to as the "respondent").

2(i). The facts of the case in brief are that the respondent is a manufacturer who is holding central excise and service tax registration. The audit of the records of the respondent was carried out under which it was observed that the respondent is purchasing capital goods i.e. cylinders on behalf of their customers for manufacturing the final product i.e. packing material and are availing cenvat credit on the said cylinders and including the cost of cylinders on pro-rata basis in the assessable value of the final products in their books of accounts. Further the respondent were keeping the said used cylinders with them but were raising sales invoices to their customers showing the sale of said cylinders in which they were recovering from their customers excess amount over and above the purchase price of cylinders towards development/storage/maintenance of cylinders through the said sale invoice. They were paying the applicable central excise duty on such sale in respect of the Customers in India. However in case of foreign customers, though they raise the sale invoices, they neither charge nor pay the central excise duty on such sale. The said facts were also confirmed by the respondent vide their letter dated 12.05.2014 addressed to the Commissioner of Central Excise, Ahmedabad-III. The Department considered that the respondent were providing the service for development/storage/ maintenance of cylinder to their foreign customers and receiving the amount/consideration for such service which is liable to service tax payment and such service tax has not been paid by them. A statement of Shri Vivek B. Kothari, Director of the Respondent was recorded on 05.01.2016 in this respect. This ultimately resulted into issuance of a Show Cause Notice dated 13.07.2018 (hereinafter referred to as "SCN") issued by the Joint Commissioner of CGST, Gandhinagar Comm'rate, proposing demand of service tax of Rs.1,19,35,318/- (including Cesses) under Section 73(1) of the Finance Act, 1994 by invoking extended period alongwith inerest on such demand under Section 75 of the Finance Act, 1994. The SCN also proposed the penalties upon the respondent under Section 77(1)(a) and 78 of the Finance Act, 1994.

2(ii). The adjudicating authority while adjudicating the SCN dropped the SCN on the following grounds :

(a) that for the same set of facts, in case of domestic supply the Department has not objected the payment of central excise duty on such clearance, however in case of overseas supply the Department is of the view that such activity comes under the purview of service and service tax is payable on such overseas supply therefore the single activity can not be viewed with two different perspective;

(b) that the SCN does not discuss in detail about the nature of the activity performed by the respondent;

(c) that the buyers have authorized the respondent to procure the cylinders on their behalf and use the same in the manufacture of final goods meant to be cleared to them; that the respondent does not have any written contracts in case of domestic sale however in case of foreign buyers they have entered into contract with them;

(d) that the adjudicating authority is in agreement with the contention of the respondent that the respondent has entered into the contract with the overseas buyer for sale of the cylinders and not for providing any kind of service;

(e) that the adjudicating authority was also in agreement with the contention of the respondent that the additional value over and above the actual cost of value of cylinder was towards margin/profit towards cost of cylinder and various cost incurred to upkeep the cylinder etc.;

(f) that these contracts are primarily for purchase of packing material and for manufacturing the packing material, the respondent were procuring the cylinders and using it in the manufacture of final product and thus the activities undertaken by the respondent on the cylinders are ancillary activity and not separate taxable activity;

(g) that agreement should be read in whole and intention should be gathered from the essence of the contract and a contract can not be bifurcated in parts to scan the tax liability;

(h) that according to Article 4.4 of the Unidroit Principles of International Commercial Contracts 2004, terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear and according to the Article 4.5, contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them to effect;

(i) that reliance is placed on Hon'ble Apex Court in case of Super Poly Fabrics Ltd. v/s. Commissioner of Central Excise, Punjab [2008(10)STR 545 SC] which states that a document has to be read as a whole. The purport and object with which parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof;

(j) that the contracts entered into by the respondent are purely the contracts of sale and same can not be treated as contract of service;

(k) that the demand has been raised on the entire amount received against the sale of export of cylinder which includes cost of cylinders, profit margin and other activities;

(l) that there is no value addition which could be attributed to the provision of the service;

(m) that the activities were not involving any elements of service and no consideration received against it so there can be no service tax liability;

(n) that the respondent is satisfying the conditions specified under Rule 6(A) regarding Export of Service;

(o) that the demand for the period from October-2012 to March-2017, when SCN is issued on 13.07.2018, is beyond the period of limitation;

(p) that the respondent was under the bonafide impression that their transaction amounts to export where no tax can be levied and transaction was reflected in the export column of the returns;

(q) that the respondent unit was regularly (every year) audited by the department for central excise and service tax and therefore facts were in the knowledge of the Department;

3. Aggrieved with the impugned order the Department preferred the appeal on the following grounds :

(i) that by referring the wrong provisions does not per se rendered the demand notice invalid if the authority have power to issue such notice;

(ii) the case law of M/s. Elphinstone Spinning & Weaving Mills Co. Ltd. [1978(002)ELT 399(SC)] is relied upon in the matter under which it has been decided that if the authorities have the power to issue notice, the fact that the notice refers specifically a particular rule which may not be applicable, will not make the notice invalid;

(iii) that merely because of a audit para mentioning the wrong provision in initial stage does not vitiate the entire demand;

(iv) that at present the duty/tax is paid on self assessment basis and the liability lies on the respondent to correctly assess the tax/duty and pay the same accordingly;

(v) that the nature of activity/transaction has not only been properly elaborated in the SCN but also has been described by the respondent itself vide its letter dated 12.05.2014 addressed to the Commissioner of Central Excise, Ahmedabad-III;

(vi) that as per the contract, the respondent has to choose the vendor, design, technical specification, upkeep the cylinder, store and maintain and carry out all the necessary steps in the benefit of the Party in the contract with the respondent;

(vii) that a whole package (buy, procure, store and maintain cylinder) was awarded to the respondent;

(viii) that there is contradiction in the submission of the respondent before the adjudicating authority and under their letter dated 12.05.2014 addressed to the Commissioner of Central Excise, Ahmedabad-III as on one hand respondent is saying that they recovery complete cost of cylinder and other expenses incurred by them towards the cylinder and on other hand in their letter the respondent is saying that they recover the amount along with value addition which is towards storage & maintenance of cylinders with them;

(ix) that the contracts are composite contracts which includes sale of goods as well as provision of service;

(x) that the respondent in their letter dated 12.05.2014 has admitted that they have recovered the amount of value addition in respect of cylinder which is consideration;

(xi) that as per the Place of Provision of Service Rules, 2012 the said transaction can not be considered as Export of Service.

4. Hearing in this Appeal was held on 21.08.2019, wherein Shri Mayur Sompura, Chartered Accountant and Shri Mayank Contractor, Chief Accountant, appeared on behalf of the respondent and reiterated the submissions advanced in the impugned order for consideration.

5. I have gone through the facts of the case, the grounds of appeal in the appeal memorandum, the SCN, impugned order and the submissions made at the time of personal hearing. The question to be decided in the present appeal is whether the activity of the respondent can be considered as Service or not.

6. The facts which are coming out reveal that the respondent is purchasing capital goods i.e. cylinders on behalf of their customers for manufacturing the final product i.e. packing material and are availing cenvat credit on the said cylinders and including the cost of cylinders on pro-rata basis in the assessable value of the final products. Further the respondent were keeping the said cylinders with them but were raising invoices to their customers showing the sale of said cylinders in which they were recovering from their customers excess amount over and above the purchase price of cylinders through the said sale invoices. It is the say of the respondent that this excess amount is towards the storage and to maintain cylinders with them. The respondent was paying the applicable central excise duty on such sale invoices in respect of the Customers in India. However in case of

foreign customers, though they raise the sale invoices, they neither charge nor pay the central excise duty on such sale. The said facts were also confirmed by the respondent vide their letter dated 12.05.2014 addressed to the Commissioner of Central Excise, Ahmedabad-III.

7. From the facts, I find that there is no dispute over the clearance of final product i.e. packing material and the duty liability under central excise either by Department or by respondent. The dispute is only over the tax/duty liability on the amount received by the respondent from overseas customers towards cylinder by issuing separate invoice, when such cylinders were never removed from the factory of the respondent. The Department considers it as service, which is not satisfying the conditions meant for treating the same as export & liable to service tax payment whereas the impugned order does not consider it as service at all & rather considering it as export of goods not liable to payment of service tax. Since there is no dispute over the duty liability on the final product i.e. packing material, therefore it would be justified if only the facts in respect of the cylinders are discussed hereinafter.

8. The impugned order in its para-57 has mentioned that the contracts with the overseas buyers are very vital to understand the essence of the activities & to ascertain the taxability and in para-58 it is mentioned that identical types of agreements have been executed by the respondent with other overseas buyers. So let us see the wordings used in a contract as described under para-58 of the impugned order. The same is reproduced below for the sake of convenience:

"..... whereas M/s. T.Choithram & Sons wish to purchase the packing material from M/s. Shako Flexipack Pvt. Ltd. For printing packing material as per design and requirement of M/s. T.Choithram & Sons LLC, engraved cylinders required on which customized designs as per requirement of M/s. T.Choitharam & Sons LLC is engraved. As per the mutual understanding between both the parties, engraved printing cylinders is to be provided by M/s. T.Coithram & Sons LLC to M/s. Shako Flexipack Pvt. Ltd. for manufacturing of printed packing material.

For the convenience of transaction and utilization of expert knowledge of M/s. Shako Flexipack Pvt. Ltd. in the businessline, ***M/s. T.Choithram & Sons LLC wish to give whole package of deal in cylinder to M/s. Shako Flexipack Pvt. Ltd. In this package, M/s. Shako Flexipack Pvt. Ltd. has to choose the vendor, design, technical specification, negotiate the price with vendor, use the cylinder for manufacture of packing material, to upkeep of cylinder, to store and maintain and carry out all the necessary steps*** *in the benefit of M/s. T.Choithram & Sons LLC."*

The wordings used in the contract clearly indicate that the contract is a composite contract for purchase of packing material (i.e. final product) from the respondent and for the service to be rendered by the respondent to M/s. T.Choithram & Sons LLC (overseas party) in respect of cylinders. The contract also indicate that the whole package of deal in cylinder was granted to the respondent under which the respondent had to utilize its expert knowledge to choose the vendor, design, technical specification, negotiate the price of

cylinder with vendor and had to upkeep, store and maintain the cylinder. Thus, it is very clear that the respondent has utilized its expert knowledge to provide service to M/s. T.Choithram & Sons LLC (overseas party) right from choosing the vendor, design, technical specification, price negotiation in respect of the cylinders upto the upkeep, store and maintain the cylinders at their end (in India). It is also clearly coming out of the records that the respondent has charged such customers for this by issuing a separate single invoice and an amount has been given by the overseas customers to the respondent towards choosing the vendor, design, technical specification in respect of the cylinders, negotiate the price with vendor, purchasing the cylinders on their behalf and to upkeep, store & maintain the cylinders at their end. The amount in such activity is nothing but a consideration towards the services rendered by the respondent to the overseas customers.

9. The adjudicating authority has relied upon the case law of Hon'ble Apex Court in case of Super Poly Fabrics Ltd. v/s. Commissioner of Central Excise, Punjab [2008(10)STR 545 SC], which states that a document has to be read as a whole. The purport and object with which parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. I am fully agreed with the view of the Hon'ble Apex Court in the matter. The terms and conditions of the contract in the present case are such that the contract is made for sale of packing material and for providing service in respect of the cylinder required for manufacture of packing material. Thus the contract can not be read by focusing only on one aspect and leaving the other aspect (which is appearing in the contract and holds equal importance) unattended. Each and everything mentioned in the contract will require consideration to decide the liability of the respondent. I find that the contract is a composite contract for sale and service and therefore I am not in agreement with the stand of the adjudicating authority that the contract is purely the contract for sale and not for service. Regarding the contention of the adjudicating authority that the activities were not involving any elements of service and no consideration received against such service, I find that it is clearly coming out of the contract itself that the respondent has not only provided the service but also received the consideration in this respect. The same things are coming out of the letter of the respondent dated 12.05.2014 addressed to the Commissioner of Central Excise, Ahmedabad-III.

10. I find that the nature of activity/transaction has been properly elaborated and has also been described by the respondent themselves vide their letter dated 12.05.2014 addressed to the Commissioner of Central Excise, Ahmedabad-III. From the perusal of the words incorporated in the contract, it can not be said that the contract is for sale of the cylinder and not for providing any kind of service. It is clearly coming out of the activities of the respondent that they are providing the service in respect of the cylinder.

Therefore, I am not convinced with the concurrence of the adjudicating authority with the contention of the respondent that the respondent has entered into the contract with the overseas buyer for sale of cylinders and not for providing any kind of service. The adjudicating authority was also in agreement with the contention of the respondent that the additional value over and above of the actual cost of value of cylinders were towards margin/profit towards cost of cylinder and various cost incurred to upkeep the cylinder. However I find no force in such contention of the respondent, as they have already admitted in their letter dated 12.05.2014 that the value addition is towards storage and maintenance of cylinders with them. The things are further coming out of the contract that over and above the storage and maintenance of cylinders at their end, the respondent have also carried out more activities like choosing the vendor, design, technical specification and negotiation of price of the cylinders on behalf of the such customers. Therefore no space is left to believe the contention of the respondent. The adjudicating authority's stand, that the contracts are primarily for purchase of packing material and the activities of the respondent in respect of cylinders are ancillary activity and not separate taxable activity, has no base as the contracts itself is a composite contract made for sale of packing material and for the service required in respect of the cylinders. When requirement of such services are specifically mentioned in the contract itself, the law can not keep its eyes closed to overlook the same.

11. Since the activity of the respondent is considered as service, it is required to look at some of the relevant provisions of law regarding service tax in the present case :

Section 65B(44) of the Finance Act, 1994 reads as under :

> *"service" means any activity carried out by a person for another for consideration and includes a declared service, ...*

Rule 6A(1) of the Service Tax Rules, 1994 reads as under :

> *The provision of any service provided or agreed to be provided shall be treated as export of service when,-*
> *(a) the provider of service is located in the taxable territory,*
> *(b) the recipient of service is located outside India,*
> *(c) the service is not a service specified in the section 66D of the Act,*
> ***(d) the place of provision of the service is outside India,***
> *(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and*
> *(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act*

Rule 4 of the Place of provision of Service Rules, 2012 reads as under :

> *The place of provision of following services shall be the location where the services are actually performed, namely:-*
> > *(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service.*

Now let us see the above provisions of law in view of the present facts of the case. From the discussion in the foregoing, it is clear that the respondent has rendered the services to the overseas customer and also received the amount towards such service which is nothing but the consideration as per the provisions of Section 65B(44) of the Finance Act, 1994. However, Rule 6A(1) of the Service Tax Rules, 1994 defines that for treating a service as 'export of service', all the conditions from (a) to (f) mentioned above, are required to be satisfied. If any of the condition is not satisfied, the service can not be treated as export of service. The condition (d) of Rule ibid states that place of the provision of service should be outside India. However in the instant case, looking into the provisions of Rule 4(a) of Place of Provision of Service Rules, place of provision of service is in India. Rule 4(a) of the Place of Provision of Service Rules, 2012 states that the place of provision of a service shall be the location where the services are actually performed when services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service. In the present case, it has been clearly mentioned in the contract that the cylinder is required to be made available by the overseas customer to the respondent in India. Thus, according to Rule 4(a), the place of provision in this situation would be India only as the service has been performed in respect of the cylinders in India only. The contention of the adjudicating authority that respondent is satisfying the conditions specified under Rule 6(A) regarding export of service, is far from the facts present in the case and therefore I am not convinced with this contention of the adjudicating authority. The service rendered by the respondent can not be treated as export of service looking to the above provisions of law and respondent is liable for the service tax payment on such service.

12. In the impugned order the adjudicating authority has tried to focus on the audit report where earlier the para was raised under central excise however, the same was withdrawn and a new para under service tax was raised vide the Corrigendum dated 16.01.2015 issued by the Asstt.Commissioner(Audit) of Central Excise & Service Tax, Ahmedabad. However, the Department in the present appeal has contended that referring the wrong provisions does not per se render the demand notice invalid if the authority has power to issue such notice. The Department has relied upon the case law reported at 1978(002)ELT 0399(SC) in case of N B Sanjana Asstt. Collector of C.Ex. Mumbai V/s. The Elphinstone Spinning & Weaving Mills Co. Ltd. under which it was held by the Hon'ble Apex Court that if the authorities have the power to issue notice, the fact that notice refers specifically a particular rule, which may not be applicable, will not make the notice invalid. I am in agreement of this contention of the Department. If it is found that there is some sort of mistake, it does not mean that the same can not be corrected at later

stage. Before issuance of the SCN, the corrigendum was issued by the Asstt.Commissioner(Audit) of Central Excise & Service Tax, Ahmedabad. Thus the Department was having the authority to correct its stand and the same has been done before issuance of notice in the present matter.

13. The adjudicating authority has found that in case of domestic clearance, the Department has not objected the payment of central excise duty on such clearance, however in case of overseas supply the Department is of the view that such activity comes under the purview of service tax. The adjudicating authority has contended that a single activity can not be viewed with two different perspective. Towards it, the Department has contended that it is the respondent, who has to self assess the excise duty or service tax liability and has to pay the duty or tax accordingly. So it was the duty of the respondent to come to some conclusion whether such activity of them would fall under central excise or under service tax. I am in agreement with this contention of the Department. In the present scenario, every assessee has to assess their duty/tax liability by themselves and has to pay the duty/tax accordingly. The respondent is in the central excise and service tax regime since long and therefore it can not be said that they were not aware about their activity. It is also pertinent to mention that the respondent is having the written contract with overseas buyers only and not with the buyers located in India. So in absence of written contract with local buyer, it was not possible for the Department to arrive at properly whether the activity of the respondent in respect of local buyer would come under the purview of excise or service tax.

14. The adjudicating authority in para-94 of the impugned order, on the basis of the statement of Shri Vivek B. Kothari, Director of the respondent recorded on 05.01.2016, arrived at that transaction was reflected by the respondent in the export column of the returns. However, no such admission is found in the Statement of Shri Vivek B. Kothari. Had it been so, Shri Vivek B. Kothari could have stated that the transactions were shown by them in the export column of returns. Even the things regarding this contention are not clearly coming out of the respondent's letter dated 12.05.2014.

15. Regarding the limitation, I find that the respondent is working in the self-assessment regime under the present law. The respondent is well aware about the activity they are carrying out. After perusing the contract with overseas customers, any one would arrive at the conclusion that the activities carried out by the respondent in respect of cylinders are nothing but service only and would come under the purview of service tax. Though fully aware about their own activities which were clearly falling under the purview of service tax, yet the respondent intentionally continued to show the same as goods

attracting excise duty. The respondent intentionally did not show the same under service tax because had it been shown under service tax, the service tax would have been paid not only in case of local customer but also in case of overseas customers. The same would not have been the situation under central excise because under excise, the excise duty could not be demanded in case of overseas customers. The adjudicating authority found that the respondent had entered into written contract with their overseas customers only and not with local/domestic customers (para-57 of the impugned order at page-31). The adjudicating authority has also considered that no extended period can be invoked as the respondent has represented the matter with the Department vide their letter dated 12.05.2014. However, I am not in agreement of this contention of the adjudicating authority. I find that the respondent had not disclosed the full facts in their letter dated 12.05.2014 regarding whether they have any written contracts with overseas customers and local/domestic customers. Thus, the letter dated 12.05.2014 of the respondent is nothing but to protect themselves from any proceedings by the Department at later stage. It is pertinent to mention that the cylinders have never left the Indian Territory (as mentioned by the respondent in their letter dated 12.05.2014) therefore the same can not be considered as export under excise.

16. In view of the foregoing, I set aside the impugned order and allow the appeal filed by the Department.

18/10/19

(Gopi Nath)
Commissioner (Appeals)

Date: .10.2019

Attested

23/10/19

(Jitendra Dave)
Superintendent (Appeal)
CGST, Ahmedabad.

BY R.P.A.D. / SPEED-POST TO :

M/s. Shako Flexipack Pvt. Ltd.,
Survey No. 1023/P/13, 1024/14,
Ghumasan, Near Sandvik Asia Ltd.,
Ahmedabad-Mehsana Highway,
Village Rajpur, Tal- Kadi,
District Mehsana, Gujarat-382715.

Copy to :-

1. The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Pr.Commissioner/Commissioner, CGST & Central Excise, Gandhinagar Comm'rate, Ahmedabad.
3. The Asstt./Dy. Commissioner, CGST & Central Excise, Division-Kadi, Gandhinagar Comm'rate, Ahmedabad.
4. The Asstt. Commissioner, System, CGST & Central Excise, Gandhinagar Comm'rate, Ahmedabad.
5. Guard File.
6. P.A. File.