आयुक्त(अपील)का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065- टेलेफैक्स07926305136

DIN : **20211264SW000000DFE0**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1180/2021 /H585 TO H589

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-65/2021-22**
दिनाँक Date : **30-11-2021** जारी करने की तारीख Date of Issue 03.12.2021

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **AHM-CEX-003-ADC-PMR-002-2020-21** दिनाँक: **31.07.2020** issued by Additional Commissioner, CGST& Central Excise, HQ, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पताName & Address of the **Appellant / ~~Respondent~~**

M/s Avani Services
14, Ganpati Market,
Rajmahal Road, Mehsana,
Gujarat-384002

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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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 हानिकार खाने 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 मे 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.

(क) 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।

(A) 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.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी 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।

(c) 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 भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) 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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,BahumaliBhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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 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 in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(44) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(Demand) एवं दंड(Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

› यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है.

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(cxv) amount determined under Section 11 D;
(cxvi) amount of erroneous Cenvat Credit taken;
(cxvii) amount payable under Rule 6 of the Cenvat Credit Rules.

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।

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

The present appeal has been filed by M/s. Avani Services, 14, Ganpati Market, Rajmahal Road, Mehsana, Gujarat – 384 002 (hereinafter referred to as the appellant) against Order in Original No. AHM-CEX-003-ADC-PMR-002-20-21 dated 31-07-2020 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, CGST & C.Ex., Gandhinagar Commissionerate [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant are engaged in providing 'Manpower Recruitment & Supply Agencies Services' and are holding Service Tax Registration No. AAPFA8632DSD001. The Assistant Commissioner, Circle-10, Central Excise Audit-II, Gurgaon had in the month of May, 2016 conduced audit of M/s. Mehsana District Co-operative Milk Products Union Ltd, Gurgaon, Haryana (hereinafter referred to as the said Dairy) for the period from F.Y. 2012-13 to F.Y. 2014-15. The said Dairy was engaged in the processing of Milk and manufacturing of Ice Cream and Curd. During the audit, it was observed that the said dairy was paying job charges for packing of Dahi, Butter Milk, Ice Cream per piece i.e. the said dairy was having job work contract with the appellant for work of packing, unpacking, loading, unloading and miscellaneous work.

2.1 Subsequently, vide letter dated 18.10.2016, the appellant was requested to submit ledger account of payment received from the said Dairy, copy of Balance Sheet, 26 AS Form, & ST-3 returns for the period from F.Y. 2012-13 to F.Y. 2014-15 and to pay service tax on the services provided. The appellant was also requested to submit details of the work order, Invoice, P&L account, Balance Sheet, 26 AS, ST-3 for the period from F.Y. 2015-16 to F.Y. 2016-17 and April to June, 2017. The appellant submitted the requested documents to the department.

2.2 On scrutiny of the work order dated 07.08.2013 of the said Dairy, it was found that the scope of the work order pertained to packing of Dahi, supply of crates to the machine, manual cleaning of dirty crates, arranging Dahi cases/crates in incubation room, general cleaning of Machines, floor, drains, trays, general cleaning of Dahi cold store, unloading of filled buttermilk crates, general cleaning of buttermilk and ice cream cold store, unloading of all receivables such as packing material, SMP, sugar, salt, oil etc., arrange loading , unloading of all receivables etc. In the Certificate No. PUR/leko/2016-17/21513 dated 15.02.2017 of the said Dairy, it was stated that work order included manufacturing related activities for various dairy products on piece rate in their organization. Control of the workers in every respect was solely with the appellant and the Dairy had no effective control or supervision over the workers deployed under the said work order. In view of the above, it appeared that the services provided by the appellant would not fall under Manpower Recruitment & Supply Agencies Service. Hence, the total service tax liability was on the appellant. It appeared that the appellant was providing 'Packaging', 'Cleaning' Services as defined in Section 65 (105) (zzzf) & 65 (105) (zzzd) of the Finance Act, 1994 which were taxable services, till 30.06.2012.

2.3 From 01.07.2012, the negative list regime came into existence. As per Section 65B (44) of the Finance Act, 1994, Service means any activity carried out by a person for another for a consideration and includes a declared service. It appeared that the nature of activity carried out by the appellant on behalf of the said Dairy was covered under the definition of Service and was not covered by the Negative List as per Section 66D of the Finance Act, 1994. This service was also not exempted under Notification No. 25/2012-ST dated 20.6.2012. On scrutiny of the ST-3 returns of the appellant, it was found that they had not paid any Service Tax during the period from F.Y. 2013-14 to F.Y. 2015-16. It appeared that the appellant had mis-declared the value received for providing service and short paid Service Tax amounting to

Rs.1,63,56,984/-. Therefore, the appellant was issued a SCN bearing No. V.ST/15-50/DEM/OA/2017-18 dated 06.09.2018 seeking to :-

i. Consider the receipts amounting to Rs.12,35,06,743/- for the period from F.Y. 2013-13 to F.Y. 2015-16 under the income head of Contract Income as taxable value for the purpose of charging service tax;
ii. Demand and recover Service Tax amounting to Rs.1,63,56,984/- under the proviso to sub-section (1) of Section 73 of the Finance Act, 1994 by invoking the extended period of five years;
iii. Recover Interest under Section 75 of the Finance Act, 1994;
iv. Impose penalty under Section 77 (2) of the Finance Act, 1994; and
v. Impose penalty under Section 78 of the Finance Act, 1994.

2.4 The SCN was adjudicated vide the impugned order wherein :

i. The receipts amounting to Rs.12,35,06,743/- for the period from F.Y. 2013-13 to F.Y. 2015-16 under the head of Contract Income was held as taxable value for the purpose of charging service tax;
ii. Demand of Service Tax amounting to Rs.1,63,56,984/- was confirmed under the proviso to sub-section (1) of Section 73 of the Finance Act, 1994 by invoking the extended period of five years;
iii. Interest was ordered under Section 75 of the Finance Act, 1994;
iv. Penalty of Rs.10,000/- was imposed under Section 77 (2) of the Finance Act, 1994; and
v. Penalty of Rs.1,63,56,984/- was imposed under Section 78 of the Finance Act, 1994.

3. Aggrieved with the impugned order, the appellant firm has filed the instant appeal on the following grounds:

i) The impugned order has been passed without going in to the facts of the case and the decisions of the higher appellate authorities including that of the Hon'ble Supreme Court.

ii) The work carried out by them is an ancillary process required for the manufacture of ice-cream and hence it is not a service falling under the definition of service as defined in the Finance Act, 1994. As per the work order, they have to fill ice-cream/curd in retail packs and the related works such as carrying empty crates, bringing packing material from the godown, counting, arranging the packs till dispatch. Thus, it is evident that the works carried out are ancillary process of manufacture of ice-cream.

iii) The work order would reveal that they have carried out the manufacturing and packing activity of curd/butter milk making plant with the machinery. The work order is for the complete manufacturing activity.

iv) From the definition of manufacture as per Section 2(f) of the Central Excise Act, 1944, manufacture includes any process incidental or ancillary to the completion of a manufactured product. The packing of ice-cream and related packing activities are incidental or ancillary to the manufacture of ice-cream.

v) As per Chapter Note 6 of Chapter 4 of the Central Excise Tariff Act, 1985, labelling or re-labelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. This chapter note obliterates any doubt as to whether the activity of pouch filling and packing would amount to manufacture.

vi) Even after the introduction of the Negative List from 01.07.2012, any process amounting to manufacture or production of goods has been kept out of service tax net. Any process amounting to manufacture or production of goods is mentioned at Section 66D (f) of the Finance Act, 1994.

vii) The contract was for execution of the work of manufacturing, stacking, transferring, loading and unloading of finished goods, packing materials and raw materials within the factory

premises of the said Dairy. It is a kind of job work within the premises of the principal manufacturer. As per the contract the rate is fixed per number of units and they had raised bills accordingly

viii) The same adjudicating authority has in Order No. AHM-CEX-003-ADC-PMR-006-19-20 dated 28.08.2019 in respect of M/s.Komal Enterprise, Mehsana dropped the demand in an identical case.

ix) The issue is settled by OIA No. AHD-EXCUS-003-APP-017-19-20 dated 08.07.2019 passed by the Commissioner (Appeals), Ahmedabad, wherein it was held that the activity carried out is amounting to manufacture and hence not liable to service tax.

x) In the case of Surya Trading and Services reported at 2018 (15) GSTL J209 (SC), the appeal filed by the department against CESTAT Final Order No. A/93095-93097/2016-WZB/STB dated 28.09.2016 was dismissed by the Hon'ble Supreme Court and the CESTAT order that job work activity under contract is not liable to service tax was upheld.

xi) They rely upon the decision in the case of Gokul Ram Gurjar Vs. Commissioner of C.Ex., Jaipur-II reported in 2018 (19) GSTL 269 (Tri.-Del) and Super Poly Fabriks Ltd Vs. CCE, Punjab reported in 2008 (10) STR 545 (SC). The aforesaid judgement is identical to the present case.

xii) They also rely upon the following judgement wherein it was held that process amounting to manufacture is not eligible to service tax. 1) Midas Care Pharmaceuticals – 2010 (18) STR 768 (Tri.-Mumbai), 2) Rubicon Formulations Pvt Ltd – 2010 (19) STR 515 (Tri.-Mumbai), 3) Mistair Health & Hygiene Pvt Ltd – 2015 (40) STR 148 (Tri.-Mumbai), 4) Munish Forge Pvt Ltd – 2015 (37) STR 662 (Tri.-Del) and 5) Ferro Scrap Nigam Ltd – 2014 (36) STR 955 (Tri.-Del).

xiii) The demand is hit by limitation as it has been issued after the period of one year from the date of knowledge of the department and there are number of judgements in this regard.

xiv) There is no suppression of facts or malafide intention to evade payment of duty is not established by the department. Hence extended period cannot be invoked.

xv) No penalty should be imposed where the mens rea is absent. Also not penalty is imposable when they had acted on the bonafide belief that they were not liable to pay service tax. They rely upon the decisions of the Hon'ble Courts and the Hon'ble Tribunal in this regard.

4. Personal Hearing in the case was held on 16.09.2021 through virtual mode. Shri Manilal Hiralal Raval, Consultant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

5. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. I find that the issue before me for decision is whether the activity of packing of Dahi, supply of crates to the machine, manual cleaning of dirty crates, arranging Dahi cases/crates in incubation room, general cleaning of Machines, floor, drains, trays, general cleaning of Dahi cold store, unloading of filled buttermilk crates, general cleaning of buttermilk and ice cream cold store, unloading of all receivables such as packing material, SMP, sugar, salt, oil etc., arrange loading , unloading of all receivables etc. carried out by the appellant for the said Dairy can be considered as provision of Packaging Services and Cleaning Services as defined under erstwhile Section 65 (105) (zzzf) and Section 65 (105) (zzzd) of the Finance Act, 1994 respectively for the period prior to 01.07.2012 and as service w.e.f 01.07.2012 and whether they are liable for payment of Service Tax. The demand pertains to the period F.Y. 2012-13 to F.Y. 2014-15.

6. I find that prior to 01.07.2012, 'cleaning activity' was defined under Section 65(24b) of the Finance Act,1994 as :

> " "cleaning activity" means cleaning, including specialised cleaning services such as disinfecting, exterminating or sterilising of objects or premises, of –
>
> (i) commercial or industrial buildings and premises thereof; or
> (ii) factory, plant or machinery, tank or reservoir of such commercial or industrial buildings and premises thereof,
>
> but does not include such services in relation to agriculture, horticulture, animal husbandry or dairying;"

6.1 From the above definition of cleaning activity as defined under Section 65 (24b) of the Finance Act, 1994, it is clearly evident that cleaning services provided in relation to Dairying is excluded. It is not a matter of dispute that the service provided by the appellant is to a dairy and therefore, on this very count the contention of the department is not sustainable.

6.2 I further find that prior to 01.07.2012 'packaging activity' was defined under Section 65(76b) of the Finance Act,1994 as :

> " "packaging activity" means packaging of goods including pouch filling,bottling, labeling or imprinting of the package, but does not include any packaging activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944);"

I find that the activity undertaken by the appellant are in respect of goods Dahi, Butter Milk and Ice cream. Dahi and Butter Milk which are classifiable under Chapter 4 of the Central Excise Tariff Act, 1985 while Ice cream is classifiable under Chapter 21. As per Note 6 of the Chapter 4 and Note 4 of Chapter 21, labelling or re-labelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. In view thereof, the activity of packaging undertaken in respect of the said goods is excluded from the purview of

packaging activity as defined under Section 65 (76b) of the Finance Act, 1994.

6.3 I find that from 01.07.2012, it is the contention of the department that the activity of the appellant is not covered by the negative list of services and neither is it exempted by a notification and accordingly a service which is chargeable to service tax. I find that Section 66D (f) which was introduced vide Finance Act, 2012 read as "*any process amounting to manufacture or production of goods*;". The said section was amended w.e.f 01.06.2015 to read as "*services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption*". Therefore, even under the negative list regime, the activities amounting to manufacture was excluded from the scope of taxable services. The said Section 66D (f) of the Finance Act, 1994 was omitted w.e.f 31.03.2017.

7. It is further observed that the appellant has contended that the adjudicating authority, who passed the impugned order, had adjudicated another case, involving the same issue, vide OIO No. AHM-CEX-003-ADC-PMR-006-19-20 dated 28.08.2019. In the said case, it was the contention of the department that the activity of cleaning, packing, loading/unloading of crates etc. was classifiable under 'Manpower Supply service'. The adjudicating authority had, however, rejected the contention of the department and dropped the proceedings. In this regard, I find that the department has not been consistent in its stand inasmuch as in the present case involving similar activity, the department contends that the activity undertaken by the appellant amounts to 'Packaging Activity' and 'Cleaning Activity' services.

7.1 I further find that the adjudicating authority too has failed to follow his own order inasmuch as while he dropped the proceedings against another assessee, he has confirmed the demand and imposed penalty on the appellant in the present case involving the similar issue/activity. While passing OIO No. AHM-CEX-003-ADC-PMR-006-

19-20 dated 28.08.2019, the adjudicating authority has relied upon OIA No. AHM-EXCUS-003-APP-017-19-20 dated 08.07.2019 passed by the Commissioner (Appeals), Ahmedabad. However, while passing the impugned order under challenge in the present appeal, the adjudicating authority has clearly ignored his own order as well as not followed the order of the appellate authority and thereby committed judicial indiscipline.

8. I also find that the department had filed an appeal against the said OIO No. AHM-CEX-003-ADC-PMR-006-19-20 dated 28.08.2019 passed in the case of M/s. Komal Enterprise, Mehsana. The appeal was decided by me vide OIA No.AHM-EXCUS-003-APP-74-19-20 dated 18.03.2020 wherein the appeal of the department was rejected. Further, an appeal preferred by M/s.Komal Enterprise, Mehsana on the same issue was also decided by me vide OIA No. AHM-EXCUS-003-APP-42-20-21 dated 19.11.2020 wherein the appeal was allowed. The period involved in the above said OIAs is F.Y. 2010-11 to F.Y. 2015-16 and F.Y. 2016-17 to F.Y.2017-18 (upto June, 2017) respectively. Since the present dispute involves an identical issue and the facts are the same, the operative part of the OIA dated 18.03.2020 is reproduced as under :

> *"7. I find that the adjudicating authority has dropped the demand of Service Tax along with interest and imposition of penalty, as proposed in the Show Cause Notice, on the grounds that the respondent have provided service viz packing, unpacking, printing etc on packing material, loading and unloading of materials etc to MDCMPU is as per their contract between MDCMPU and the said contract is not for number of 'supply of Manpower' but for execution of some specific works in relation to the manufacture of MDCMPU's finished goods; that the activity carried out by the respondent is amounting to manufacture. Therefore, no Service Tax is leviable. On other hand, the department has contended that the purpose of the agreement/work order is merely for due supply of manpower by the respondent to MDCMPU; that the essential character of the contract is to supply of manpower only and the labourers deployed by the respondent did complete the given work of specific task within time as per requirement under the direction of MDCMPU. Therefore,*

Service Tax under the service category of 'Manpower & Supply service' is leviable.

8. I have gone through the work order/agreement No.DMD/Manesar/1753 dated 08.05.2010 reproduced by the adjudicating authority in his impugned order at para 14. The work order/agreement is for "Scope of Work-Packing activity of milk" which is entrusted to the respondent to carry out different works. As per the said work order/agreement, the works starts from unloading of crates from vehicle to till the dispatch of the finished goods of Therefore, the purpose of the agreement/work order is merely for due supply of manpower by the respondent to MDCMPU. Since the adjudicating authority has reproduced the work order/agreement (Sr.No.1 to 24) in the impugned order, the same is not again re-produced here. In short, the work includes unloading of crates from vehicles and stacking them properly, Loading of empty crates to crate washer, arrange properly the milk sachets in the crates after counting, remove the leaky pouches, arranging accurate number of milk pouches to be filled in the crates, general cleaning of machines, floor, drains etc.

9. In the instant case, I find that the process undertaken by the respondent is on the materials or goods supplied by the principal manufacture i.e MDCMPU. Therefore, the purpose of the agreement/work order is for carrying out specific activities at MDCMPU premises by the respondent; that MDCMPU supplies the materials or goods to the respondent at their premises for carrying out the works as discussed above, according to the work contract/agreement and the respondent complete the process so as to enable MDCMPU to dispatch the goods finally to their customers. In other words, MDCMPU entrust certain job works to the respondent to get their goods ready for dispatch. Looking into the said facts, the activities carried out by the respondent qualify as 'process of goods' which amounts to 'manufacture' as per Section 2(f) of the Central Excise Act, 1944. Section 2(f) ibid reads as under:

> *(f) "manufacture" includes any process, -*
>
> *(i) incidental or ancillary to the completion of a manufactured product;*
>
> *(ii) which is specified in relation to any goods in the Section or Chapter notes of [the Fourth Schedule]as amounting to manufacture; or]*
>
> *(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,*

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

9.1 I further find that as per chapter note 6 of chapter 4, labeling or relabeling of containers or repacking from bulk packs to retails packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'.

9.2 It is a fact on records that the respondent have carried out the work of packing of milk in pouches/bottles and its ancillary works from unloading of packing materials from vehicles to the packing section to till dispatch of finished goods of MDCMPU at their premise. In the circumstances, as per definition of Section 2(f) ibid and chapter note discussed above, I do not find any merit to interfere the contention of the adjudicating authority that the activity of the respondent in the instant case is amounting to manufacture.

10. Further, it explicit from the copy of invoices furnished by the respondent that they raised the labour bills for their various works done as per the work contract/agreement and not for the labour deployed for the work. In the circumstances, there is no merit in the contention of the department that the work the essential character of the contract is to supply of manpower only. The department has further contended that the OIA No. No.AHM-EXCUS-003-APP-017-19-20 dated 08.07.2019 passed by the Commissioner (Appeals), Ahmedabad in an identical case relied on by the respondent is not applicable to the instant case as the Commissioner (Appeals) has set aside the OIO by terming the work as job work. I do not find any merit in the said contention also. In the said OIA, the Commissioner (Appeals) has set aside the activity of packing and cleaning etc work of milk products from the beginning i.e unloading of crates from vehicles to till dispatch of finished goods as 'rendering service' but akin to manufacturing activity.

11. The department has also relied on the decision of Hon'ble Supreme Court in the case of M/s Aman Marbles Industris and M/s Parle Products Pvt Ltd supra. Looking into the activities carried out by the respondent in the instant case and the definition of the term 'manufacture' under Section 2(f) of the Central Excise Act, 1944 and chapter note of the product in question, the decision of Hon'ble Supreme Court supra is wrongly relied on by the department. Especially, there is decision by the Hon'ble High Court and Supreme Court, wherein, it has been held that specific job work activity undertaken under a contract is not liable for Service Tax.

11.1 I find that the Hon'ble High Court of Bombay in the case of M/s Samarth Sevabhai Trust [2016 (41) STR 806] has held that when there is no supply of labour as per agreement, the services provided not covered under Manpower Recruitment & Supply service and not taxable. By relying Hon'ble Supreme Court decision in the case of Super Poly Fab-riks Pvt Ltd, the Hon'bvle High Court has held as under:

> *7. Having regard to the nature of contract between the respondents and sugar factory and the scope of definitions mentioned above, it appears that the Appellate Tribunal has rightly come to the conclusion that the respondent's work, though provided services to the sugar factory, did not come within the mischief of the term "Manpower Recruitment or Supply Agency".*
>
> *8. This interpretation of agreement between respondents and its principal is in tune with the judgment of Supreme Court in the case of Super Poly Fab-riks Ltd. v. Commissioner of Central Excise, Punjab reported in 2008 (10) S.T.R. 545 (S.C.). Paragraph No. 8 of the said judgment can be relied upon to drag the point at home, which reads as under :-*
>
> > *"8. There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive."*
> >
> > *9. In view of the above, it is clear that no manpower has been supplied by the respondents to the sugar factory to constitute supply of manpower. This Court had an occasion to deal with the similar issue, as is involved in these appeals, in Central Excise Appeal No. 19 of 2014, and this Court by order dated 27-1-2015 [2015 (38) S.T.R. 468 (Bom.)] has dismissed the said appeal."*

11.2 Further, I also find that the Hon'ble Supreme Court in the case of Commissioner V/s M/s Surya Trading & Service [2018 (15) GSTL J 209] has dismissed an appeal filed by the Commissioner of Service Tax, Mumbai by holding that specific job work activity undertaken under a contract is not liable for Service Tax, if payment was given based on quantity of output. The decision of the Hon'ble Court is as under:

> *"2. Heard the Learned Counsel for the appellant and perused the relevant material.*
>
> *3. In view of the order dated 23-10-2017 passed by this Court in Civil Appeal Nos. 18369-18370 of 2017 titled as 'Commissioner of Service Tax, Mumbai-I v. M/s. Reach Trading and Service', the present Civil Appeal is also dismissed in the same terms."*
>
> *The Appellate Tribunal in its impugned order had followed its decision in Commissioner v. Vintage Service Co. [Final Order Nos. A/93095-93097/2016-WZB/STB, dated 28-9-2016] which was delivered in Revenue's appeals filed against same impugned order-in-appeal which was set aside by that order. In the aforesaid order the Tribunal had*

relied upon the decisions reported in 2010 (19) S.T.R. 370 (Tri.-Bang.), 2014 (35) S.T.R. 602 (Tri.-Mum.) and 2016 (41) S.T.R. 806 (Bom.) and held that the specific job work activity undertaken under a contract is not laible to Service Tax under the category of Manpower Recruitment and Supply Agency service if payment therefor was given based on quantity of output."

12. In view of above discussion, I find that the activities carried out in whole by the respondent at the premises of MDCMPU is akin to manufacturing activities and does not call for levy of Service Tax. In the circumstances, I do not find any merit in the department appeal. Therefore, I uphold the decision of the adjudicating authority and reject the appeal filed by the department."

9. I find that subsequent to the above orders being passed, there is no change in the legal provisions nor has there been any judicial ruling contrary to the aforesaid orders. That being so, I do not find any reason to take a different view in the matter. Hence, following my above decision, it is held in the present case also that the activities carried out by the appellant at the premises of the said Dairy is akin to manufacturing activities and does not fall within purview of Service Tax law both in the pre-negative list regime as well as in negative list regime. In view thereof, the impugned order is deserved to be set aside for being not sustainable in law both on merits and facts.

10. In view of the foregoing the facts, I set aside the impugned order for being not legal and proper and allow the appeal of the appellant.

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

The appeal filed by the appellant stands disposed off in above terms.

30th November, 2021.

(**Akhilesh Kumar**)
Commissioner (Appeals)
Date: .11.2021.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

F No.GAPPL/COM/STP/1180/2020

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To

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Appellant

The Additional Commissioner,
CGST & Central Excise,
Commissionerate : Gandhinagar

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.

(for uploading the OIA)

4. Guard File.
5. P.A. File.