



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
GST Bhavan, Ambawadi, Ahmedabad-380015
Phone: 079-26305065 - Fax: 079-26305136
E-Mail : commrappl1-cexamd@nic.in
Website : www.cgstappealahmedabad.gov.in

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आज़ादी का
अमृत महोत्सव

By SPEED POST

DIN:- 20231064SW00000027E9

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/529/2023-APPEAL / 6661 - 6S
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-105/2023-24 and 25.09.2023
(ग)	पारित किया गया / Passed By	श्री शिव प्रताप सिंह, आयुक्त (अपील) Shri Shiv Pratap Singh, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	04.10.2023
(ङ)	Arising out of Order-In-Original No. AC/S.R./18/ST/KADI/2021-22 dated 27.03.2022 passed by the Assistant Commissioner, CGST, Division-Kadi, Gandhinagar Commissionerate.	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Mahakali Enterprise, C/o Mr. Ghanshyambhai V Limbachiya, 03, Soham Bungalows, Karannagar Road, Kadi, Mehsana, Gujarat-382715.

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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:-

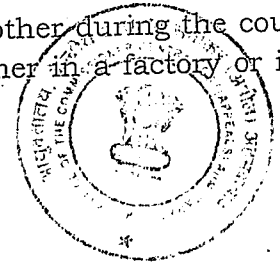
Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त 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 :-

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 :-

(क) 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 में हो माल की प्रक्रिया के दौरान हुई हो।

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



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

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।

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

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

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.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम होतो रुपये 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 अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(2) उक्तलिखित परिच्छेद 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।

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

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

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

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

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु 6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एक प्रति अपीलो 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)।

- (1) खंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिया गलत सेनवैट क्रेडिट की राशि;
- (3) 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:

- (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.

(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।

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."



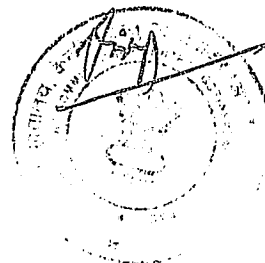
अपीलिय आदेश / ORDER-IN-APPEAL

The present appeal has been filed by M/s Mahakali Enterprise, 14-VRBDAVN Society, At-Karannagar, Kadi, Dist.:Mehsana, Gujarat-382715 [New address: C/o Mr. Ghanshyambhai V Limbachiya, 03, Soham Bunglows, Karannagar Road, Kadi, Mehsana, Gujarat-382715] (hereinafter referred to as "*the appellant*") against Order in Original No. AC/S.R./18/ST/KADI/2021-22 dated 27.03.2022 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST and Central Excise, Division- Kadi, Commissionerate: Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case are that the appellant were engaged in providing services under the category of 'Transport of Goods by Road/Goods Transport Agency Service' under Service Tax registration No. ABXPL7531MST001. As per the information received from the Income Tax department discrepancies were observed in the total income declared by the appellant in their Income Tax Return (ITR) when compared with Service Tax Returns (ST-3) filed by them for the period F.Y. 2014-15. In order to verify, letters & email were issued to the appellant calling for documents i.e Balance Sheet, Profit & Loss Account, Income Tax Returns, Form 26AS & Service Tax Ledger for the period F.Y. 2014-15. They did not file any reply. The services provided by the appellant during the relevant period were considered taxable under Section 65 B (44) of the Finance Act, 1994 and the Service Tax liability was determined on the basis of value of 'Sales of Services' under Sales/Gross Receipts from Services shown in the ITR-5 and Taxable Value shown in ST-3 return for the relevant period as per details below :

Table-A

		(Amount in Rs)
Sr. No	Details	F. Y. 2014-15
1	Value of Services declared in ITR (From ITR)	0/-
	Value of total amount paid/credited under 194C, 194H, 194I, 194J	16,008.9/-
2	Taxable Value declared in ST-3 return	0/-
3	Hight Difference of value	16,008.9/-
4	Amount of Service Tax along with Cess not paid / short paid	1,979/-



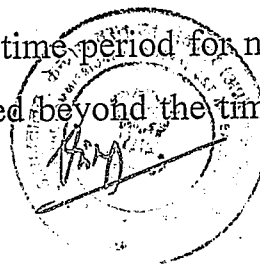
3. Show Cause Notice vide F. No. IV/16-15/TPI/PI/Batch 3C/2018-19/Gr.IV dated 25.06.2020 (in short 'SCN') was issued to the appellant, wherein it was proposed to:

- Demand and recover service tax amounting to Rs. 1,979/- under the proviso to Section 73 (1) of the Finance Act, 1994 alongwith Interest under Section 75 of the Finance Act, 1994 ;
- Impose penalty under Section 77 and 78 of the Finance Act, 1994;

4. The said SCN was adjudicated *ex-parte* vide the impugned order wherein the demand for Rs. 1,979/- for the period F.Y. 2014-15 was confirmed under Section 73 (1) of the Finance Act, 1994 alongwith interest under Section 75. Penalty amounting to Rs. 1,979/- was imposed under Section 78 of the Finance Act, 1994. Penalty of Rs. 10,000/- or Rs.200/- per day whichever is higher starting with the first day after the due date, till the date of actual compliance for failure to provide documents/details for further verification in a manner as provided under Section 77 of the Service Tax Rules, 1994.

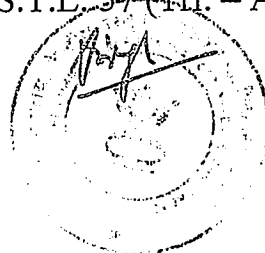
5. Being aggrieved with the impugned order, the appellant have filed the present appeal on following grounds :

- The appellant is a proprietorship firm, having Service Tax Registration No. ABXPL7531MST001 is engaged in the activity of providing goods transportation services.
- The Appellant provided the services of goods transport agency / transportation of goods by road and the same fell under full reverse charge mechanism vide Sr. No. 2 of Notification No. 30/2012-ST dated 20.06.2012 wherein the service receiver will make payment of Service Tax on the same. The Appellant had been filing timely Service Tax returns ST-3 via Service Tax registration No. ABXPL7531MST001 under the same reverse charge mechanism.
- The Appellant's requested to the honorable Commissioner (Appeals) to take a lenient view in their case based on the following facts:
 - a. The difference is not due to any excess income received, but the TDS on the invoice value.
- Under the Finance Act, 1994, the time period of issuance of Show Cause Notice on the date of present SCN i.e. 25.06.2020, the time period for normal Notice was only 30 months and the said has been issued beyond the time limit of 30



months. In case of extended period of five years the authorities need to prove fraud, suppression of facts, etc.

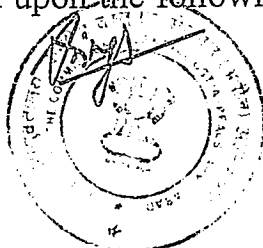
- The present SCN has been issued beyond 30 months i.e. for the FY 14-15 and no reasons have been provided for issuance of SCN for extended period. The authorities have no-where mentioned or detailed any reasons for issuing SCN for extended period.
- It is the legal burden of the authorities to prove that the Appellant has suppressed certain facts with willful intention to evade liability from the Tax Department through legitimate proofs. Mere invoking of the extended period without proper reasoning cannot be substantiated. They relied upon the following judgements of Hon'ble Court and Tribunal in case of :
 - Uniworth Textiles Ltd v. CCE, Raipur [2013 (288) ELT 161 (SC)]
 - Pahwa Chemicals Pvt Ltd v. CCE, Delhi [2005 (189) ELT 257 (SC)]
 - Ranbaxy Laboratories Ltd v. CCE & ST, Chandigarh [2015 (329) ELT 867 (Tri-Del)]
 - Tamilnadu Housing Board v. CCE [1994 (74) ELT 9 (SC)]
 - Cosmic Dye Chemical v. CCE (1995) 6 SCC 117 (SC 3 member bench judgment)
- Since the demand is primarily based on IT returns and form 26AS, the information of provision of service is well within the knowledge of the Department. As IT returns and information therein forms part of the government records, alleging suppression is not proper. In this regard, they relied upon the following judgements of Hon'ble courts and Tribunals in the case of :
 - Lakshmi Engineering Works vs. Collector of C. Ex. [1989 (44) ELT 353 (Tri.)] maintained by Supreme Court reported in [1991 (55) ELT A33 (SC)].
 - M/s. Cosmic Dye chemical Vs Collector of Cen. Excise, Bombay [1995 (75) E.L.T. 721 (S.C.)]
 - Pushpam Pharmaceuticals Company v. CCE, [1995 (78) ELT 401 (SC)].
 - Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur [2013 (288) ELT 161 (SC)].
 - Continental Foundation Jt. Venture vs. Commr. Of C. Ex., Chandigarh-I [2007 (216) ELT 177 (SC)].
 - Mega Trends Advertising Ltd. [2020 (38) G.S.T.L. 57-(Tri. – All.)]



- Rama Paper Mills Vs Commissioner of Central Excise, Meerut, [2011 (22) S.T.R. 19 (Tri.-Del)]
 - Hindalco Industries Ltd. Vs. CCE, Allahabad [2003 (161) ELT 346 (Tri-Del)].
 - Scott Wilson Kirkopatrik (I) Pvt. Ltd. Vs. CST Banglaore [(2007) 8 STJ 358 (CESTAT Bangalore)].
 - Nexcus Computers Pvt. Ltd. Vs. CCE [(2008) 9 STR 34 Chennai Tribunal].
 - Gujarat Ambuja Exports Ltd. Vs. UOI [(2012) 26 STR 165 (Gujarat HC)].
 - Infinity Infotech Parks Ltd. Vs. UOI & Others [2012 – TIOL – 987 (Delhi High Court)].
 - Collector of Central Excise Vs. Chemphar Drugs & Liniments [1989 (40) E.L.T. 276 (S.C.)]
 - Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut [2005 (188) E.L.T. 149 (S.C.)],
 - Padmini Products Vs. Collector of Central Excise [1989 (43) E.L.T. 195 (S.C.)],
 - Commissioner of Central Excise, Aurangabad vs. Bajaj Auto Ltd. [2010 (260) E.L.T. 17 (S.C.)].
- It appears that there are no specific allegations which have been properly explained while issuing the SCNs. Unless the allegations are properly explained in a show cause notice, it cannot be said that there is any proper opportunity to defend the allegations. It is a settled law that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. Therefore, it can be contested that such SCN's ought to be held as bad in law as issued without following the due procedure of law and against the principles of natural justice. They relied up on the following judgements of Hon'ble Courts and Tribunals in the case of :
- C.C.Ex. Bangalore vs. Brindavan Beverages (P) Ltd [2007 (213) E.L.T. 487 (S.C.)]
 - Oryx Fisheries Private Limited vs. Union of India [2011 (266) E.L.T. 422 (S.C.)]
- Furthermore, as stated above, the demand of Services Tax has been solely raised on account of difference in the value of services as per the Income Tax returns/ Form 26AS and Service Tax returns. It is a settled position of law that

income reflected in the Income Tax returns/ Form 26AS is not a proper basis to determine the Service Tax liability without establishing the nature of service and the purpose for which the relevant income is received. In this regard, they relied upon the following judgements of Hon'ble courts and Tribunals in the case of :

- Kush Constructions Vs. CGST NACIN, ZTI, Kanpur [2019 (24) G.S.T.L. 606 (Tri. - All.)],
 - Amrish Rameshchandra Shah Vs. Union of India & Ors. [Writ Petition (L) No. 2103 of 2021]
 - Alpa Management Consultants P. Ltd. Vs. Commissioner of Service Tax [2007 (6) S.T.R. 181 (Tri.-Bang.)],
 - Synergy Audio Visual Workshop P. Ltd. v. CST [2008 (10) S.T.R. 578 (Tri. - Bang.)],
 - Free Look Outdoor Advertising v. CC & CE, Guntur [2007 (6) S.T.R. 153 (Tri. - Bang.)],
 - J.I Jesudasan vs. CCE [2015 (38) S.T.R 1099 (Tri.Chennai)],
 - Turret Industrial Security vs. CCE [2008 (9) S.T.R. 564 (Tri-Kolkata)],
 - Commissioner Vs. Sharma Fabricators & Erectors Pvt. Ltd. [2019 (022) GSTL J166 (All.)],
 - Oudh Sugar Mills Ltd. vs. UOI [1978 (2) ELT (J172) (SC)] .
- Furthermore, the minimum requirement to levy Service Tax on services rendered by an assessee is to identify the nature of their taxable service. It is worthwhile to note that the Service Tax liability cannot be demanded on an unidentified service. Therefore, without discharging such onus, no recovery of tax could sustain. Thus, unless the activity is described in detail and examined in terms of Section 65B(44) of Finance Act, i.e., satisfying all the attributes of the term "service", no demand of Service Tax can be made. They relied upon the judgements of Hon'ble Court and Tribunal in case of Deltax Enterprises Vs. CCE, Delhi. Therefore, demand of Service Tax cannot be raised on an unidentified service and hence, such SCNs ought to be held invalid.
- With regard to the allegation of suppression of facts, the Appellant hereby submits that they are a law abiding assessee and they have been filing their Service Tax returns under Registration No. ABXPL7531MST001 regularly with the Department. In this regard, they relied upon the following judgements



of Hon'ble courts and Tribunals in the case of :

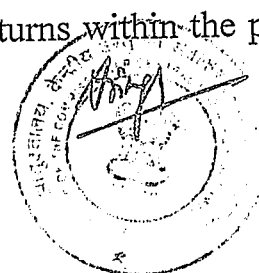
- M/s Saurin Investments Private Limited vs. CST Ahmedabad [2009-TIOL-1322-CESTAT-AHM]
- CCE, Kolkata-Vi vs. ITC Ltd. [2013 (291) ELT 377 (Tribunal Calcutta/Kolkata)].
- M/s. Chandra Shipping and Trading Services Vs. C.C.Ex. Vishakhapatnam-II [2009(13) S.T.R. 655 (Tri. Bang)],
- Anagram Capital Ltd. Vs. Commissioner of Service Tax, Ahmedabad [2010 (17) STR 55 (Tri. Ahmd)],

➤ The Appellant further submitted that in the present case they have not suppressed any information with a deliberate intent to evade duty. The filing of Service Tax returns ST-3 and filing of Income Tax returns ITR or TDS statement 26AS all are governed by separate tax laws and accounting policies. There matching is inherently not possible and the Appellant had filed a reply stating the reasons for the same. The Appellant will never make a wilful mistake of showing different revenue figures to two separate tax authorities governed under the Central Government with the intention to evade duty. Hence, the Appellant never intended to evade duty, it is just a reconciliation matter. In this regard, they relied upon the following judgements of Hon'ble courts and Tribunals in the case of :

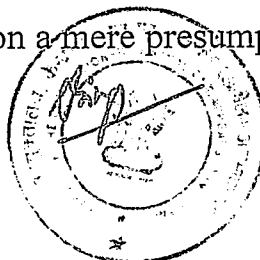
- CCE v. Chemphar Drugs & Liniments [1989 (40) ELT- 276]
- Tamilnadu Housing Board v. CCE [1994 (74) ELT 9 (SC)].
- Uniworth Textiles v. CCE [(2013) 9 SCC 753 (SC)]
- Cosmic Dye Chemical v. CCE [(1995) 6 SCC 117] (SC 3 member bench judgment)
- Uniworth Textiles Limited Vs. CCE, Raipur (2013-288-ELT-161-SC)
- Easland Combines, Coimbatore Vs. CCE, Coimbatore (2003-152-ELT-39-SC)
- CCE, Bangalore v. Pragathi Concrete Products (P) Ltd [2015 (322) ELT 819 (SC)]

➤ In nutshell, the Appellant submitted that the extended period of limitation cannot be invoked based on the following grounds:

- a. When the Appellant has submitted returns within the prescribed time limit;

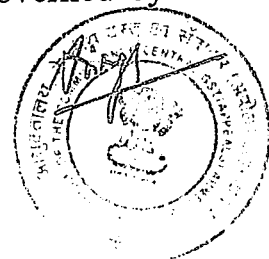


- b. When the department is aware of the functionalities of the Appellant;
 - c. When proper reasons for invoking extended period have not been provided in the SCN;
 - d. When there is mere non-payment/short payment of taxes.
- In view of the aforesaid legal and factual submissions, the Appellant submitted that SCN and resultant OIO issued based on invocation of extended period of limitation is invalid and untenable.
- The Appellant submitted that, from 01.07.2012, the structure of levy of Service Tax was re-constituted in the format of negative list wherein all the services except the ones listed in the negative list of services (Section 66D) will be liable to Service Tax. The provisions that lead to taxability under Section 66B – Charge of Service Tax on and after Finance Act, 2012.
- In the present case, the honorable Assistant Commissioner has not been able to classify the services provided by the Appellant and hence the charging and payment section cannot be made applicable and in absence of the same there is no question of any Service Tax liability to be paid.
- The SCN and resultant OIO presumes that the difference in turnover is towards provision of service. It is a settled law that no Service Tax liability can be fastened on any assessee without determining the classification of service further, once there is no allegation in the Show Cause Notice and the resultant Order in Original based on which the demand is proposed then the demand cannot be sustained. In this regard, they relied upon the following judgements of Hon'ble courts and Tribunals in the case of :
- CCE v. Brindavan Beverages [(2007) 213 ELT 487(SC)]
 - Deltax Enterprises vs. CCE, Delhi [2018 (10) GSTL 392 (Tri – Del)]
- When revenue cannot point out excess receipt or taxable service that results in consideration escaping tax, in absence of specific allegation with reference to the nature of service or the service recipient it is not tenable to hold an income even if it is admitted to be an actual income, as consideration for a taxable service. The minimum requirement to tax an assessee for Service Tax is to identify the nature of their taxable service along with the recipient of such service. Therefore, without discharging such onus, no recovery of tax could sustain. Thus, unless the activity is described in detail and examined in terms of Section 65B(44) of Finance Act i.e. satisfying all the attributes of the term “service”, no demand or recovery can be made on a mere presumption, ignoring

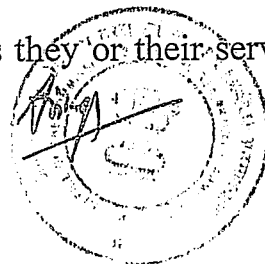


the exemptions and abatements.

- Hence, the Appellant's submitted that in order to levy Service Tax the first criteria is classification of service, which the present SCN and OIO has not been able to provide. If there is no classification of service, how one can determine its taxability, exemptions or abatements? Thus, in absence of classification of service, the present OIO does not hold any grounds of levy of Service Tax and should be quashed.
- The adjudicating authority, based on circumstances, discussion and documents she holds the Appellant liable to pay Service Tax at full value. The same is only her assumption and far-fetched from the facts of the Appellant's case. The Appellant has obtained registration under goods transportation by road services and has filed ST-3 returns under the said head which is liable to reverse charge provisions. The adjudicating authority has not considered the said facts and presumed to levy Service Tax on full value without providing any explanation or classification of the taxable service. In this regard, they relied upon the following judgements of Hon'ble courts and Tribunals in the case of :
 - Oudh Sugar Mills Limited v. UOI [1978 (2) ELT 172 (SC)]
 - Shubham Electricals v. CCE [2015 (40) S.T.R. 1034 (Tri. – Del)]
 - Delhi High Court [2016 (42) STR J312] and [2016 (45) STR J314].
- Hence, the Appellant submitted that no SCN or OIO should be issued merely on assumption and presumption. The same should be backed by facts and documents, which the present OIO lacks. As the facts and documents that the Appellant provided goods transportation by road services to its customers which is liable to reverse charge mechanism as not been considered and moreover no classification of service provided in impugned order.
- Benefit of cum-tax under Section 67 – in case demand stands confirmed same shall be re-quantified after allowing the benefit of cum-tax u/s. 67(2) of Finance Act, 1994 in cases where no Service Tax is collected from customers. Reliance can be placed on Commissioner of Central Excise, Delhi v. Maruti Udyog Limited 2002 (141) E.L.T. 3 (S.C.).
- A proprietor or an organisation / firm / company / entity is governed under various tax laws in India. The 2 principles tax laws governed by the Central Government are as under:

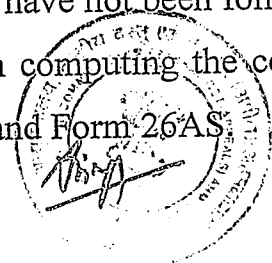


- (i) Direct Tax laws i.e. Income Tax – wherein the person will pay taxes on their income received during the said Financial Years subject to the provisions of the said Act.
 - (ii) Indirect Tax laws i.e. Central Excise, Service Tax, Central Sales Tax and Value Added Tax now governed as Goods and Service Tax; and Customs – wherein the person will pay taxes on each transaction subject to the provisions of the said Act.
- There are different criteria's based on which the levy of taxes arises e.g. period, occurrence of the taxable event, book keeping, etc. The said criteria's are different for both Direct and Indirect Taxes. It is safe to say that an event arising as taxable event in one tax law may not be considered as a taxable event in another tax law. For example, for book keeping and Income Tax the assessee can make provision of expense and deduct TDS on it, whereas mere provisioning of any expense or income does not amount to a taxable event in case of indirect taxes. Hence, revenue or expenditure booked in both the tax laws may be different, but that cannot be interpreted as avoidance of tax in another law. In order to term them as avoidance or evasion of law the transaction should be seen in its complete picture.
- The Appellant submits that, yes, there is a reason for difference between their ITR / 26AS and ST-3 for the FY 2014-15. The reasons for the same are as under:
- The Appellant would like to submit that the difference identified by the authorities is the TDS deducted under Section 194C of the Income Tax Act, 1961 as shown in Exhibit – C.
 - The Appellant would like to submit that if they bill a certain amount (liable to Service Tax) to their service receivers, the recipients as per the provisions of Income Tax Act, 1961 are liable to deduct and deposit Tax on their behalf and pay them the remaining amount to them. The amount of Rs. 16008.90/- identified by the authorities is the said TDS amount. The same as already been considered while making payment of Service Tax by either the service provider or the service recipient as the case maybe. Hence, the claim of the authorities that Form 26AS as higher income of Rs. 16,008.90/- is redundant.
 - The Appellant would like to submit that paying Service Tax on Rs. 16,008.90/- would amount to payment of tax on tax as they or their service

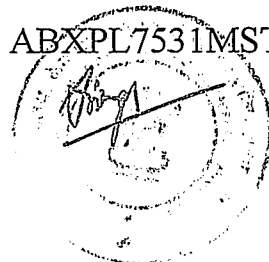


recipients have already made payment Service Tax on the basic value / invoice value before the deduction of TDS.

- The Appellant has been filing Service Tax returns in timely manner. The Appellant hereby attaches the FY 2014-15 Service Tax return filing acknowledgement as Exhibit – D.
 - The Appellant provides goods transportation by road services, which was under full reverse charge mechanism during FY 2014-15. Under Notification No. 30/2012-ST dated 20.06.2012 Sr. No. 2 – goods transport agency was under full reverse charge mechanism The Appellant's had filed timely returns and their service recipients had made payment of Service Tax under reverse charge mechanism. Moreover, small service providers were also given a benefit of paying Service Tax only on receipt. Copies of ST-3 return acknowledgements filed under registration no. ABXPL7531MST001 of FY 2014-15 are attached as Exhibit – D.
 - Thus, the Appellant as been filing Service Tax returns under different registration no. then for the SCN issued and the authorities can have easily verified the same and avoided litigation.
- The language adopted in the Service Tax Notice seems to indicate that there is an understatement of service revenue in the Service Tax returns based on Form 26AS and the onus is shifted to the Appellant to reconcile and establish the position. This exercise is absolutely illegal since the tax deducted and shown in Form 26AS does not necessarily mean that there are services which are liable to Service Tax. While one can understand reconciliation between Financial Statements and Service Tax Returns, this new exercise of comparing Form 26AS under Income Tax laws is completely unwarranted.
- There is another angle to the issue. Form 26AS under Income Tax laws itself is not a perfect system and has its own cup of woes. Form 26AS under Income Tax laws is the tax statement under Section 203AA of Income Tax Act, 1961. Rule 31AB of the Income Tax Rules, 1962 provides that the DG of Income Tax Systems or any other person duly authorised shall deliver a statement in Form 26AS to every person from whose income the tax has been deducted. They relied upon the various judgements of Hon'ble Courts and Tribunals.
- Even in the case of the Appellant the CBIC Instructions have not been followed to the extent that the adjudicating authority as erred in computing the correct gross service value / gross income as shown in the ITR and Form 26AS.



- The Appellant submitted that under Service Tax laws, the authorities cannot issue SCN beyond the limit of five years from the date of filing ST-3 returns. For FY 2014-15 Apr-Sep period, the date of filing ST-3 return by the Appellant is 22.10.2014. The five years for the same gets completed on 22.10.2019. Whereas, the present SCN is dated 25.06.2020, which is a period beyond the stipulated five years. Hence, the demand for Apr-Sep FY 2014-15 should be quashed.
- As per Section 75 of the Act as amended from time to time, every person who fails to pay duty or any part thereof to the credit of Central Government within the prescribed period shall pay simple interest at the rate fixed by Central Government for the period by which payment of such tax or part of tax thereof is delayed. Therefore, as per Section 75, interest is payable only when a person has delayed or has not paid duty on due dates. They relied upon the various judgements of Hon'ble Courts and Tribunals.
- Such a generalised and vague allegation is not sustainable in law unless the Adjudicating Authority succeeds in proving mala fides or mens rea. The Adjudicating Authority must prove mala fides or mens rea in order to invoke the first proviso to Section 73(1) read with Section 78(1) of the Finance Act, 1994.
- The Appellant submitted that it is a well-settled proposition in law that imposition of penalty is the result of quasi-criminal adjudication. It is not a mechanical process or cannot be imposed just because it is legitimate to levy penalty. The element of mens rea or malafide intent must be necessarily present, in order to justify imposition of penalty. Penalty can be levied only if it is proved that there is presence of guilty, dishonest, and wilful intent either to defraud revenue or evade the payment of tax on the Appellant's part. In other words, there has to be positive act on part of assessee to evade payment of service tax. They relied upon the various judgements of Hon'ble Courts and Tribunals.
- The Appellant submitted that the present OIO has proposed penalty under Section 77 of the Act on the ground that the Appellant have violated the provisions of the Act and the Rules. However, in terms of the provisions, penalty cannot be imposed as the Appellant have paid Service Tax in accordance with the provisions of the Act and has correctly furnished all the details in the returns under registration no. ABXPL7531MST001. It is



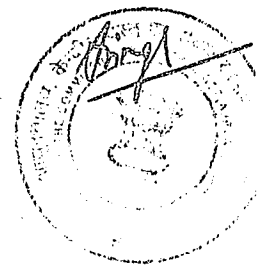
submitted that none of the sub-clauses of Section 77 can be invoked as all the requisite details have been produced in the filed returns, hence, no penalty can be imposed.

6. Personal Hearing in the case was held on 18.09.2023. Ms. Pooja Shah, Chartered Accountant, appeared on behalf of the appellant for the hearing. She reiterated the submissions made in the appeal memorandum. She also submitted that the appellant provided services classified under GTA services and had filed ST-3 returns. However, the adjudicating authority has passed the impugned order, arbitrarily on an arbitrary value of TDS mentioned in Form-26AS without any verification whatsoever. She handed over a copy of an appellate order dated 10th March 2023 passed by Commissioner (Appeals), CGST, Ahmedabad in similar circumstances. Therefore, based on above, she requested to set aside the impugned order.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, oral submissions made during personal hearing and material available on record. It is observed from the records that the present appeal was filed by the appellant on 09.01.2023 against the impugned order dated 27.03.2022, reportedly received by the appellant on 09.11.2022. As claimed by the appellant, an unusual delay was observed between the date of issue of impugned order and the date of communication claimed by the appellant. In order to verify the said delay, letters dated 10.03.2023 & 16.08.2023 were forwarded to the jurisdiction office requesting them to confirm the date of communication of the impugned order from their records.

7.1 The jurisdictional Officer i.e Assistant Commissioner, CGST, Division-Kadi, Gandhinagar Commissionerate replied vide letter F.No. GEXCOM/ADJN/MISC/122/2020- CGST-DIV-KADI- COMM RTE-GANDHINAGAR dated 21.08.2023 and confirmed that :

"..it is to inform that the OIO has been dispatched vide registered post (consignment number – RG016181521IN) from this office on 21.04.2022 and the same was delivered to Addressee on 26.04.2022 as per postal tracking system."



Therefore, it was confirmed that the impugned order was received by the appellant on 26.04.2022. Hence, the claim of the appellant regarding the date of communication of order (on 09.11.2022) gets refuted.

8. Further, it is observed that the Appeals preferred before the Commissioner (Appeals) are governed by the provisions of Section 85 of the Finance Act, 1994. The relevant portion of the said section is reproduced below :

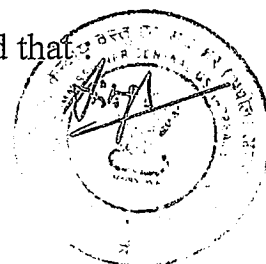
"(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 received the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month."

8.1 In terms of Section 85 of the Finance Act, 1994, an appeal before the Commissioner (Appeals) is to be filed within a period of two months from the receipt of the order being appealed. Further, the proviso to Section 85 (3A) of the Finance Act, 1994 allows the Commissioner (Appeals) to condone delay and allow a further period of one month, beyond the two month allowed for filing of appeal in terms of Section 85 (3A) of the Finance Act, 1994:

8. In the instant case, the impugned order dated 27.03.2022 was received by the appellant on 26.04.2022. Therefore, the period of two months for filing the appeal before the Commissioner (Appeals) ended on 25.06.2022. The further period of one month, which the Commissioner (Appeals) is empowered to condone for filing appeal ended on 25.07.2022. The present appeal was filed by the appellant on 09.01.2023 is, therefore, filed beyond the Condonable period of one month as prescribed in terms of Section 85 of the Finance Act, 1994 and is therefore barred by limitation.

8.1 My above view also finds support from the judgment of the Hon'ble Tribunal, Ahmedabad in the case of Zenith Rubber Pvt. Ltd. Vs. Commissioner of Central Excise and Service Tax, Ahmedabad – 2014 (12) TMI 1215 – CESTAT, Ahmedabad. In the said case, the Hon'ble Tribunal had held that



"5. It is clear from the above provisions of Section 85(3A) of the Finance Act, 1994 that Commissioner (Appeals) is empowered to condone the delay for a further period of one month. The Hon'ble Supreme Court in the case of Singh Enterprises (supra) held that Commissioner (Appeals) has no power to condone the delay beyond the prescribed period. In our considered view, Commissioner (Appeals) rightly rejected the appeal following the statutory provisions of the Act. So, we do not find any reasons to interfere in the impugned order. Accordingly, we reject the appeal filed by the appellant."

9. In view of the above discussions and following the judgment of the Hon'ble Tribunal, supra, I do not find this a fit case for exercising the powers conferred vide Section 85 (3A) of the Finance Act, 1994. Therefore, I reject the appeal filed by the appellant on the grounds of limitation.

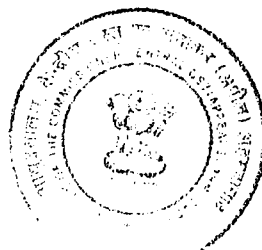
10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.


(SHIV PRATAP SINGH)
Commissioner (Appeals)

Dated: 25 Sept, 2023

सत्यापित (Attested):

(Somnath Chaudhary)
Superintendent (Appeals),
CGST, Ahmedabad.



By REGD/SPEED POST A/D

To,

M/s Mahakali Enterprise,
14-VRBDVN Society,
At-Karannagar, Kadi,
Dist.:Mehsana, Gujarat-382715

C/o Mr. Ghanshyambhai V Limbachiya,
03, Soham Bunglows, Karannagar Road
Kadi, Mehsana, Gujarat-382715.

Copy to :

1. The Principal Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Principal Commissioner, CGST and Central Excise, Gandhinagar.
3. The Deputy /Asstt. Commissioner, Central GST, Division- Kadi, Gandhinagar Commissionerate.
4. The Superintendent (Systems), CGST, Appeals, Ahmedabad, for publication of OIA on website.
5. Guard file.

