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

सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By SPEED POST

DIN:- 20231164SW0000222A65

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/927/2023-APPEAL /3912-16
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-116/2023-24 and 31.10.2023
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील्स) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	07.11.2023
(ङ)	Arising out of Order-In-Original No. AC/S.R./26/ST/KADI/2021-22 dated 29.03.2022 passed by the Assistant Commissioner, CGST, Division - Kadi, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Dineshkumar Vidyaram Yadav, My Home Society, Karannagar, Kadi, Mehsana, Gujarat-382715 Old Address – Opp. Krishana Society Rashika Guest House, Kadi, Mehsana , Gujarat

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 मे हो माल की प्रकिया 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 मामलें 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 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।

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 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.

(3) 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 :-

(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 2ndfloor, 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. 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 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 संषोधित की अनुसूची -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 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 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके 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 राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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 Dineshkumar Vidyaram Yadav, 43, My Home Society, Karannagar, Kadi, Mehsana, Gujarat-382715 [Address mentioned in OIO – Opp. Krishana Society Rashika Guest House, Kadi, Mehsana , Gujarat] (hereinafter referred to as "*the appellant*") against Order in Original No. AC/S.R./26/ST/KADI/2021-22 dated 29.03.2022 [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 'Manpower recruitment/supply agency service' under Service Tax registration No. AAUPY3588MST001. 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 the said discrepancy, 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 failed to 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	49,152.58/-
2	Taxable Value declared in ST-3 return	0/-
3	Highet Difference of value	49,152.58/-
4	Amount of Service Tax along with Cess not paid / short paid	6,075/-

3. Show Cause Notice 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. 6,075/- 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. 6,075/- 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. 6,075/- 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 was imposed under Section 77 of the Finance Act, 1994.

5. Being aggrieved with the impugned order, the appellant have filed the present appeal alongwith application for condonation of delay on following grounds :

- The appellant is a proprietorship firm, having Service Tax Registration No. AAUPY3588MST001 and AAUPY3588MST002. Registration No. AAUPY3588MST001 was obtained on their Old address and was surrendered subsequently due to change of address. Subsequently, Service Tax Registration No. AAUPY3588MST002 was obtained and was valid during the period F.Y. 2014-15. Under the said registration they were engaged in the activity of 'Manpower recruitment/supply agency service'.

- The Appellant's income liable to Income Tax for FY 2014-15 was shown as Rs. 49,15,258/- and was same in both Income Tax return filed (ITR-4S) and Form 26AS. But still the authorities have issued a SCN and that to for Service Tax amount of Rs. 6,075/-.

- The Appellant have filed their Service Tax returns (ST-3) under Service Tax registration No. AAUPY3588MST002. The acknowledgements for filing of

ST-3 Returns for the period F.Y. 2014-15 was submitted by them.

- The Appellant requested to consider the following facts:

  a. They have been filing Service Tax returns not under registration no. AAUPY3588MST001, but under registration no. AAUPY3588MST002.

  b. The difference is not due to any excess income received, as total amount in both the ITR and 26AS is same i.e Rs. 49,15,258/-.

  c. The taxable amount identified by the authorities corresponds to the TDS deducted under Income Tax Act, 1961 and Service Tax on the same has already been paid under registration no. AAUPY3588MST002.

- 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)].
- Pushpam Pharmaceuticals Company v. CCE, [1995 (78) ELT 401 (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)].
- 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 replied 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 Service 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 submits that they are a law abiding assessee and they have been filing their Service Tax returns under Registration No. AAUPY3588MST002 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 :
  - Pushpam Pharmaceuticals Company v. CCE Bombay [1995 (78) E.L.T 401 (S.C), the Supreme Court
  - CCE v. Chemphar Drugs & Liniments [1989 (40) E.L.T. 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)

➢ Hence, they submit that as the Service Tax Department was aware of the fact that the Appellant was holding a Service Tax registration under supply of manpower service and filing timely Service Tax returns under Registration No. AAUPY3588MST002, it cannot be alleged that the Appellant has done any wilful act of suppressing the facts from the authorities. Thus, the authorities cannot invoke extended period provisions under Section 73 of the Finance Act, 1994.

➢ 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 had two Service Tax registrations Service Tax Registration No. AAUPY3588MST001 and AAUPY3588MST002. The authority has issued SCN under AAUPY3588MST001 whereas if they would have enquired / verified then they would have found out that the Appellant is filing timely Service Tax returns under registration no. AAUPY3588MST002 under the

taxable service of supply of manpower service and is eligible for reverse charge mechanism. But the authority has no-where taken into consideration the same and also passed an order without any classification of taxable service and consideration of AAUPY3588MST001 ST-3 returns filed.

- The adjudicating authority had all the facts on record to determine the correct registration, classification and computation of Service Tax. Hence, the Appellant has 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. Also, the adjudicating authority after discussing the fact that the Appellant was registered under supply of manpower services also mentions that the Appellant has not paid Service Tax under transport of goods by road services.

- Thus, the Appellant submits that the adjudicating authority has erred while issuing OIO and hence they should not be affected and harassed for non-consideration of the facts of the authorities and the said OIO should be quashed.

- In the present case, the adjudicating authority 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 asseseee 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 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 supply of manpower services to its customers which is liable to reverse charge mechanism as not been considered and moreover no classification of service provided by the adjudicating authority 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 has under:

  - The Appellant submitted that there is no difference between services/income amount between ITR and Form 26AS as stated in the SCN and resultant OIO. For the said claim, the Appellant hereby submits their Income Tax return and Form 26AS for FY 2014-15 as Exhibit - D. The Appellant would

like to submit that in both of them the gross turnover / gross income is Rs. 49,15,258/- and not different. Hence, the claim of the authorities that Form 26AS as higher income of Rs. 49,152.58/- is redundant.

- The Appellant has been filing Service Tax returns in timely manner. Just not under Service Tax No. AAUPY3588MST001, but under Service Tax No. AAUPY3588MST002. The Appellant hereby attaches the FY 2014-15 Service Tax return filing acknowledgement as Exhibit - D.
- The Appellant provides supply of manpower services, which was under partial reverse charge mechanism during FY 2014-15. Under Notification No. 30/2012-ST dated 20.06.2012 Sr. No. 8- supply of manpower was under partial reverse charge mechanism i.e. the service provider had to pay Service Tax on 25% of the taxable value and the service recipient had to pay Service Tax on 75% of the taxable value. The Appellant's had filed timely returns and made payment of Service Tax under partial reverse charge mechanism i.e. on 25% of taxable value. 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. AAUPY3588MST002 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, which is the same i.e. Rs. 49,15,258/- and there is no difference as stated in the SCN and the resultant OIO. Moreover, the basic facts of their case, i.e. the Appellant being supply of manpower service provider has not been considered in classification of service (which is lacking in the OIO) and has filed Service Tax returns under registration no. AAUPY3588MST002.

- 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 F.Y. 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 F.Y. 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. AAUPY3588MST002. 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 15.09.2023. 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 demand has been confirmed on the TDS value shown in the Form 26- AS without any further verification or investigation by the adjudicating authority. She submitted that the appellant had another service tax registration under which they had filed service tax return and had already discharged the tax liability under man power supply services. However, the adjudicating authority has erroneously confirmed the demand under the cancelled registration that too on arbitrary value. In view of above she requested to set aside the impugned order.

6.1 On account of change in appellate authority, personal hearing was again held on 27.10.2023. Ms. Pooja Shah, Chartered Accountant, appeared on behalf of the appellant for the hearing. She reiterated the contents of the written submission and also submitted copy of some documents having similar case and one tribunal order

in appellant's case. She also requested for condonation of delay. She requested to allow their appeal.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, oral submissions made during the Personal Hearing and the material available on records. It is observed from the records that the present appeal was filed by the appellant on 03.02.2023 against the impugned order dated 29.03.2022, reportedly received by the appellant on 09.11.2022. 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, letter dated 12.10.2023 was forwarded to the jurisdiction office requesting them to confirm the date of communication of the impugned order from their records. The jurisdictional Office i.e CGST, Division-Kadi, Commissionerate-Gandhinagar replied vide e-mail dated 19.10.2023 from their e-mail kadi.cgstgnr@gov.in, wherein they confirmed that :

> *"...order is dispatched through registered post with AD which was returned undelivered to this office. Further, Range officers visited given address to serve OIO but the address could not be located, therefore the OIO is affixed on notice board as per Section 37C of the Central Excise Act, 1944 and Section 169 of the CGST Act, 2017 on 10.06.2022. Further on 03.11.2022, the noticee has received copy of OIO from Range Office."*

7.1 Therefore, on the basis of the above communication it was confirmed that the impugned order was actually received by the appellant on 03.11.2022. Thus, the claim of the appellant regarding the date of communication of order (on 09.11.2022) stands rectified as 03.11.2022.

7.2 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."*

7.3 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.

7.4. In the instant case, the impugned order dated 29.03.2022 was received by the appellant on 03.11.2022, as confirmed by the Jurisdictional Office. Therefore, the period of two months for filing the appeal before the Commissioner (Appeals) ended on 03.01.2023. The further period of one month, which the Commissioner (Appeals) is empowered to condone for filing appeal ended on 03.02.2023. This appeal was filed on 03.02.2023, i.e after a delay of one month from the stipulated date of filing appeal, and is within the period of one month that can be condoned under the proviso to Section 85 (3A) of the Finance Act, 1994.

7.5 In their application for Condonation of delay in filing the appeal, they submitted that the consultant of the appellant was busy with the treatment of a close relative, who eventually passed away. On account of these medical problems the delay in filing of the appeal had occured. These reasons were also explained by them during the course of personal hearing, the grounds of delay cited and explained by the appellant appeared to be genuine, cogent and convincing. Considering the submissions and explanations made during personal hearing, the delay in filing appeal is condoned in terms of proviso to Section 85 (3A) of the Finance Act, 1994.

8. It is observed from the case records that the appellant were registered with the Service Tax department under registration no. AAUPY3588MST002 and their new address was mentioned in the said registration. However, the SCN was issued without addressing these facts and referring to their old registration no. AAUPY3588MST001 which was actually surrendered by the appellant. However, the SCN in the case was issued entirely on the basis of data received from Income Tax department without causing any verification and the demand raised vide the SCN was confirmed vide the impugned order which was issued *ex-parte.*

8.1 I find it relevant here, to refer to the CBIC Instruction dated 26.10.2021, wherein at Para-3 it is instructed that:

Government of India
Ministry of Finance
Department of Revenue
(Central Board of Indirect Taxes & Customs)
CX &ST Wing Room No.263E,
North Block, New Delhi,
Dated- 21st October, 2021

To,
All the Pr. Chief Commissioners/Chief Commissioners of CGST & CX Zone, Pr. Director General DGGI

Subject:-Indiscreet Show-Cause Notices (SCNs) issued by Service Tax Authorities-reg.

Madam/ Sir,
...
3. It is once again reiterated that instructions of the Board to issue show cause notices based on the difference in ITR-TDS data and service tax returns only after proper verification of facts, may be followed diligently. Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate show cause notices. Needless to mention that in all such cases where the notices have already been issued, adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee
...

Examining the facts of the case with the specific Instructions of the CBIC, I find that the SCN has been issued indiscriminately and without application of mind, and is vague, being issued in clear violation of the instructions of the CBIC discussed above. Further, it is also observed that the appellants were registered with Service Tax department, however the adjudicating authority have carried out any verification in the case and the demand was confirmed in violation of principles of natural justice, hence the impugned order is legally unsustainable.

9. I further find that the adjudicating authority has recorded at Para 17 of the impugned order, that the appellant have not filed any written submission in reply to the SCN. It is also recorded that opportunity for personal hearing was granted on 01.03.2022, 11.03.2022 and 16.03.2022 but the appellant had neither appeared for hearing nor requested for any adjournment and thereafter the adjudicating authority decided the case *ex-parte*.

9.1 It is relevant to refer to Section 33A (1) of the erstwhile Central Excise Act, 1944, (made applicable to Service Tax vide Section 83 of the Finance Act, 1994) the adjudicating authority shall give an opportunity of being heard. In terms of sub-section (2) of Section 33A of the erstwhile Central Excise Act, 1944, the

adjudicating authority may adjourn the case, if sufficient cause is shown. In terms of the proviso to Section 33A (2) of the erstwhile Central Excise Act, 1944, no adjournment shall be granted more than three times. I find that in the instant case, three adjournments as contemplated in Section 33A of the erstwhile Central Excise Act, 1944 have not been granted to the appellant. The Hon'ble High Court of Gujarat in the case of *Regent Overseas Pvt. Ltd. Vs. UOI - 2017(6) GSTL 15 (Guj)* had ruled held that:

> *12. Another aspect of the matter is that by the notice for personal hearing three dates have been fixed and absence of the petitioners on those three dates appears to have been considered as grant of three adjournments as contemplated under the proviso to sub-section (2) of Section 33A of the Act. In this regard it may be noted that sub-section (2) of Section 33A of the Act provides for grant of not more than three adjournments, which would envisage four dates of personal hearing and not three dates, as mentioned in the notice for personal hearing.* ***Therefore, even if by virtue of the dates stated in the notice for personal hearing it were assumed that adjournments were granted, it would amount to grant of two adjournments and not three adjournments, as grant of three adjournments would mean, in all four dates of personal hearing."***

Considering the facts of the instant case with the legal provisions and the order of the Hon'ble High Court, I find that the impugned order is legally unsustainable being passed in violation of principles of natural justice and is liable to be set aside.

10. In view of the above discussion and findings, the impugned order is set aside and the appeal filed by the appellant is allowed.

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.

31.10.23

ज्ञानचंद जैन

आयुक्त (अपील्स)

सत्यापित /Attested :

Dated: 31 October, 2023

सोमनाथ चौधरी/SOMNATH CHAUDHARY
अधीक्षक/SUPERINTENDENT
केन्द्रीय वस्तु एवं सेवाकर (अपील), अहमदाबाद.
CENTRAL GST(APPEALS), AHMEDABAD.

F. No. GAPPL/COM/STP/927/2023

By REGD/SPEED POST A/D

To,
M/s Dineshkumar Vidyaram Yadav,
43, My Home Society, Karannagar,
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.
6. PA File.