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:- 20230864SW000000BA2B

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/533/2023-APPEAL /4255-59
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-063/2023-24 and 31.07.2023
(ग)	पारित किया गया / Passed By	श्री शिव प्रताप सिंह, आयुक्त (अमील) Shri Shiv Pratap Singh, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	08.08.2023
(ङ)	Arising out of Order-In-Original No. AHM-CEX-003-JC-SP-007-22-23 dated 23.11.2022 passed by The Joint Commissioner, CGST, Gandhinagar Commissionerate.	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Avani Services, 11/B, Aradhana Society, Opp. Dudhsagar Dairy Gate, Highway Road, Mehsana – 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 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 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 :-

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 मे 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 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 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. Avani Services, 11/B, Aradhana Society, Opp. Dudhsagar Dairy Gate, Highway Road, Mehsana - 384002 [Old Address : 14, Ganpati Market, Rajmahal Road, Mehsana - 384002] (hereinafter referred to as the appellant) against Order.in Original No. AHM-CEX-003-JC-SP-007-22-23 dated 23-11-2022 [hereinafter referred to as "*impugned order*"] passed by the Joint Commissioner, CGST, Gandhinagar Commissionerate [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case are that the appellant are engaged in providing 'Manpower Recruitment & Supply Agencies Services' and are holding Service Tax Registration No. AAPFA8632DSD001. During the course of Audit of M/s. Mehsana District Co-operative Milk Products Union Ltd, Gurgaon, Haryana by the Assistant Commissioner, Circle-10, Central Excise Audit-II, Gurgaon in the month of May, 2016 for the period from F.Y. 2012-13 to F.Y. 2014-15 it was observed that M/s. Mehsana District Co-operative Milk Products Union Ltd, Gurgaon, Haryana is engaged in the 'job work' contract with the appellant. They were paying 'job charges' for packing of Dahi, Butter Milk, Ice Cream of per piece. The officers of audit observed that the appellant was providing 'Packaging', 'Cleaning' Services and the said services were considered taxable. Accordingly, a show cause notice (first SCN) was issued to the appellant as detailed below :

SCN No.	SCN Date	Period Covered	Proposed Demand (in Rs.)	Issuing Authority
V.ST/15-50/Dem/OA/2017-18	06.09.2018	F.Y. 2013-14 to F.Y. 2015-16	Rs.1,63,56,984/- alongwith Interest & Penalty.	Joint Commissioner, CGST & C.Ex., Gandhinagar

2.1 The said first SCN was adjudicated vide Order in Original No. AHM-CEX-003-ADC-PMR-002-2020-21 dated 31.07.2020 wherein the demand of Service Ta amounting to Rs. 1,63,56,984/- was confirmed alongwith interest and penalty was imposed equal to the duty demanded.

2.2 Being aggrieved, the appellants filed an appeal before the Commissioner (Appeals), CGST, Ahmedabad and the appeal was decided vide OIA No.AHM-EXCUS-003-APP-65/2021-22 dated 03.12.2021 (OIA for short) wherein the Commissioner (Appeals) set aside the Order in Original No. AHM-CEX-003-ADC-

PMR-002-2020-21 dated 31.07.2020 and allowed the appeal filed by the appellant. The operative part of the OIA are reproduced below :

> *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 ... In view thereof, the activity of packaging under taken 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.*
>
> *...*
>
> *7. ... 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. ...*
>
> *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.*

3. The issue being detected by Audit, demand notices for subsequent period were required to be issued under Section 73 (1A) of the Finance Act, 1994. Hence, to issue

a demand for the period subsequent to the period covered vide earlier SCN, the jurisdictional officers collected data from the appellant and a periodical show cause notice File No.GEXCOM/ADJN/ST/ADC/350/2021-ADJN-o/o COMMR-CGST-GANDHINAGAR dated 20.10.2021 (SCN for short) was issued under Section 73 (1A) of the Finance Act, 1994 to the appellant for the period F.Y. 2016-17 and F.Y. 2017-18 (upto June-2017) wherein it was proposed :

- the amount of Rs. 10,10,12,387/- to be considered as taxable value;
- demand and recover Service Tax amounting to Rs. 1,51,51,858/- under Section 73 (1) of the Finance Act, 1994 alongwith interest under Section 75 of the Act.;
- Penalty was proposed under Sections 76, 77 and 78 of the Finance Act, 1994.

4. The SCN was adjudicated by the impugned order wherein the demand of Service Tax amounting to Rs. 1,51,51,858/- was confirmed under Section 73 (1) of the Finance Act, 1994 alongwith interest under Section 75 of the Act. Penalty amounting to Rs. 15,15,186/- was imposed under Scetion 76 of the Finance Act, 1994. Penalty of Rs. 10,000/- was imposed under Section 77 of the Finance Act, 1994 and Penalty amounting to Rs. 1,51,51,858/- was imposed under Scetion 78 of the Finance Act, 1994.

5. Aggrieved by the impugned order the appellants have filed the instant appeal on following grounds :

i. The adjudicating authority has passed the order with a biased and prejudiced mind set without going to the facts of the case and the decisions of higher appellate authorities including that of Hon'ble Supreme Court.

ii. That the adjudicating authority has erred in not following the order of Commissioner (Appeals) vide Order-in-Appeal No.AHM-EXCUS-003-APP-65-21-22 dated 30.11.2021. Hon'ble Commissioner (Appeals) in the said order has set aside the demand confirmed on identical grounds by Order-in-Original No.AHM-CEX-003-ADC-PMR-002-2020-21 dated 31.07.2020 passed by the Additional Commissioner, CGST & Central Excise, HQ, Gandhinagar Commissionerate, Ahmedabad. Since the matter is identical, the ratio of the aforesaid decision is squarely applicable in the present case also.

iii. The Joint Commissioner, being subordinate officer to Commissioner (Appeals) in the hierarchy, was legally bound to follow the judicial discipline. The principles of judicial discipline require that the orders of the higher

appellate authorities should be followed unreservedly by the subordinate authorities.

iv. The adjudicating authority had confirmed that the appellant had provided taxable service in respect of the work carried out at M/s Mehsana Dist. Co-op. Milk Products Union Ltd., Gurgaon, Haryana. He had come to the said conclusion after dissecting the contract with them. The adjudicating authority had not gone through the full tenor of the contract and he had considered only certain parts of the contract and hence the impugned order is suffering from infirmity. As per the tenor of the contract with M/s Mehsana Dist. Co-op. Milk Products Union Ltd., Gurgaon, Haryana, the work carried out was to fill the ice-cream/curd in retail packs and its ancillary works at the premises of the service recipient. The service recipient viz. M/s Mehsana Dist. Co-op. Milk Products Union Ltd., Manesar, Gurgaon, Haryana is a dairy engaged in manufacture of milk, milk products and ice-cream. The work carried out is an ancillary process required for the manufacture of ice-cream and hence it is not a service falling under the definition of taxable service as defined under Finance Act 1994. Therefore the impugned order is perverse and is required to be dropped.

v. As per the work order of M/s Mehsana Dist. Co-op. Milk Products Union Ltd., Gurgaon, Haryana i.e. Dudhmansagar Dairy, Gurgaon they have to fill ice-cream/curd in retail packs and the related works such as carrying empty crates, brining packing materials from go-down, counting, arranging the packs till dispatch. Thus it is evident that the works carried out are the ancillary processes of manufacture of ice-cream.

vi. Plain reading of the work order would reveal that what the appellant have carried out is the manufacturing and packing activity of curd/buttermilk making plant with the machinery. Thus it is evident that the work order is for complete manufacturing activity from the preparation of raw materials, cleaning, packing, loading etc. Normally, all these works have to be carried out by the dairy itself, but due to labour problems, these activities have been outsourced through tender and we have been awarded the tender for carrying out these activities. Thus it is a comprehensive works order.

vii. The definition of 'manufacture' given under Section 2(f) of the Central Excise Act, 1944. Section 2(f) reads as under:

> (f) *"manufacture" includes any process, -*
>
> i) *incidental or ancillary to the completion of a manufactured*
> ii) *product;*
> iii) *which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or*
>
> *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;*

viii. From the above definition of 'manufacture', the appellant submits that, manufacture includes any process incidental or ancillary to the completion of a manufactured product. The activity of packing i.e. packing of ice-cream and related packing activities is the processes incidental or ancillary to the manufacture of ice-cream. It is a known fact that ice-cream today is marketed in packs and is not marketed directly to customers in loose form without packing. Therefore, the activity of packing is a process of 'manufacture' as defined under Section 2(f) ibid.

ix. Also manufacture includes any process which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture. Appellant submits that as per Chapter Note 6 under Chapter 4, labeling or relabeling 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'. The said chapter note reads as under:

> *4. In relation to products of this Chapter, labelling or relabelling 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'.*

x. The above chapter note obliterates any doubt in the mind whether the activity of pouch filling and packing would amounts to manufacture. The chapter note clearly mentioned that repacking from bulk packs to retail packs or any other treatment to render the product marketable to the consumer shall amounts to manufacture. In the present case it is clear that the appellant carried out the work of packing of curd/butter milk, ice-cream etc in retail packs and its ancillary works from bringing of packing materials to the packing section till dispatch at the dairy premises and hence the process or the work carried out by us are amounting to manufacture. It is settled law that any process resulting to manufacture is not coming under the purview of service tax.

xi. Even after the introduction of negative list with effect from 01.07.2012, any process amounting to manufacture or production of goods are kept out of service tax net. Section 66B of the Finance Act 1994 reads that;

> **66B. Charge of Service tax on and after Finance Act, 2012.**-*There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services,* ***other than those services specified in the negative list,*** *provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

xii. As per the above Section, service tax is chargeable on the service other than those specified in negative list. Any process amounting to manufacture or production of goods is mentioned at Section 66D (f) under negative list. Section 66D (f) of the Finance Act 1994 introduced with effect from 01.07.2012 reads that;

(f) any process amounting to manufacture or production of goods.

xiii. That it is very clear that any process amounting to manufacture or production of goods is kept out of purview of service tax. As mentioned in the above paragraphs, the work carried out by the appellant is a process of manufacture of curd/buttermilk/ice-cream etc. as per Section 2(f) of Central Excise Act 1944 and Chapter Note 6 under Chapter 4 of Central Excise Tariff Act 1985, and hence not attracted levy of service tax

xiv. That from the above contract, it can be observed that the contract was for the 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 the raw materials are of the principal manufacturer and the responsibility of the job worker is to complete the process of manufacture in the machine, packing, labeling, loading and unloading. As can be seen from the contract and invoices issued by the appellant that essence of the contract was an execution of work as understood by the appellant and recipient of the services. As per the contract the rate is fixed per number of units. Appellant had raised the bill accordingly.

xv. The appellant submits that the adjudicating authority in the impugned order had rejected the claim of the appellant that the work carried out is amounting to manufacture without any reason. The only reason the adjudicating authority mentioned in the order is that the appellant is having labour contract license and hence it is more akin to packing service rather than process amounting to manufacture (paragraph 31 of the order). The plain reading of the contract would reveal that the contract was for carrying out the entire activity of manufacturing of curd/buttermilk/ice-cream and not mere packing and loading. The appellant had to carry out all the related activities of manufacturing and packing is a part of manufacturing process as defined under Section 2(f) of Central Excise Act 1944 and Chapter Note 4 under Chapter 25 of Central Excise Tariff Act 1985. Further, as per the contract, reprocess of damaged pieces are to be carried out by the appellant. The rate is fixed for number of pieces. The adjudicating authority had not considered any of the statutory definition of manufacturing, neither Section 2(f) of Central Excise Act 1944 nor the Chapter Not 4 under Chapter 25, and arbitrarily held that the work carried out is taxable service and not manufacturing of ice-cream in a prejudiced mind set and hence the impugned order is not sustainable.

xvi. The same adjudicating authority, in his OIO No.AHM-CEX-003-ADC-PMR-006-19-20 dated 28.08.2019 in respect of M/s. Komal Enterprise, F/119, Dharti Manan Plaza, Jail Road, Mehsana- 384002 had dropped the demand in identical case. However, the adjudicating authority, in the present case, which is identical to the issue involved in OIO No.AHM-CEX-003-ADC-PMR-006-19-20 dated 28.08.2019 had confirmed the demand which is arbitrary and travesty of justice.

xvii. The appellant submits that the issue is settled by OIA No.AHM-EXCUS-003-APP-017-19-20 dated 08.07.2019 issued by this Hon'ble

Commissioner (Appeals) wherein it was held that the activity carried out is amounting to 'manufacture' and hence not liable to service tax. The adjudicating authority in the OIO No.AHM-CEX-003-ADC-PMR-006-19-20 dated 28.08.2019 had relied upon the above order-in-appeal while dropping the demand. In the present case, the adjudicating authority has failed follow the judicial discipline by not following the precedent when no new factor has emerged. Thus the impugned order has suffered infirmity and is required to be set aside.

xviii. In the case of M/s. Surya Trading and services-2018(15) G.S.T.L. J209 (S.C.), the appeal filed by the Commissioner, Service tax, Mumbai against CESTAT Final Order No. A/93095-93097/2016-WZB/STB dated 28.09.2016 was dismissed by the Hon'ble Supreme Court holding the order of Hon'ble CESTAT that job work activity under the contract is not liable to service tax.

xix. In the case of M/s. Gokul Ram Gurjar versus Commissioner of Central Excise, Jaipur-II – 2018 (19) G.S.T.L. 269 (Tri.- Del.) has held that;

"Manpower Recruitment or Supply Agency's service - Activities relating to washing of cans/crates, sorting of milk bags, milk packing, etc., undertaken for Milk Dairy under a contract by using their own labours, not leviable to Service Tax under category of Manpower Recruitment or Supply Agency's service especially when payment made on per litre/pack basis and not in the form of wages/salaries to such labours - Further, contract also does not envisage deployment of any labour - Sections 65(68) and 65(105)(k) of Finance Act, 1994. [para 4]"

xx. The Hon'ble Supreme Court in the case of M/s. Super Poly Fabriks Ltd v/s CCE, Punjab - 2008 (10) S.T.R. 545 (S.C.) in paragraph 8 has specifically laid down the ratio which is as under :

" 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 form the terms and conditions thereof. Neither the nomenclature of the document not any particular activity undertaken by the parties to the contract would be decisive.

xxi. The aforesaid judgement is quite identical to the present case as we are not only carrying out cleaning and packing activity solely but works like unloading and staking of crates, cleaning of empty crates, cleaning of empty crates to ice-cream packing lines etc. also and the contracts itself as an evidence that contract is not solely for packing and cleaning activity.

xxii. An identical view was taken up by Hon'ble Supreme Court in the case of State of AP V/s Kone Elevaltores (India) Ltd.- 2005 (181) E.L.T. 156 (S.C.) nd UOI V/s Mahindra and Mahindra – 1995 (76) ELT.481 (S.C) in the similar issues. The ratio of all the three judgments of the Hon'ble Supreme Court is that the tenor of agreement between the parties has to be understood and interpreted on the basis that the said agreement reflected the role of parties. The said ratio is squarely applicable to the present case also being an identical in nature. The entire tenor of the agreement and the invoices issued by the service provider clearly indicates the execution of a lump-sum work and this lump-sum work would not fall under the category of providing of service of 'loading' or 'packing' only. On the contrary it is a complete contract for manufacturing of ice-cream. Appellant rely upon the following case laws wherein it is held that the process amounts to manufacture is not eligible to service tax.

(i) ***Midas Care Pharmaceuticals***-2010 (18) S.T.R. 768 (Tri. - Mumbai) **(EXHIBIT – T)**

(ii) ***Rubicon Formulations Pvt. Ltd***-2010 (19) S.T.R. 515 (Tri. - Mumbai) **(EXHIBIT- U)**

(iii) ***Mistair Health & Hygiene Pvt. Ltd***-2015 (40) S.T.R. 148 (Tri. - Mumbai)

(iv) ***Munish Forge Pvt. Ltd***-2015 (37) S.T.R. 662 (Tri. - Del.)

(v) ***Ferro Scrap Nigam Ltd***-2014 (36) S.T.R. 955 (Tri. - Del.)

xxiii. Without prejudice to the above, appellant submits the adjudicating authority erred in confirming the demand which is hit by limitation of time. Appellant submits that the demand is time barred as it has been issued after period of one year from the date of the knowledge of the department and there are numbers of judgments that if the demands is issued after one year from the date of knowledge of the department then in that case demand is hit by the limitations.

xxiv. Appellant rely the decision of Hon'ble Supreme Court's decision in the case of Uniworth Textiles Ltd [2013 (288) ELT 161-SC], where it has been held that;

Mere non-payment of duties is not equivalent to collusion or willful mis-statement or suppression of facts - Otherwise, there would be no situation for which ordinary limitation of six months would apply - Inadvertent non-payment is to be met with limitation of six months, whereas deliberate default faces limitation of five years - For the latter, positive action betraying negative intention of wilful/deliberate default is mandatory prerequisite - Use of "willful" introduces mental element, requiring look into mind of noticee by gauging their actions - Observation not founded on any material fact/evidence, is not sufficient - Section 28 of Customs Act, 1962.

xxv. In the case of M/s Steel Cast Ltd [2011 (21) STR 500] the Hon'ble Gujarat High Court has also set aside demand and penalty imposed while dealing the issue of bonafide belief and allegation of the suppression in the show cause notice.

xxvi. Hon'ble Supreme Court of India in various instances had held that there should be some positive act on the part of the party to establish suppression or mis-statement In the case of *Pahwa Chemicals Pvt. Ltd* - 2005 (189) ELT.257 (S.C) the Apex Court had held that;

'mere failure to declare does not amount to wilful mis-declaration or wilful suppression There must be some positive act on the part of the party to establish either wilful mis-declaration or wilful suppression.

xxvii. There is no suppression of facts or mala-fide intention to evade payment of duty is not established by the department. Also, there is no suppression of facts or mala-fide intention and hence extended period limitation cannot be invoked.

xviii. Hon'ble Supreme Court has held that mere failure to furnish information is not suppression of facts and extended period cannot invoke in such cases. The Apex Court has held that there should be some positive and deliberate withholding of information or giving false information so as to invoke extended period. Appellant had not withheld any information from the department or not provided any false information with intent to evade payment of service tax. In such cases there cannot be any suppression and hence extended period of limitation cannot be invoked.

xxix. Appellant further submits that the show cause notice did not enumerate on what counts the appellant had suppressed the facts. Mere mention of word 'suppression' in the notice does not make a case of invoking extended period. Hon'ble Supreme Court in various decisions had held that mere failure to give

information is not suppression. There should be some positive misstatement with an intention to evade payment of duty. In the case of *Continental Foundations Jt. Venture – 2007 (216) E.L.T.177 (S.C)* the Apex Court has held that;

> *10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.*

xxx. In the case of *Mysore Kirloskar Ltd – 2008 (226) E.LT.161 (S.C),* it is held by Hon'ble Supreme Court that on the basis of vague allegation neither the larger period could have invoked nor the penalty could have imposed. In the said order Apex Court held that;

> *"The order of the Commissioner does not indicate adequate reasons to invoke proviso to Section 11A(1). On the basis of vague allegations made in the show cause notice neither the proviso to Section 11A(1) could have been invoked nor penalty could have been imposed upon the respondent under Rule 173Q of the Central Excise Rules."*

xxxi. It is held by Hon'ble Supreme Court that there should be intent to evade payment of duty so as to invoke extended period of limitation. In the case of *Cosmic Dye Chemical – 1995 (75) E.L.T.721 (S.C)* Honourable Supreme Court has held that;

> *"6.Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "willful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not willful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be willful."*

xxxii. Honorable Supreme Court in the case of *H.M.M Limited – 1995 (76) E.L.T.497 (S.C)* held that the show cause notice must put the assessee to notice which of the various commissions or omission stated in the proviso is committed to extend the period to 5 years. In the present case there is no mention of what omissions or commissions have been made by us with intent to evade any tax. The decision of *H.M.M. Limited (supra)* has been followed by the Apex Court in the case of *Raj Bhadur Narain Singh Sugar Mills – 1996 (88) ELT.24 (S.C)* also.

xxxiii. In view of the above settled legal position it is evident that the demand is time barred as there is no suppression of facts, fraud, willful misstatement or intention to evade service tax. When all the ingredients required for invoking extended period of limitation is absent, the demand is hit by limitation under Section 73 of the Finance Act 1994.

xxxiv. Appellant submits that the adjudicating authority had erred in imposing penalty where it was not warranted. Appellant submits that no penalty should be imposed where the *mens rea* is absent. The appellant submits that the issue is already settled in favour of the appellant by Order-in-Appeal No. No.AHM-EXCUS-003-APP-65-21-22 dated 30.11.2021. Therefore, there cannot be any intention on the part of appellant to evade payment of service tax and hence no penalty can be imposed on the appellant. They rely upon the decisions of the Hon'ble Courts and the Hon'ble Tribunal in this regard.

xxxv. Appellant also submits that no penalty is imposable when he has acted on the bona fide belief that he was not liable to pay service tax. They rely upon the decisions of the Hon'ble Courts and the Hon'ble Tribunal in this regard..

xxxvi. It is a settled legal position the judicial pronouncements that when there were no elements of fraud and suppression, penalty under Section 78 is not imposable. Appellant rely recent decision in following cases.

1. FRANKE FABER INDIA LTD 2017 (52) S.T.R. 155 (Tri. - Mumbai)
2. CHHATTISGARH STATE INDL. DEV. CORPN. LTD. 2016 (44) S.T.R. 642 (Tri. - Del.)
3. LANDIS + GYR LTD. 2017 (49) S.T.R. 637 (Tri. - Kolkata)

4. SUN PHARMACEUTICALS INDUSTRIES2017 (49) S.T.R. 609 (Tri. - Ahmd.)
5. APOLLO TYRES LTD.2014 (36) S.T.R. 835 (Tri. - Bang.)

xxxvii. In view of the above it is evident that the impugned order is not sustainable and hence Hon'ble Commissioner may set aside the same in the interest of justice.

xxxviii. The order of the Joint Commissioner is even otherwise bad, illegal, and incorrect, without any authority in law and jurisdiction; therefore, the same deserve to be set aside.

5. Personal Hearing in the case was held on 24.07.2023. Shri M. H. Raval, Consultant, appeared on behalf of the appellant for the hearing. He submitted Additional written submission dated 24.07.2023 with copies of OIA dated 03.12.2021 in their own case and OIA dated 10.07.2019 in the case of R.V.Labour Job Contractor in respect of similar activities. He reiterated the submissions made in appeal memorandum and those in the additional submissions. He submitted that as per the contract with the dairy, they were paid an amount based on per unit quantity of the production by them. The same being a Job-Work in respect of manufacturing of the products such as dahi, buttermilk, ice cream, etc. is not liable to service tax. He referred to the Board Circular, several decisions of the Hon'ble Supreme Court and various branches of CESTAT. He further submitted that the Commissioner Appeals in their own case had set aside the order in an earlier show cause notice, which has not yet been set aside by any competent authority. In view of these case laws and nature of their activity he requested to set aside the impugned order. He undertook to submit a copy of the contract sample invoices and financial statements such as balance sheet and profit and loss account within a week.

5.1 Vide their additional submission dated 26.07.2023 the appellant submitted sample copies of Invoices, copies of work order and balance sheet for the F.Y. 2016-17 and F.Y. 2017-18.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, additional submissions and documents submitted after the personal hearing and material available on records. I find that the issue before me for decision is whether the impugned order confirming the demand of service tax amounting to Rs. 1,51,51,858/- along with interest and penalties in the facts and circumstances of

the case is proper and legal. The demand pertains to the period F.Y. 2016-17 to F. Y. 2017-18 (upto june-2017).

6.1 It is observed from the case records that the appellants are a Partnership Firm engaged in the activities of 'Manpower Recruitment & Supply Agency Service' and registered under Service Tax. During the period F.Y. 2016-17 & F.Y. 2017-18 they have received a Work Order (Renewal) for the period 01.05.2014 to 30.04.2017 from M/s. Mehsana District Co-operative Milk Products Union Ltd, IMT-Manesar, Gurgaon, Haryana-122050 (hereinafter referred to as the said Dairy). The said Work Order dated 30.04.2014 was issued as a Renewal of their earlier Work Order for the period 01.05.2011 to 30.04.2014. Hence, it is apparent that the activities performed by the appellant during the period F.Y. 2016-17 and F.Y. 2017-18 are the same as performed during the F.Y. 2013-14 to F.Y. 2015-16. Vide the said work order the appellants were entrusted with the activities of Packing and Dispatch activities of Dahi, Loading/unloading of Butter Milk, Dispatch activity of Ice Cream, Loading/Unloading of all receivable in Store and Supply of unskilled/semi-skilled/skilled A & B Casual Manpower. From the description of the contracted activities, I find that all the activities are 'Labour Intensive' Jobs and involves utilization of manpower/labour for completion of specific jobs. It is also observed that Clauses of the said Contract specifies that *"...mentioned rates are as per the prevailing minimum wage rates and are inclusive of all the taxes, surcharges, levies etc. charged by the Government/local authorities..."* . This implies that the said Dairy was responsible for payment of all taxes. It is also reflected from the Bills/Invoices raised by the appellant that they have not charged any tax on the billed amount. From the documents submitted I also find that the said contract is not for 'supply of Manpower' but for execution of some specific works in relation to the manufacture of finished goods and that the activity carried out by the appellant is amounting to manufacture.

7. I further find that, the SCN in the case was issued in terms of Section 73 (1A) of the Finance Act, 1994 as a periodical SCN in pursuance of the earlier demand notice issue in the matter dated 06.09.2018. However, the said SCN proposes to confirm the demand of service tax in terms of Section 73 (1) of the Finance Act, 1994. It is also observed that the demand of service tax was confirmed vide the impugned order in terms of Section 73(1) of the Finance Act, 1994 invoking the

extended period of limitation. The relevant portion of Section 73(1A) is reproduced below :

> *SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. —*
>
> ...
>
> *(1A) Notwithstanding anything contained in sub-section (1) except the period of thirty months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.*

Hence, the SCN in the case as well as the impugned order are issued in violation of the relevant provisions of the Finance Act, 1994 and are incorrect and legally unsustainable. On this very count itself the impugned order is liable to be set aside.

7.1 It is further observed that principal SCN in the case issued for the period F.Y. 2013-14 to F.Y. 2015-16 was decided vide Order in Original No. AHM-CEX-003-ADC-PMR-002-2020-21 dated 31.07.2020 (OIO) wherein the demand of Service Tax amounting to Rs. 1,63,56,984/- was confirmed alongwith interest and penalty was imposed equal to the duty demanded. The said OIO was set aside by the Commissioner (Appeals) on merits vide OIA No. OIA No.AHM-EXCUS-003-APP-65/2021-22 dated 03.12.2021. It is also apparent that the issue raised vide principal show cause notice dated 06.09.2018 was identical to the issue raised in the periodical SCN dated 20.10.2021.

8. I also find that the appellants have submitted various judicial pronouncements in support of their defense. Upon going through the contentions of the appellant I find that the demand raised by the principal show cause notice and confirmed vide OIO No. AHM-CEX-003-ADC-PMR-002-2020-21 dated 31.07.2020 was set aside by my predecessor on grounds that the activities performed by the appellant during the period would merit classification under Job-Work amounting to manufacture and therefore are not liable to Service Tax. I also 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 order. That being so, I do not find any reason to take a different view in the matter. Hence, following the previous decision, it is held in the present case 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. I am of the considered view that, the impugned order is deserved to be set aside for being not sustainable in law both on merits and facts.

9. Accordingly, the demand of Service Tax amounting to Rs. 1,51,51,858/- confirmed vide the impugned order is set aside for being not legal and proper. As the demand fails to sustain the question of interest and penalty does not arise. 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.

31-7-23

(Shiv Pratap Singh)
Commissioner (Appeals)
Date: 31 July, 2023.

Attested:

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

BY RPAD / SPEED POST

To

M/s. Avani Services,
11/B, Aradhana Society,
Opp. Dudhsagar Dairy Gate,
Highway Road, Mehsana,
Gujarat – 384 002

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Gandhinagar Commissionerate.
3. The Jont Commissioner, CGST, Gandhinagar Commissionerate
4. The Assistant Commissioner (System), CGST, Appeals, AHmedabad. (for uploading the OIA)
5. Guard File.
6. P.A. File.