आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

DIN:20230364SW000000A66F

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1793/2022-APPEAL /9284-88

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-194/2022-23**
दिनाँक Date : **15-03-2023** जारी करने की तारीख Date of Issue 21.03.2023

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

ग Arising out of Order-in-Original No. **55/AC/D/KMV/21-22** दिनाँक: **29.03.2022**, issued by Assistant/deputy Commissioner,Division-III, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s Dharamshibhai Laxmanbhai Desai,
   620, Rabari Vas, Andej Gam, Sanand,
   Ahmedabad-382115

2. Respondent
   The Assistant/Deputy Commissioner, CGST,Division-III, Ahmedabad North , Ground Floor, Jivabhai Mansion Building, Aashram Road, Ahmedabad-380009

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

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

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

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो 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।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

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

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

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के 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 संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall 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.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (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 सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

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

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

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

Under Central Excise and Service Tax, "Duty demanded" shall include:

(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.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Dharamshibhai Laxmanbhai Desai, 620, Rabari Vas, Andej Gam, Sanand, Ahmedabad – 382115 (hereinafter referred to as "the appellant") against Order-in-Original No. 55/AC/D/KMV/21-22 dated 29.03.2022, issued on 30.03.2022, (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST & Central Excise, Division III, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant is holding PAN No. BORPD3888M. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the Financial Year 2015-16, it was noticed that the appellant had earned an income of Rs. 18,76,500/- during the FY 2015-16, which was reflected under the heads "Sales / Gross Receipts from Services (Value from ITR)" filed with the Income Tax department. Accordingly, it appeared that the appellant had earned the said substantial income by way of providing taxable services but has neither obtained Service Tax registration nor paid the applicable service tax thereon. The appellant was called upon to submit copies of Balance Sheet, Profit & Loss accounts, Income Tax Returns, Form 26AS, for the said period. However, the appellant had not responded to the letters issued by the department.

2.1 Subsequently, the appellant was issued a Show Cause Notice No. III/SCN/DC/ Dharamsibhai/43/2021 dated 20.10.2020 demanding Service Tax amounting to Rs. 2,71,905/- for the period FY 2015-16, under provision of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; and imposition of penalties under Section 77(1)(a) & Section 78 of the Finance Act, 1994. The SCN also proposed recovery of un-quantified amount of Service Tax for the period April-2016 to June-2017.

2.2 The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority and the demand of Service Tax amounting to Rs. 2,71,905/- by invoking extended period of limitation was confirmed under Section 73(1) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period from FY 2015-16. Further, Penalty of Rs. 2,71,905/- was imposed on the appellant under Section 78 of the Finance Act, 1994 and Penalty of Rs. 10,000/- was also imposed on the appellant under Section 77(1)(a) of the Finance Act, 1994 for failure to taking Service Tax Registration.

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

- The appellant is an individual engaged in the business of transportation of goods. For the said purpose, the appellant owns small carriage vehicles which were used by the appellant to transport goods by the road from his own vehicles. The appellant's business

was to collect the rent against local fair of transportation of goods without issuing consignment note.

- Since the appellant is a small entity engaged in transportation of goods without consignment note, it was therefore, not required to get registered under service tax and not required to pay service tax as they were not providing any taxable service. Assuming but not admitting that services rendered by the appellant were in the nature of goods transport agency services, even then the liability of paying service tax was on the recipient of services under the reverse charge mechanism and for the said reason, the appellant never applied for a service tax registration and/or charged or collected service tax on the transportation of the goods.

- The impugned order is void because it suffers from violation of the principles of natural justice. Even though the proceedings were in nature of ex-parte, it is a settled legal position that all the facts and law ought to have been considered. Principles of natural justice demands that the adjudicating authority must consider all the facts and law related to the subject matter in question and gives reasonable reasoning for accepting or rejecting any of the facts of the case. In this regard, they relied upon the case law of M/s. Ajay Kumar Singh v. State of Bihar, 2022 SCC Online Pat 528.

- In the present case, the authorities have not taken in consideration the letter of the appellant dated 19.11.2020 and have neither provided any reason whatsoever why the appellant requires to pay service tax even when it is a small entity engaged in transportation of goods without consignment nor analyzed the law governing the subject matter in present dispute. Thus, there is an overall failure in complying with the principles of natural justice on part of the authority in this case and the order now passed by him is adverse to the appellant's interest thus suffers from violation of the principles of natural justice.

- The present order was delivered ex-parte on the basis of the reasoning that the maximum opportunities of personal hearings are given to the appellant. It is humbly submitted by the appellant that he was under the bona-fide belief that his Chartered Accountant had already submitted a reply and that once the reply was submitted, the procedure would be over, thus he unintentionally skipped personal hearings and there was no intention to escape the procedure.

- It is submitted that the services provided by the appellant are not taxable services in terms of Section 65(B)(51) of the Act, which defines taxable service as "any service on which service tax is leviable under Section 66(B)". According to Section 66(B) of the said Act, "service tax shall be levied at the rate of applicable rate in time being force on the value of all services, other than those services specified in the negative list". A careful perusal

of this provision would mean that all the services mentioned in negative list are exempted from levy of service tax under Section 66(B) of the Act. Negative list of services is defined under Section 66D of the Act of which (p) provides for "transportation of goods by road, except the services of a good transportation agency or a courier agency". Hence, transportation of goods by road except for a good transportation agency (GTA) or a courier agency is exempted from service tax by virtue of negative list enshrined under Section 66D of the Act. In this regard, it is submitted that the appellant is neither a GTA nor a courier agency and thus transportation services provided by the appellant are exempted. For the appellant to be a GTA, it must fall within the definition of GTA under Section 65B (26) of the Act which defines it as "any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called". Therefore, issue of Consignment Note is integral and mandatory requirement before any road transport can be said to be GTA and since the appellant in the present case was transporting goods without consignment note, it cannot be classified as GTA. Similarly, the appellant is not a courier agency, which is defined "as any person engaged in the door-to-door transportation of time-sensitive documents, goods or articles utilizing the services of a person, either directly or indirectly, to carry or accompany such documents, goods or articles", in terms of Section 65B (20) of the Act, since it does not deal with any time-sensitive goods or articles. In light of the above discussion, it can be concluded that services by way of transportation of goods by road are taxable, only if the same is provided by (i) a goods transportation agency; or (ii) a courier agency. Services of Road Transport provided by all others are not taxable because they are covered by the Negative List under Section 66D (p) (i) of the Act. In other words, if any person is providing service of transportation of goods by road, and is neither covered under the statutory definition of GTA, nor under courier agency, then he is not liable to pay any service tax on such transportation.

- There is no doubt or dispute to the fact that the amount of taxable value of Rs. 18,76,500/- has been taken from the Income Tax Returns filed by the appellant, which clearly reflected that the appellant was exclusively engaged in Transport Business and the consideration which is being treated as taxable value was received for rendering the said services. The said factual position was also clarified in the reply filed by the appellant to the show cause notice. The said factual position has not been disputed by the adjudicating authority, but has been rejected on the ground that the appellant had not produced documentary evidence in support of the said contention. The appellant submits that factum of consideration having been received against transportation service was very much evident from the Income Tax Returns itself and therefore, assuming that the appellant had not produced documents with regard to the vehicle could not have been the basis to proceed overlooking that the services were in the nature of Goods Transport Services. This being the case, the adjudicating authority should have scrutinized whether the said services were taxable under the Service Regime or not. However, after proceeding to record that the appellant had not brought on record any evidence to show

the ownership of the vehicle, the authority has proceeded on a blanket presumption that the services were taxable without even scrutinizing the nature of services and legal position thereof. The appellant submits that even though the Income Tax Returns clearly show that the income was towards transportation business, the appellant hereby produces copies of financial accounts of the appellant along with the Income Tax Returns for the FY 2015-16. Perusal of the said documents would clearly show that the services in question were in the nature of goods transport services undertaken by the appellant as owner of the vehicle.

- The appellant further submits that even if the argument of the appellant that the said services were exempted from the purview of Service Tax liability was not accepted by the authority, even otherwise no service tax liability would arise against the appellant inasmuch as service tax liability would be on the service recipient under the reverse charge mechanism and not the appellant. Reference in this regard may be made to Rule 2 (1) (d) (B) of the Service Tax Rules as well as clause (2) to the Notification No. 30/2012-ST dated 20.06.2012 whereby service tax liability has been shifted on the service recipient for services in the nature of transport of goods. As stated hereinabove, the factum that the services undertaken by the appellant was for transport of goods has not been disputed by the authority and is even otherwise confirmed in the Income Tax Returns which is the very basis on which the proceeding has been initiated. The appellant therefore, submits that even if the claim of exemption was not accepted, no service tax liability would arise against the appellant in view of the reverse charge mechanism. This legal position has however, been overlooked by the authority while confirming the demand against the appellant.

- As the appellant neither provides taxable services nor liable to pay tax. Therefore, there is no violation of Section 67, 68, 69 and 70 of the Act. Furthermore, since the appellant was not liable to pay service tax and to take registration, the penalty of 10,000/- imposed on him by virtue of Section 77 of the Act deserves to be quashed and set aside.

- The appellant relied upon the negative list under Section 66D of the Act and was under the bona fide belief that the transportation services provided by its small individual entity are not taxable and liable for registration. Therefore, mere omission on the part of the appellant to get registration and to file service tax returns without the intent to evade tax is not suppression of facts and thus no extension can be invoked. As a result, the limitation period of 30 months under normal circumstances would be applicable in the present case. The demand of service tax and interest thereon is even otherwise barred by limitation.

- Therefore, at the first place when he was not liable to pay tax, there cannot be any failure on his part of the thing that he was not obliged to do. Thus, the order demanding recovery of interest is therefore wholly illegal and liable to be set aside.

- There was no malafide intention to evade payment of tax as he was under a bona-fide belief that by virtue of negative list his services are non-taxable services. For the absence of any malicious intention on the part of the appellant, there was no suppression of facts and thus no penalty can be levied on him. Therefore, penalty to the appellant under Section 78 of the Act is per se impermissible, as there is no mens rea on the part of the appellant to evade the tax liability and as such, the impugned order so far as imposing penalty to the tune of Rs. 2,71,905/- deserves to be set aside.

4. On going through the appeal memorandum, it is noticed that the impugned order was issued on 30.03.2022 and received by the appellant on 15.04.2022. However, the present appeal, in terms of Section 85 of the Finance Act, 1994 was filed on 22.06.2022, i.e. after a delay of 8 days. The appellant have along with appeal memorandum also filed an Application seeking condonation of delay stating that since the appellant is not registered with Service Tax department, they were required to obtain temporary registration number for payment of mandatory pre-deposit. They has been making continuous efforts for 5 days to make the payment, however the web-site has not been functioning and service has been down. Then, they were able to obtain temporary registration but the procedure for initiating payment result in error on the web site. Thus, due to server has been down, the appellant has been unable to tile the appeal within stipulated time limit and requested to condone the delay.

4.1 Personal hearing in the matter was held on 06.03.2023 through virtual mode. Shri Paritosh Gupta, Advocate, appeared on behalf of the appellant. He reiterated the submission made in application for condonation of delay. He also reiterated the submission made in appeal memorandum. He stated that he would file additional written submission containing relevant documents.

4.2 The appellant, vide their letter dated 06.03.2023, filed additional written submission, wherein they, inter alia, submitted that the ITR itself clearly reveals that the appellant was engaged in transportation business; that it was not open for the adjudicating authority to disregard the same when the very demand was based upon CBDT data. In view of the said factual position, the activities undertaken by the appellant were not taxable in view of the negative list provided under Section 66D of the Finance, Act, 1994. In view of the judgments and decisions rendered by the courts and tribunal, it is further clear and evident that the case of the department is even otherwise not sustainable as no evidence has been brought on record to show and suggest that the consideration has been towards any other taxable service. In support of their above submission, they have place reliance on various judgments and decisions as mentioned below:

(a) OIA No. AHM-EXCUS-003-APP-081/2022-23 dated 22.12.2022 passed by the Commissioner (Appeals), CGST Ahmedabad in case of M/s. Shree Sai Logistics

(b) Final Order No. 70323/2019 dated 20.02.2019 of the CESTAT, Allahabad in case of M/s. Kush Construction Vs. CGST NACIN, ZTI, Kanpur

(c) Final Order No. 75120/2022 dated 23.02.2022 of the CESTAT, Kolkata in case of M/s. Luit Developers Private Limited Vs. Commr. CGST & C.Ex., Dibrugarh

(d) Final Order No. 70226/2021 dated 28.09.2019 of the CESTAT, Allahabad in case of M/s. Quest Engineers & Consultant Pvt. Ltd. Vs. Commr. CGST & C.Ex., Allahabad

(e) Final Order No. A/10802/2022 dated 15.07.2022 of the CESTAT, Ahmedabad in case of M/s. Vatsal Resources Pvt. Ltd. Vs. CCE & ST, Surat-I

(f) Final Order No. A/10270-10275/2022 dated 17.03.2021 of the CESTAT, Ahmedabad in case of M/s. J. P. Iscon Pvt. Ltd. Vs. CCE, Ahmedabad-I

4.3 Before taking up the issue on merits, I proceed to decide the Application filed seeking condonation of delay. As per Section 85 of the Finance Act, 1994, an appeal should be filed within a period of 2 months from the date of receipt of the decision or order passed by the adjudicating authority. Under the proviso appended to sub-section (3A) of Section 85 of the Finance Act, 1994, the Commissioner (Appeals) is empowered to condone the delay or to allow the filing of an appeal within a further period of one month thereafter if, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of two months. Considering the cause of delay given in application as genuine, I condone the delay of 8 days and take up the appeal for decision on merits.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum, additional submission made during the course of personal hearing and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand against the appellant along with interest and penalty, in the facts and circumstance of the case is legal and proper or otherwise. The demand pertains to the period FY 2015-16.

6. I find that in the SCN in question, the demand has been raised for the period FY 2015-16 based on the Income Tax Returns filed by the appellant. Except for the value of "Sales of Services under Sales / Gross Receipts from Services" provided by the Income Tax Department, no other cogent reason or justification is forthcoming from the SCN for raising the demand against the appellant. It is also not specified as to under which category of service the non-levy of service tax is alleged against the appellant. Merely because the appellant had reported receipts from services, the same cannot form the basis for arriving at the conclusion that the respondent was liable to pay service tax, which was not paid by them. In this regard, I find that CBEC had, vide Instruction dated 26.10.2021, directed that:

"It was further reiterated that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns.

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."

6.1 In the present case, I find that letters were issued to the appellant seeking details and documents, which were allegedly not submitted by them. However, without any further inquiry or investigation, the SCN has been issued only on the basis of details received from the Income Tax department, without even specifying the category of service in respect of which service tax is sought to be levied and collected. This, in my considered view, is not a valid ground for raising of demand of service tax.

7. I also find that the adjudicating authority had confirmed the demand of Service Tax observing as under:

"13.1 The said Noticee vide his letter dated 19.11.2020 has submitted that "they were in the business of transportation of goods without any consignment. They were an individual entity having small carriage vehicles. Their business was to collect the rent against local fair for transportation of goods without any consignment note. Therefore, they were not required to get registered under service tax." They have submitted copy of Income Tax return along with computation of Income tax and Form 26 AS for the period of FY 2015-16 only in their defense. The Noticee has not submitted any other relevant documents viz. Balance sheet, profit and loss account and not any other documentary evidences in support of their claim that they were engaged in the business of transporting goods in small carriage vehicle. Inspite of several reminders and three opportunity were given for Personal Hearing to defend his case and file documentary evidence in support their claim of exemption as claimed in his letter dated 09.11.2020, but he missed the opportunities and also failed to submit the other documentary evidence like, vehicle registration no. owned by him through which transportation of goods service provided to whom during the F.Y 2015-16 and income received as freight for transportation of the goods under Goods transport agency service etc."

"17. I find from the content of the SCN that, the subject SCN was issued on the basis of Data received from Income tax department (CBDT data) for the FY 2015-16 for unregistered service providers wherein of Gross receipt from service of Rs. 18,76,500/-

shown by the Noticee in their Income Tax Return (ITR) for the period of FY 2015-16. The department has written several letters to the said Noticee to clarify the non- payment of Service tax on said gross receipt from service but the said Noticee not responded the said letters. Further find that, after issuance of SCN the said Noticee has been given ample opportunities to submit his oral or written submission before the Adjudicating Authority on the charges alleged in the SCN. However, the said Noticee failed to avail such opportunities. The issuance of show cause notice is a mandatory requirement according to the principles of natural justice which are commonly known as audi alteram pertem which means that no one should be condemned unheard. The role of natural justice demands that a reasonable opportunity be given to the aggrieved party. And in accordance with the same as narrated above an opportunity of this kind was granted by this office but the same was not fully availed by, the said Noticee. Since no evidences are produced before me by the said Noticee in reply to the SCN as well as during the course of personal hearing the case has to be decided ex-parte on the basis of available records. Further, I find that, the said, noticee could not produce, any documentary evidence in support of his claim that he has provided service of transportation of goods having small carriage vehicles without issuing consignment notes and collected local fair for transportation of goods. In absence of documentary evidence the submission made by the noticee seems vague and not tenable. Further, 1 am of opined that, after introduction of new system of taxation of services in negative list regime w.e.f. 01.07.2012 any service for a consideration is taxable except those services specified in the negative or exempt list by virtue of mega exemption. In the present case the said Noticee has not defended the demand raised, vide subject SCN for the subject period with concrete documentary evidence. Further neither claimed that the service provided was covered under negative list provided under Section 66D of the Finance Act, 1994 nor claimed any exemption of under mega exemption provided under virtue of Notification No. 25/2012-ST dated 20.06.2012 as amended. In absence of the claimed and documentary evidence from the said noticee, I am of opined that, the gross value Rs. 18,76,500/- shown by the said Noticee in their Income Tax Returns (ITR) for the period of FY 2015-16 were earned from taxable service on which service tax is leviable under Section 66B of the Finance Act, 1994."

8. I find that the adjudicating authority has arrived at the finding that the appellant had not provided any documentary evidence in support of their claim that the appellant had provided service of transportation of goods having small carriage vehicles without issuing consignment notes and collected local fair for transportation of goods. I also find that the adjudicating authority has confirmed the demand of service tax entirely on the basis of data received from Income Tax without specifying the category of service and/or without giving any arguments contrary to the contention of the appellant.

9. It is observed that the main contention of the appellant are that they were engaged in providing services by way of "Transportation of Goods" by using small carriage vehicles owned by them and collected rent against local fair of transportation of goods without issuing consignment notes. Their services are covered under the Negative List under Section 66D (p) (i) of the Finance Act, 1994 and they are not required to pay service tax.

10. I also find that the appellant had, during adjudication proceedings, submitted copies of Income Tax return along with computation of Income tax and Form 26 AS for the period of FY 2015-16. The Income Tax Return for the FY 2015-16 filed by the appellant showing the 'Nature of Business' as "Transporters". It is observed that no findings have been given by the adjudicating authority in respect of this statutory document. It is also observed that the adjudicating authority also failed to give finding that why the income earned by the appellant does not fall under the category of "Transport of Goods" in backdrop of the situation when the entire proceeding based on the data received from the Income Tax department.

10.1 Under the circumstances, I find that the version of the appellant that they were engaged in the services by way of Transport of Goods by Road by their own small carriage vehicles and that consideration so received against providing such services were not taxable and falls within negative list of service has to be considered in absence of any contrary evidences. I find that it is well settled legal position that the phrases and wordings used in the statutes have to be interpreted strictly and cannot be interpreted to suit one's convenience as it may defeat the objective/purpose of Legislature. As a principle of equity, no tax can be imposed by inference or analogy or assumptions or presumptions. In the case of **State of Rajasthan Vs Basant Agrotech (India) Ltd. [2014 (302) ELT 3 (SC)]**, the Hon'ble Supreme Court has held that if the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intention of the legislature and by considering what was the substance of the matter and in interpreting a taxing statute, equitable considerations are entirely out of place.

10.2 Hence, it is held that the impugned order has been passed by the adjudicating authority without appreciation of facts available on record. Therefore, the findings arrived by the adjudicating authority without any contrary evidences against the appellant are not legally sustainable.

11. I also find that the appellant is a proprietorship firm and engaged in providing services of "Transport of goods by road" without issuing consignment notes. Thus, the appellant does not fall within the definition of Goods Transport Agency as provided under Section 65(B)(26) of the Finance Act, 1994 and the service provided by the appellant falls under Negative List of Services as per Section 66D(p)(i) of the Finance Act, 1994, which reads as under:

"SECTION 66D. Negative list of services.—

The negative list shall comprise of the following services, namely :-

(p) services by way of transportation of goods—

(i) by road except the services of—

(A) a goods transportation agency; or

(B) a courier agency;"

(ii) [* * * *]

(iii) by inland waterways;"

12. In view of above, the appellant were neither liable for payment of Service Tax as stipulated under the provisions of the Finance Act, 1994 and Rules framed thereunder in respect of services provided by them.

13. I also find that even if the findings of the adjudicating authority is accepted that the appellant falls under the definition of GTA, the abatement benefit under Notification No. 26/2012-ST dated 20.06.2012 was available to the appellant and in that case the taxable value of the appellant remains Rs. 5,62,950/- (30% of Rs. 18,76,500/-) and the appellant becomes eligible for the benefit of threshold limit of exemption as per the Notification No. 33/2012-ST dated 20.06.2012. Further, there is the alternative argument raised by the appellant of liability under reverse charge mechanism under Notification No. 30/2012-ST dated 20.06.2012. Hence, the appellant does not appears to be liable for payment of service tax in the instant case.

14. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

15. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

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

15 March, 2023..

(Akhilesh Kumar)
Commissioner (Appeals)

Attested

(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad

Date : 15.03.2023

<u>By RPAD / SPEED POST</u>

To,

M/s. DharamshibhaiLaxmanbhai Desai,
620, Rabari Vas,
Andej Gam, Sanand,

Appellant

Ahmedabad – 382115

The Assistant Commissioner,
CGST& Central Excise, Division-III,
Ahmedabad North

Respondent

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Assistant Commissioner, CGST& Central Excise, Division III, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North
(for uploading the OIA)
5) ~~Guard~~ File
6) PA file