	केन्द्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,	केन्द्रीय उत्पाद शुल्क भवन	7 th Floor, Central Excise Building,
सातवीं मंजिल, पालिटिकलिक के पास,	आम्बावाडी, अहमदाबाद-380015	Near Polytechnic,
079-26305065	टेलीफैक्स : 079 - 26305136	

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(ST)297/A-II/2016-17 / 10031 को 10035
स्थगन आवेदन संख्या (Stay App. No.):
ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-134-17-18
दिनांक (Date): 16/10/2017, जारी करने की तारीख (Date of issue): 29-11-17
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
Passed by Shri Uma Shanker, Commissioner (Appeals)

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, (मंडल-HQ), अहमदाबाद, आयुक्तालय द्वारा जारी
मूल आदेश सं----- दिनांक -----से सृजित
Arising out of Order-In-Original No. AHM-SVTAX-000-JC-029-16-17 Dated:
31.01.2017 issued by: Joint Commissioner STC(Div-HQ), Ahmedabad.

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s M&B Engineering Ltd

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 an 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) (क) (i) केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक 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 Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, 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 हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में 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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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

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

- (d) 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 दिनांक 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 रुपये या उससे कम हो तो रुपये 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 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 :-

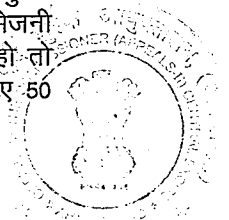
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

- (ख) 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 ओ-20, न्यू मैटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

- (b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

- (2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से



रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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

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

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

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

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

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

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

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील 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।

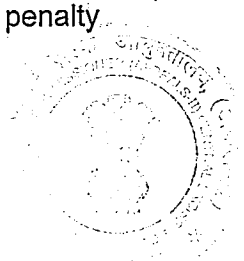
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 सन्दर्भ में 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

M/s M & B Engineering Limited, 'MB House', 51, Chandrodaya Society, Stadium Road, Navjivan, Ahmedabad 380 014 (henceforth, "appellant") has filed the present appeal against the Order-in-Original No. AHM-SVTAX-000-JC-029-16-17 dated 31.01.2017 (henceforth, "impugned order") passed by the Joint Commissioner, Service Tax, Ahmedabad (henceforth, "adjudicating authority").

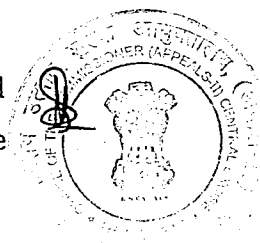
2. The facts giving rise to this appeal are that the appellant, having service tax registration for providing taxable services such as manpower recruitment agency service, construction service, was audited by the departmental officers who pointed out that the appellant had not paid service tax on the commission given to his foreign agents for services received in respect of sale of goods. A service tax demand of Rs.1,18,50,631/- was therefore raised vide show cause notice dated 30.12.2015. The adjudicating authority confirmed the demand alongwith interest and also imposed penalty of equal amount under section 78 of the Finance Act, 1994.

3. The his grounds of appeal, appellant states that when service tax alongwith applicable interest, as ascertained in the audit, had been paid before service of show cause notice, provisions of section 73(3) of the Finance Act, 1994 applied and there was no need to issue show cause notice. Appellant has cited several decisions in this regard and states that show cause notice was issued despite statutory prohibition.

3.1 Appellant analyses section 78 to state that this section can only be invoked when the service tax has not been paid or short paid by reason of fraud or collusion or any willful misstatement or suppression of facts. Appellant refers to number of decisions to state that to levy penalty under section 78, revenue must make out a case of intent to evade payment of service tax which may manifest by reason of fraud, collusion, willful misstatement or suppression of facts. In the current matter, according to appellant, there was no proof or reason to believe that suppression was deliberate. Appellant refers to various decisions to state that in view of judicial precedents, suppression of facts should be related to something positive.

3.2 Appellant states that their full cooperation during audit and suo-motu payment of entire tax and interest immediately after audit establishes their bonafide intention.

4. In the personal hearing held on 4.10.2017, Shri Kumar Parekh, Chartered Accountant and Shri Bhavin Kankhara, AGM appeared before me and reiterated the grounds of appeal.



5. I have carefully gone through the appeal. Penalty of an amount equal to the service tax not paid, in terms of section 78 *ibid*, is at the core of dispute. The amount of service tax and interest thereon was paid before issuance of the show cause notice as noted in the impugned order and in his grounds of appeal also, the appellant has not contested the tax and interest liability.

5.1 With regard to penalty of section 78, appellant's contention is that the case was covered under the provisions of section 73(3) of the Finance Act, 1994 and there was no need to even issue the show cause notice. Appellant argues that there was no intention to evade payment of service tax and it was wrong to allege suppression of facts. Thus, according to appellant, provisions of section 73(3) were applicable and therefore no penalty could have been imposed.

5.1.1 It is true that in terms of section 73(3), when service tax not paid has been paid, alongwith interest, there is no requirement of issuing a show cause notice and there shall not be imposed any penalty. So, where section 73(3) is applicable, payment of service tax and interest, before issuance of show cause notice, helps avoid imposition of penalty. Section 73(4), however, says that where non-payment of service tax is by reason of fraud or collusion or willful misstatement or suppression of facts or contravention of provisions with intent to evade payment of service tax, nothing contained in section 73(3) shall apply. Therefore, if the charge of suppression of facts has been correctly applied in the impugned order, defence put forth by the appellant will not stand. In other words, the presence of suppression of facts in the present matter is the key determinant.

5.2 The relevant fact is that non-payment of service tax was detected during auditing by the departmental officers when it was noticed that the appellant had booked the expenditure relating to commission paid to foreign sales agents but there was no payment of service tax under reverse charge or no declaration of expenditure figures in the ST-3 returns. I find that vital information with regard to payment to foreign agents was not mentioned in the ST-3 returns. The statement of authorized representative of the appellant reproduced in para 6 of the show cause notice shows that appellant was fully aware of the service tax liabilities and the appellant took shelter behind Notification No.18/2009-ST dated 07.07.2009, which was wrong. The appellant's reliance on the decision of C.C.E. & S.T., LTU, Bangalore v. Adecco Flexione Workforce Solution [2012(26) ELT 3 (Kar.)] is misplaced because this decision is with regard to section 73(3) *ibid* and hence not applicable in the impugned case where section 73(4) has been invoked.



5.2.1 I find that in the case of Hindustan Petroleum Corporation Ltd (HPCL) v. Commr. of C.Ex., Mumbai [2015 (38) S.T.R. 131 (Tri. - Mumbai)], it was held, inter-alia, that section 78 leaves no discretion to impose penalty when duty evasion is intentional by suppression of facts. I quote the relevant paras 15.1 and 15.2 -

15.1 We have gone through these judgments. It is held that when the penalties have been waived after exercise of discretion and in the absence of showing that the power has been exercised arbitrarily, it will not be open for Courts to interfere with the exercise of discretion. Here again it may be stated that these cases are distinguishable from the present case. As discussed above, the appellants actually suppressed the fact that they had entered into agreements with the manufacturers and more so that the agreements provided for inclusion of Service Tax. The appellants being a registered assessee for a long time well versed in Service Tax matters chose not to declare the existence of the agreements. They did not take the advice of the department. In fact they did not even make any query to the department as to whether the Service Tax would be leviable on the service of promotion of business for manufacturers. Their activity very transparently reflects the Business Auxiliary Service provided by them. Therefore, the appellant cannot now take shelter of *bona fide* belief or that the issue was not free from doubt.

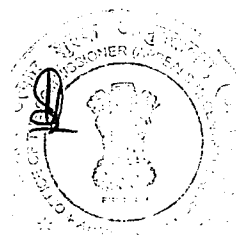
15.2 On the other hand, the matter stands settled by the decision of the Supreme Court in *Rajasthan Spinning & Weaving Mills - 2009 (238) E.L.T. 3 (S.C.)*. The question before the Hon'ble Apex Court was whether there was warrant for levy of penalty under Section 11AC since the assessee had deposited the Excise duty even before the show cause notice was issued. It was held that the "application of 11AC (of Central Excise Act) would depend upon the existence or otherwise of the condition expressly stated in the section. Once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. This is what *Dharmendra Textile Processors - 2008 (231) E.L.T. 3 (S.C.)* decides."

The provisions of Service Tax Act, 1994 on penalty are *para materia* to the provisions of Central Excise Act. In the present case under consideration it has been shown above that there was wilful suppression of facts. The act of non-disclosure of agreements and the glaring non-disclosure of fact that an agreement stipulated that commission includes Service Tax cannot find shelter under the plea of *bona fide* belief. The appellant could only have evaded duty intentionally by suppressing these facts. Hence the Section 78 leaves no discretion but to impose penalty equal to the duty confirmed.

5.2.2 The decision in the case of Rajasthan Spinning & Weaving Mills [2009 (238) E.L.T. 3 (S.C.)] is also very relevant and I quote the following head notes.

Penalty - Mandatory penalty - Nature of - Penalty under Section 11AC of Central Excise Act, 1944 is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section - Section 11AC *ibid.* [para 19]

Demand and penalty - Provisions therefor - Interpretation of - Both proviso to sub-section (1) of Section 11A of Central Excise Act, 1944 and Section 11AC *ibid* use same expressions like fraud, collusion, wilful mis-statement, suppression of facts, or contravention of provisions with intent to evade payment of duty - Conditions that extend normal period of limitation for demand to five years also attract imposition of penalty - Sections 11A and 11AC *ibid.* - *If the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would*

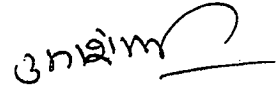


also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. [para 18]

6. In view of above, I find that order of imposition of penalty requires no interference and deserves to be upheld. Accordingly, the impugned order is upheld and appeal is rejected.

7. अपीलकर्ता 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.

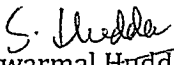


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:

Attested


(Sanwamal-Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
M/s M & B Engineering Limited,
'MB House', 51, Chandrodaya Society,
Stadium Road, Navjivan, Ahmedabad 380 014

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax, Division-VII, Ahmedabad- North.
5. Guard File.
6. P.A.

