

 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय उत्पाद शुल्क भवन सातवीं मंजिल, पोलिटिकलिक के पास आम्बावाडी, अहमदाबाद-380015	 7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
 079-26305065	टेलीफक्स 079-26305136	

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(STC)9/EA-2/North/Appeals/ 2017-18
 ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-380-16-17
 दिनांक (Date): 22.03.2018, जारी करने की तारीख (Date of issue): 9/4/2018
 श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित
 Passed by **Shri Uma Shanker**, Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-VII), अहमदाबाद- II, आयुक्तालय द्वारा जारी
 मूल आदेश सं _____ दिनांक _____ से सृजित
 Arising out of Order-In-Original No. SD-01/06/AC/Interactive/17-18 Dated: 17/05/2017
 issued by: Assistant Commissioner., Central Excise (Div-VII), Ahmedabad-II

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

M/s Interactive Manpower Solution

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) केंद्रीय 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 उत्पादने 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 हो।

- (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 :-

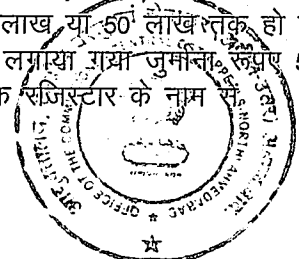
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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 मेटल हास्पिटल 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर 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 ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्ट्रार 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।

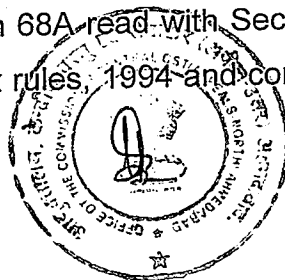
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

This is an appeal filed by the department against Order-in-original No. SD-01/06/AC/Interactive/2017-18 dated 11/05/2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Division-I, Service Tax, Ahmedabad (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated the facts of the case are that on the basis of searches conducted at the premises of M/s Interactive Manpower Solutions Pvt. Ltd., 4, Saujanya row House, Near Darpan Six roads, Ahmedbad (hereinafter referred to as 'the respondent'), who were providing services under the category of 'Manpower Receitment Agency', it was detected, *inter alia*, that the respondent had incurred expenditure in foreign currency towards various services during the financial years 2010-11 to 2014-15 such as (i) "Business Support service"; (ii) "Online Information and database Access or Retrieval Service" and (iii) "Intellectual Property Services". As these services were provided from outside India, the respondent as recipient appeared to be liable to pay Service Tax under Reverse Charge Mechanism (RCM) in terms of Section 65A of the Finance Act, 1994 read with clause (iii) of Rule 3 of the Taxation of Services (Provided from Outside India and received in India) Rules, 2006 under the respective categories of taxable service. On the basis of investigations, a demand Show Cause Notice F.No. STC/04-27/O&A/ADC/Prev(D-1)/2015-16 dated 16/10/2015 (hereinafter 'the SCN) was issued to the respondent that was adjudicated by the adjudicating authority by issuing the impugned order. In the impugned order the demand of Service Tax amounting to **Rs.28,54,853/-** on 'Business Support service' has been confirmed under proviso to Section 73(1) of the finance act, 1994 along with interest under Section 75 of the Finance Act, 1994 but refrained from imposing penalty under Section 76 and Section 78 of the Finance Act, 1994. In the impugned order the demands in respect of "Online Information and database Access or Retrieval Service" and "Intellectual Property Services" have been dropped.

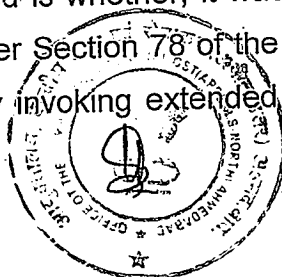
3. On going through the grounds of appeal filed by the department, it is seen that only plea is that even though the adjudicating authority had confirmed demand under proviso to section 73(1) of the Finance Act, 1994 in respect of Service Tax demand on 'Business Support service', received by the respondent from a foreign service provider and not paid under RCM, no mandatory penalty under section 78 of the Finance Act, 1994 has been imposed upon the appellant. The departmental appeal contends that the respondent had contravened the provisions of Section 68A read with Section 88 of the Finance Act, 1994 and Rules 2 & 6 of the Service Tax rules, 1994 and contravened the



provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax rules, 1994 by way of suppression of facts and extended period was invoked under proviso to Section 73(1) of the Finance Act, 1994 and therefore, penalty under Section 78 of Finance Act, 1994 was required to be imposed on the appellant. The adjudicating authority refraining from imposing penalty under section 78 of the Finance Act, 1994 by citing the ground that the respondent had paid service Tax under RCM, utilized CENVAT credit and had been sanctioned refund under rule 5 of CCR, 2004 read with notification No. 27/2012-CE and hence there was no loss of revenue to the government as the situation was Revenue Neutral is not in consonance with the provisions of Section 78 of the Finance Act, 1994 (analogous to Section 11AC of Central Excise Act, 1944). It has been in the departmental appeal that Hon'ble Supreme Court in the case of U.O.I. vs. Dharmendra Textile Processors – 2008 (231) E.L.T. 3 9S.C.) had held that penalty under Section 11AC of the Central Excise Act, 1944 is mandatory and there is no discretion to the authorities on quantum of such penalty. Similar view was expressed by Hon'ble Supreme court in the case of U.O.I. vs Rajasthan Spinning & Weaving Mills – 2009 (238) E.L.T. 3 (SC) where it has been held that Mandatory penalty under Section 11AC of CEA, 1944 is not applicable to every case of non-payment or short-payment of duty but authorities have no discretion on quantum and penalty equal to duty must be imposed once section 11AC *ibid* is applicable. Penalty under section 11AC of CEA, 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 Section 11AC of CEA, 1944. It has been further been pointed out in the grounds of appeal that the Supreme Court has also held that conditions that extend normal period of limitation for demand to five years under Section 11A also attract imposition of penalty under Section 11AC.

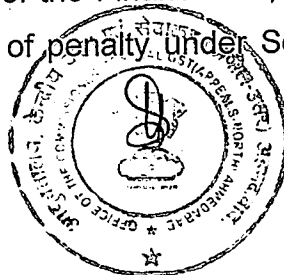
4. Personal hearing in the appeal was held on 14/03/2018, attended by Shri Bishen R. Shah, C.A. The learned C.A. reiterated the grounds filed before the adjudicating authority and pleaded that as per place of supply of services, the service was not taxable.

5. I have carefully gone through the facts of the case on records and the grounds of appeal filed by the department. At the outset it is pertinent to note that the department is not in appeal against the dropping of Service Tax demand in respect of the services of "Online Information and database Access or Retrieval Service" and "Intellectual Property Services". Therefore, there is no need to discuss the merits of these services in the instant order. The only issue to be decided is whether, it was legally binding on the adjudicating authority to impose penalty under Section 78 of the Finance Act, 1994 in respect of Service Tax demand confirmed by invoking extended period being such



Service Tax that was not paid by the respondent under RCM on 'Business Support service' received from a foreign service provider.

6. On going through the discussions in paragraph 27.8, 27.8.1, 27.8.2 and 27.8.3 of the impugned order it is seen that the charge of suppression of facts has been upheld and the plea raised by the respondent that extended period of demand was not invocable has been rejected by the adjudicating authority who has held that the plea that in a revenue neutral situation extended period of demand cannot be invoked is not acceptable as there was suppression of fact with intention to evade Service Tax. Contrastingly, in paragraph 27.11.4 of the impugned order, the adjudicating authority has dropped the proposal to impose penalty under section 78 and Section 76 of the Finance Act, 1994 on the ground of Revenue Neutrality. It has also been held that he agrees with all the citations relied upon by the respondent in this regard. There are about 13 case laws discussed in paragraph 27.11.3 of the impugned order that were relied upon by the respondent. The issues dealt with in these case laws are that refund of Service Tax paid under RCM has been allowed; CENVAT credit of Tax paid under RCM is allowed; it has been held that in the case of revenue neutrality there can be no intent to evade duty; it has been held that in revenue neutral situation there can be no demand; demand has been set aside on the ground of revenue neutrality and that revenue neutrality is a question of fact and needs to be established in the fact of each case. In none of these case laws is there any ratio to the effect that even when suppression of facts is confirmed and when extended period is invoked, penalty under Section 78 of the Finance Act, 1994 can be set aside. It is settled law that the ingredients such as suppression of facts etc. with intend to evade duty when established to invoke extended period of limitation, penalty under Section 11AC of CEA, 1944 / Section 78 of Finance Act, 1994 is mandatory and the adjudicating authority cannot exercise discretion. The adjudicating authority has also held in paragraph 27.11.4 of the impugned order that the plea of the respondent to invoke the provisions of Section 80 of the Finance Act, 1994 to set aside the penalty under Section 78 *ibid* was not tenable. It is erroneous to allow the plea of revenue neutrality and confirm the demand on the ground of suppression of facts under proviso to section 73 of Finance Act, 1994 and then at the same instance drop the mandatory penalty under Section 78 of the Finance Act, 1994. In the present case there is no appeal against the confirmation of demand and hence following the ratio of the Apex court decisions in the case of U.O.I. vs Dharmendra Textile Processors – 2008 (231) ELT (SC) and Rajasthan Spinning & weaving Mills – 2009 (238) E.L.T. 3 (S.C.), the plea of the department is allowed that the adjudicating authority had erred by not imposing penalty on the respondent under the provision of Section 78 of the Finance Act, 1994. However, the appellant is eligible for the reduced quantum of penalty under Section 78 of Finance



Act, 1994 in accordance with the provisos thereunder. The appeal filed by the department is allowed.

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 the above terms.

अमा शंकर

(उमा शंकर)

आयुक्त (अपील्स-१)

Date: 22/ 03 /2018

Attested

(Signature)

(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.

To

M/s Interactive Manpower Solutions Pvt. Ltd.,
301, President Plaza, Near Thaltej Cross road, S.G. Highway
Ahmedabad – 380 054..

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (North).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad (North).
4. The A.C / D.C., C.G.S.T Division: VII, Ahmedabad (North).
5. Guard File.
- ✓ 6. P.A.

