

 सत्यमेव जयते	<b>केंद्रीय कर आयुक्त (अपील)</b>	
<b>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,</b>		
केंद्रीय उत्पाद शुल्क भवन, 7 <sup>th</sup> Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015		
साम्बाजी मंजिल, पोलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015		
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रजिस्टर डाक ए .डी .द्वारा

2/08/2018

- क फाइल संख्या (File No.): V2(STC)107 /North/Appeals/ 2017-18
- ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 386-17-18  
दिनांक (Date): 22-Mar-2018 जारी करने की तारीख (Date of issue): 5/4/2018  
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित  
Passed by **Shri Uma Shanker** , Commissioner (Appeals)
- ग \_\_\_\_\_ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-VII), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी  
मूल आदेश सं \_\_\_\_\_ दिनांक \_\_\_\_\_ से सृजित  
Arising out of Order-In-Original No CGST/A'bad-north/Div-VII/S.Tax-DC-002-17-18  
Dated: 18/12/2017  
issued by: Deputy Commissioner Central Excise (Div-VII), Ahmedabad North
- घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

### M/s Black Pearl Shipping & Logistics

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 उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित हैं।



- (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 मैन्टल 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 इ.ए-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 अनुसूचि-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।

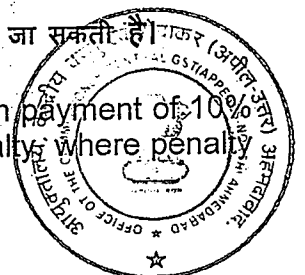
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section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



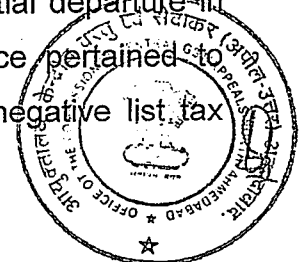
## ORDER-IN-APPEAL

M/s Black Pearl Shipping & Logistics, 210, 2<sup>nd</sup> Floor, Unique Metropolis, Near Prashang Party Plot, R,C, Technical Road, Opposite Bhagwat Vidyapith, Off S.G. Highway, Gota, Ahmedabad – 382 481 (hereinafter referred to as 'the appellant') is providing the service under the category of 'Business Auxiliary Services (BAS)' falling under Section 65(105)(zzb) Finance Act, 1994.

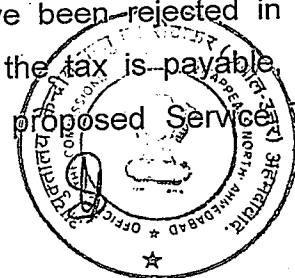
2. During the course of audit of the records of the appellant by the officers of the department conducted during January / February – 2013, it was noticed that the appellant had not paid Service Tax payable on income earned on account of difference between the sale and purchase of "Ocean Freight Charges" and "Air Freight Charges" for facilitating the exporters / importers in booking space in 'ocean going vessels' and 'aircrafts' falling under the category of 'Business Auxiliary Services (BAS)' falling under Section 65(105)(zzb) Finance Act, 1994. According four Show Cause Notice were issued to the appellant that were adjudicated *vide* O.I.O. No.AHM-SVTAX-000-ADC-010-15-16 dated 14/08/2015; and O.I.O. No AHM-SVTAX-000-ADC-013-15-16 dated 25/01/2016 and O.I.O. No SD-01/19/AC/Black Pearl/2016-17 dated 06/02/2017. Since it appeared that the appellant had continued to follow the same practice, the present Show Cause Notice No.SD-01/04-106/SCN/BP/2016-17 dated 13/06/2017 (hereinafter referred to as 'the SCN') was issued to the appellant demanding Service Tax amount of **Rs.1,50,484/-** for the period of **April-2015 to March-2016** under the proviso to Section 73(1A) of the Finance Act, 1994, along with interest under Section 75 of the Finance Act, 1994 and proposing to impose penalty on the appellant under Section 77(2) and Section 76 of the Finance Act, 1994. The SCN was adjudicated *vide* O.I.O. No. CGST/A'bad-North/Div-VII/S.Tax-DC-002-17-18 dated 18/12/2017 (hereinafter referred to as 'the impugned order') passed by the Deputy Commissioner, Central GST & Central Excise, Division-VII, Ahmedabad North (hereinafter referred to as 'the adjudicating authority'). In the impugned order the Service Tax demand of Rs.1,50,484/- has been confirmed under section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994 by treating the receipt of Rs.11,67,483/- for the period of April-2015 to March-2016 as taxable service under the category of 'Business Auxiliary Service' under Clause (19) of Section 65 of the finance Act, 1994. A penalty of Rs.15,048/- under Section 76 and a penalty of Rs.10,000/- under section 77(2) of the Finance Act, 1994 have been imposed on the appellant in the impugned order.

3. Aggrieved by the impugned order, the appellant has preferred the instant appeal, mainly on the following grounds:

- i. The appellant submits that wrong provisions have been invoked as the SCN has been issued invoking Section 73(1A) which is applicable for subsequent show cause notices on same grounds even when there was substantial departure in legal provisions because the period of first show cause notice pertained to positive list tax regime whereas the present case pertains to negative list tax



regime. The impugned order has cunningly confirmed Service Tax demand by making reference to negative list provisions which were not at all invoked in the SCN and as such the impugned order has travelled beyond the scope of the SCN. The SCN issued under Section 73(1A) of the Finance Act, 1994 has failed to adhere to the allegations leveled against then in the first SCN where the figures of ocean freight purchase, ocean freight sales, air freight purchase and air freight sales were used and the Service Tax was computed on the difference between sales and purchase value. However, in the present case, only sales value have been taken for computing Service Tax liability against the appellant which indicates that the present SCN seeks to levy Service Tax on ocean freight and air freight charges collected by them. Consequently the SCN is non-est and the impugned order is also void *ab initio*. The contention that the appellant had provided business auxiliary service to the exports / ultimate shipper of goods is totally weird as the appellant had not promoted or marketed the business of exporter / ultimate shipper but had arrange cargo space in vessels / aircraft on principal to principal basis. The appellant was not agent of exporter / ultimate shippers and the allegation that it had provided BAS to the exporter is not at all tenable. In the negative list regime, Service Tax is leviable on any service if it is provided or agreed to be provided in the taxable territory by one person to another except the services in the negative list. The appellant submits that if at all it is providing any service, it was providing it to the customers for whom it books cargo space in airlines / shipping lines and consequently, it should be treated as providing the service of transportation of goods by air / sea and was not liable to pay any Service Tax on the same. The amount collected by the shipping lines / aircraft operators from the appellant qualifies as ocean freight / air freight but the amount collected by the appellant from the client is not ocean freight / air freight. Therefore, the provision of Rule 10 is not applicable in the instant case. It is not true to say that the appellant is bearing all the risks and liability for transportation up to the final destination and the transaction is not on 'principal to principal' basis. Practically, the exporter himself takes insurance of goods that are being exported and the freight forwarders or the shipping lines do not undertake the risks of safe transportation of goods to the ultimate buyer. When neither the shipping lines nor the freight forwarders undertake risk of goods, the contention of the adjudicating authority is irrelevant. The transaction between the shipper and the shipping lines are two separate and independent transactions and so the provisions of Rule 10 of the Place of Provision of Service Rules, 2012 are applicable. The reliance placed on several case laws by the appellant with regards to taxability, penalties, cu-duty value etc. have been rejected in the impugned order. As per its own computation, even if the tax is payable, the amount comes to Rs.3,831/- whereas the SCN had proposed Service Tax demand of Rs.1,50,484/-.



4. Personal hearing in the appeal was held on 15/03/2018 attended by Shri Pradeep Jain, C.A. and Authorized Representative. The learned C.A. reiterated the grounds of appeal. Earlier O.I.A. was against the appellant. This time demand on aggregate value but earlier demand on differential between sale and purchase price was raised.

5. I have carefully gone through the facts of the case on records and submissions made by the appellant in the grounds of appeals. The appellant is booking space on behalf of its clients and was making payments to the shipping line / airline for such space. The appellant collects an amount higher than the booking amount and treat the differential amount as its profit. This activity is clearly an act of Commission Agent offering service under Business Auxiliary service. Such a transaction is not on principal to principal basis as the appellant is neither the provider of the space nor is it consuming or utilizing the space of shipping line / airline for its own purpose. The appellant simply passes on the service for a certain sum of fee realized in the form of differential amount which is not Ocean Freight / Airfreight. I agree with the adjudicating authority that the case laws cited by the appellant are not relevant because the same pertain to providing / receiving of services of Ocean Freight / Air Freight, whereas in the present case, the appellant is neither a recipient nor a provider of services pertaining to Ocean Freight / Air Freight. The appellant acts as a commission agent in the said transaction and the service squarely falls under the ambit of Business Auxiliary service defined under Section 65(105)(zzb) Finance Act, 1994. This position has already been settled against the appellant in my earlier order. However, the appellant has continued the same in contravention of the provisions of the Act and Rules of Service Tax. The appellant has grossly disregarded its liability to tax particularly after the introduction of r the negative list regime which is an act of intentional evasion of Tax. Therefore, the confirmation of demand for Service Tax along with interest and the imposition of penalties under Section 76 and Section 77 are justified and correct in the instant case.

6. In the grounds of appeal in the instant case, the appellant has contended that while computing of value for Service Tax determination, only sale value has been considered for computation of the value of Services whereas in the first show cause notice the value for Service Tax was derived by computing the difference between the sales value and purchase value. In paragraph 11 of the impugned order it has been clearly held that difference between the amount collected from the clients and amount paid to the shipping line for booking of space is the gross earning of the appellant. However, there is no discussion as to whether the value of service has been derived from computing the difference between the sale value and the purchase value or whether the entire sale value has been treated as value for the purpose of Service Tax as claimed by the appellant. This aspect pertaining to valuation is required to be examined and confirmed at the level of the adjudicating officer and for this purpose the case is remanded back to the original authority for the limited purpose to give specific

findings with regards to valuation of the services under BAS and compute the correct Service Tax. The appellant is directed to produce all the evidences it wishes to rely on before the adjudicating authority when the case is posted for personal hearing. The appeal is allowed by way of remand for computation of value of services as per discussion above. Demand of Service Tax, interest and penalty are confirmed but will be modified as per rectification/recalculation.

7. अपीलका निपटारा उपरोक्त तरीकेसे किया जाता हैं।  
The appeal stands disposed of in the above terms.

31/2/18  
(उमा शंकर)

आयुक्त (अपील्स-१)

Date: 22/03/2018

Attested



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

By R.P.A.D.

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Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad North.
3. The Additional Commissioner, Central Excise (System), Ahmedabad North.
4. The Deputy Commissioner, Central Excise Division: VII, Ahmedabad.
5. Guard File.
6. P.A.

