



आयुक्त का कार्यालय, (अपीलस)

Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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क फाइल संख्या : File No : **V2(ST)76 /North/Appeals/2018-19**

ख अपील आदेश संख्या : Order-In-Appeal No.. **AHM-EXCUS-002-APP-51-18-19**

दिनांक Date : **27-Aug-18** जारी करने की तारीख Date of Issue **11/9/2018**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **CGST/Abad-North/Div-VII/S.tax-DC-005-18-19** Dated **09-May-18** Issued by **Deputy Commissioner** , Central GST , Div-VII , Ahmedabad North.

घ **अपीलकर्ता का नाम एवं पता**
Name & Address of The Appellants

M/s Jolly Motors

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-

Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-

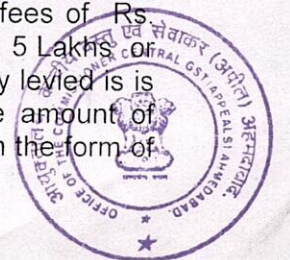
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा **अधीक्षक** केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

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.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ 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।

4(1) 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 appeal has been filed by M/s Jolly Motors, 1-2, Gitanjali Complex, Nr.Darpan Six Road, Navrangpura, Ahmedabad [hereinafter referred to as the "appellant"] against Order-in-Original No.CGST/A'bad-North/Div-VII/S.Tax-DC-005-18-19 dated 09.05.2018 [hereinafter referred to as the "impugned order"] passed by the Deputy Commissioner of CGST, Division-VIII, Ahmedabad North [hereinafter referred to as the "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant was engaged in purchase and sale of old and used cars on commission basis and was appointed as DSA for M/s Kotak Mahindra Primus Ltd & HDFC Bank Ltd and arranging the finance for their clients for purchase of old and used cars. As it appeared during the course of investigation that the said service are liable for service tax in terms of Section 65(19) of Finance Act, 1944 under the category of "Business Auxilliary Service", a show cause notice dated 19.10.2006 was issued to them for considering the said service as taxable service. A recovery of service tax amounting to Rs.1,79,843 with interest for the period of 2003-04 to 2004-05 and imposition of penalty under Section 75A for failure to make application for registration with service tax; Section 76 for failure to pay service tax within time prescribed' Section 77 for failure to file prescribed ST-3 return and under Section 78 for suppressing and not disclosing the value of the said taxable service provided by the before the department was proposed in the said show cause notice. The said show cause notice was adjudicated vide OIO dated 21.01.2008 by confirming allegations and confirmed the service tax with interest and also imposed penalty under Section 75A,76,77 and 78 of Finance Act, 1994. The Commissioner (Appeals) vide OIA dated 18.03.2009 has also upheld the said decision. The order of Commissioner (Appeals) was also challenged by the appellant before the Hon'ble Tribunal and the Tribunal has remanded the case to the original adjudicating authority to look into issue of limitation which appears to have not been agitated/examined by the lower authority without making any opinion on the issue involved. Vide the impugned order, the adjudicating authority has considered the said service as taxable service under the category of "Business Auxilliary Service" as defined under Section 65(19) of FA and confirmed the service tax with interest and imposed penalty under Section 75A, 76, 77 and 78 of FA supra.

3. On being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds:

- The case was remanded by the Hon'ble Tribunal to look into the issue of limitation by the adjudicating authority; that the demand is for the period of 01.07.2003 to 31.03.2005 and the show cause notice was issued on 19.10.2006, so the demand is time barred.



- The appellant was giving table space in their premises for the said work and therefore not covered under the category of Business Auxiliary service but Business support service, hence taxable from 01.05.2006;
- The appellant come under the ambit of the exemption under notification 25/2004- ST dated 10.09.2004 because as a service provider, they were other than banking company.
- Penalty cannot be imposable.
- They relied on various case laws in support of their argument.

4. Personal hearing in the matter was held on 26.07.2018. Shri Vipul Khandar, Chartered Accountant appeared for the same and reiterated the grounds of appeal and further pleaded that the issue regarding limitation is contrary to the Hon'ble Tribunal's remand order. He further submitted written submissions.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the grounds of appeal as well as at the time of personal hearing.

6. At the outset, I observe that the impugned order is arisen in view of Hon'ble Tribunal's remand order dated 02.09.2016. Therefore, I reproduced the gist of the said Tribunal's order.

"4. On careful consideration of the arguments of both sides and perusal of the records, it is observed that the issue was in dispute during the relevant period and there were decisions of the Tribunal in favour during the relevant period. The Board Circular dated 06.11.2016 also state that the issue was in dispute during the previous period. Prima facie, we find there were reasons for the appellant to have had a bonafide belief that service tax was not chargeable for the said commission during the said period. However, the issue of limitation appears to have not been agitated/examined by the lower authorities. Hence the matter has to be send back to the original adjudicating authority for a decision on this aspect, after examining the facts of the case and hearing the appellants. We make it clear that we are not expressing any opinion and the adjudicating authority is expected to take an unbiased impartial decision."

7. From the above, I observe that the issue involved in the matter is as to whether the adjudicating authority has correctly decided the matter relating [i] to the payment of service tax under the service category of "Business Auxilliary Service" for the period of 2003-04 to 2004-05 in connection with sale of old and used cars on commission basis by the appellant and [ii] whether the demand in question hits by limitation of time bar or other wise.

8. As regards [i] above, I observe that the adjudicating authority has contended that from the nature of service, it can be derived that the appellant had rendered the services of the kind of promotion of banking and other financial services on behalf of their clients i.e banks or financial institutions; Accordingly, correct classification of the activity is Business Auxiliary service with effect from 01.07.2003. He relied on case laws in case of M/s Brij Motors Pvt Ltd [2012 (25) STR (489)-Tr. Del]; City Motors & Financial Services [2012 (25) STR (449) Tri-Del]



and Board's circular No.87/06/2006-ST dated 06.11.2006 which stipulates that the activities carried out by the appellant are under the net of service tax and benefit of exemption notification No.25/2004-ST dated 10.09.2004 is not entitled to them.

9. As regards the classification of the service I observe that the Hon'ble Tribunal Larger Bench, Mumbai in case of M/s Pagariya Auto Centre [2014 (33) S.T.R. 506 (Tri. - LB)] has settled the issue. The Hon'ble Tribunal has held that:

20. *On a consideration of the apparent conflict of opinion in the decisions mentioned in the order of reference and the other decisions which were cited at bar, it is clear that no uniform principle emerges as would guide determination of whether a particular transaction involving an interface between an automobile, dealer and bank or financial institution would per se amount to BAS. The identification of the transaction and its appropriate classification as the taxable BAS or otherwise must clearly depend upon a careful analysis of the relevant transactional documents. Only such scrutiny and analysis would ensure rational classification of the transaction.*

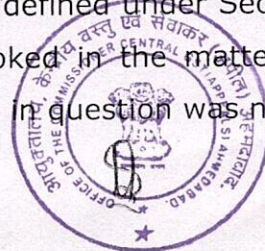
21. *Where mere space is provided along with furniture for facilitating accommodation of representatives of financial institutions in the premises of an automobile dealer and consideration is received for that singular activity, such consideration may perhaps constitute a rent for the provision of space and associated amenities. Such restricted relationship/transaction may not amount to BAS. If on the other hand, the transactional documents and other evidence on record indicates a substantial activity falling within the contours of any of the integers of the definition of BAS, spelt out in Section 65(19), then it would be legitimate to conclude that BAS is provided."*

Further, the CBEC vide its circular No. 87/05/2006-S.T., dated 6-11-2006 has clarified that

"4. In some cases, the automobile dealers help the buyers of the vehicles for arranging the finances. For this, they have a tie-up with Banks/Non-banking Finance Companies. The customers are advised by the dealers to approach such financial companies for taking loans. The automobile dealers get commission from such financial companies for directing the customers to the latter. By this activity, the automobile dealers 'promote or market the services provided by their customer (i.e., the financial institution), and are therefore covered under 'taxable service', namely, the "Business Auxiliary Service". The tax is payable on the gross commission received by the automobile dealer. In some cases, the dealers share part of their commission with their customers to attract them. However, this is an independent transaction between the automobile dealer and the purchaser of the vehicle, and does not involve the service rendered by the automobile dealer to the finance company. Therefore, the tax payable by the dealer would be on the gross amount received from the financial company and not on the balance amount, i.e., after excluding the amount that he passes on to the customer."

10. In view of above, I am of the opinion that the adjudicating authority has correctly classified the service under the category of Business Auxiliary Service under Section 65 (19) ibid and do not require any interference.

11. As regard [ii] above, the adjudicating authority has contended that due to specific intelligence, the activities of the appellant came to light of the department that they were appointed as DSA. Thus, the act on the appellant constitute suppression of fact to evade payment of service tax as defined under Section 73 of the Finance Act and extended period is correctly invoked in the matter. On the other hand, the appellant has contended the service tax in question was not paid by



them as it is their bonafide belief that service tax is not payable to such activities carried out by them. I observe that Shri Suresh Vishandas Ramani, Proprietor of the appellant, in his statement dated 05.01.2006 has admitted the fact that the appellant were doing such taxable activities and not paying any service tax and not taken any service tax registration. It is also an admitted fact they never intimated or represented as to whether the activities carried out by them are non-taxable or otherwise. Therefore, the appellant cannot be escaped from provisions of Central Excise Act and Rule by saying mere bon- fide belief that the activities are not taxable. The appellant should have agitated or taken up the matter before proper authority in case of any doubt regarding taxability of service. In this instant case, the appellant have not done so.

11.1 I find that in Para 4 of Hon'ble Tribunal's order dated 02.09.2016 *supra*, it has stated that "*Prima facie, we find there were reasons for the appellant to have had a bonafide belief that service tax was not chargeable for the said commission during the said period. However, the issue of limitation appears to have not been agitated/examined by the lower authorities....*" In the impugned order the adjudicating authority has concluded that limitation is applicable. However, the appellants have appealed that the original authority has not decided the matter as per the direction of the tribunal. I would, therefore, like to examine this issue. From the file I find that the appellant have contended that they were under "bona fide belief" not to pay taxes. I would like to examine this "bona fide belief" of the appellants. I find that the appellants have not produced any document to prove that there was ever any doubt in their mind about the taxability of the service. A doubt in the mind of the assessee must lead to some active consultation, but the assessee appellant have not produced any legal advice, which will prove that they had a genuine and bona fide doubt about the taxability of the service. Whenever we have a doubt about anything, normally we consult somebody. Therefore, it is unacceptable that this business entity will not take help of any professional, because non-payment of tax does have severe penal consequences. A "bona fide belief" cannot arise in the mind of an individual and remain there without any further action. It must be supported by a professional and legal advice **which prompts a taxpayer not to pay tax, which has severe penal consequences.** The appellants have failed to substantiate this aspect. Moreover, I further find that the appellants do not even have registered themselves with the department, till his premises were visited by the officers on the basis of an intelligence. Non registration (which also has severe penal consequences) simply shows that appellants wanted to hide themselves from the Department. Therefore, to suppress their existence and hide from Department they did not obtain the service tax registration. They have also not submitted any legal advice obtained in this regard, to show that they were advised accordingly. **Non-obtaining of service tax registration, having severe penal consequences, further demolishes their claim of the above stated "bona fide belief".** I further find that in 2006 itself in



his statement the proprietor Shri Suresh Vishandas Ramani has categorically stated that "that their above mentioned service provided to their customer **was covered** under the scope of the provisions under sub-clause (ii) of the clause 19 of the section 65 of the Finance Act 1944 and **as such activity is taxable activity** with effect from 01.07.2003 under the category of the Business Auxiliary Service. From the above statement of the proprietor it is crystal clear that there were no such "bona fide belief" as claimed by the appellant and they were in fact aware of the taxability of their service. Therefore, it is very clear that their claim of "bona fide belief" that service was not chargeable is a mis-statement and afterthought. In view of this, extended period is applicable.

11.2 I further find that the Hon'ble Apex Court in case of Jain Exports Pvt Ltd [1993 (66) ELT 537] has held that mere bona fide action cannot entitle assessee to claim full waiver of penalty, unless the totality of the facts so warrant. The relevant substance of the said order is as under:

..For the foregoing reasons we are satisfied that the importers' contention that the redemption fine should be wholly waived or substantially reduced as their action in importing the goods under OGL was bona fide is not well founded. Even if the transaction has in fact resulted in a loss (we cannot delve into it for the first time in this Court) it will not make any difference. We feel that taking cover under the earlier orders passed in the case of M/s. Jain Shudh Vanaspati Lid., and the letter of the STC, the importers have tried to create the impression that they were innocent victims of the subsequent interpretation put on the relevant entry, ignoring the fact that the licences were revalidated on certain terms and conditions which did not permit import except through the STC. We are, therefore, satisfied that the import under OGL was not a bona fide act. We, therefore, dismiss both the appeals as well as the writ petition with costs. [paras 11, 13].

12. In view of above discussion, I uphold the decision of the adjudicating authority as regards the issue relating to point [ii] above. Accordingly, I reject the appeal filed by the appellant and uphold the impugned order.

13. The appeal stand disposed of accordingly, in view of above foregoing discussion.

उमा शंकर
(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date: / 08/2018

Attested

20/01/18
(Mohan V.V)
Superintendent,
Central Tax (Appeals),



By R.P.A.D.

To
M/s Jolly Motors,
1-2, Gitanjali Complex,
Nr.Darpan Six Road, Navrangpura, Ahmedabad

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 Additional Commissioner, CGST, Ahmedabad North.
5. The Assistant Commissioner, CGST, Dn VII North
6. Guard File.
7. P.A.

