

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

क फाइल संख्या : File No : V2(ST)0205/A-II/2016-17 / 3082 to 3088
 ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-001-APP-0107-17-18
 दिनांक Date : 29-09-2017 जारी करने की तारीख Date of Issue 29/10/17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-02/18/AC/2016-17 Dated 13.10.2016
 Issued by Assistant Commr STC, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

**M/s. QX KPO Services Pvt Ltd
 Ahmedabad**

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 :-

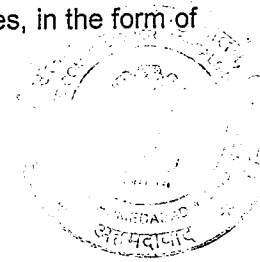
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल हास्पिटल कम्पाउण्ड, मेधाणी 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर 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 A219k 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 अर्ज़ी 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,

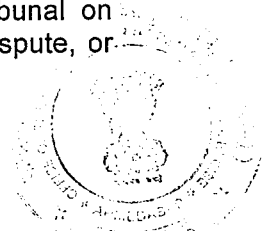
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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 order arises on account of an appeal filed by M/s QX KPQ Services Pvt. Ltd., 201 & 401, GNFC Info Tower, S. G. Highway, Bodakdev, Ahmedabad (hereinafter referred to as the 'the appellants' for sake of brevity) against Order-in-Original No. SD-02/18/AC/2016-17 dated 13.10.2016 (hereinafter referred to as the 'impugned order' for the sake of brevity) passed by the Assistant Commissioner, Service Tax, Division-II, Ahmedabad (hereinafter referred to as the 'adjudicating authority' for the sake of brevity).

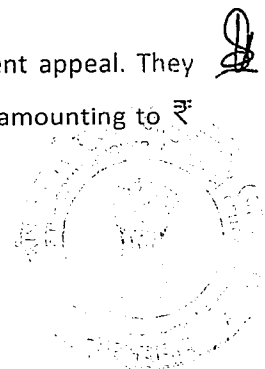
2. Briefly facts of the case are that the appellants are registered with the Service Tax Department under the category of "Rent-a-Cab Service, Security/ Detective Agency Service, Manpower Recruitment/ Supply Agency Service, Business Auxiliary Service, Legal Consultancy Service' and holding Registration No. AAACQ1087GST001.

3. During the course of Service Tax Audit, it was noticed that the appellants were recovering 'Notice Pay' from the employees who were leaving the job without giving notice for the stipulated period, and thereby permitting the concerned employees to leave the job. In this process, the appellants had recovered an amount of ₹ 7,87,026/- for the period from 01.07.2012 to 31.03.2015. It was deduced by the audit team that by recovering the notice pay, the appellants were tolerating the act of the employees to leave the job. This activity of the appellants falls under the category of 'declared services' as envisaged under Section 66E(e) of the Finance Act, 1994. On being pointed out by the audit party, the appellants did not agree with the objection and accordingly, a show cause notice, dated 10.06.2016, was issued to them.

4. Further it was noticed that the assesee being body corporate and receiver of the taxable service was required to pay total service tax payable on the invoices raised by the said service provider, which they have failed to do so, thereby they contravened the provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1) (d) (i) (F) (a) of the service Tax Rules, 1994. had discharged less Service Tax liability on rent a cab service as a service receiver. There fore a show cause notice, dated 10.06.2016, was issued to them for recovery of a sum of Rs. 2,26,218/- service Tax short paid on such services for the period from 01.07.2012 to 31.03.2015.

5. The said show cause notice was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority confirmed the demand for recovery of Service Tax amounting to ₹3,12,794/- under Section 73(2) read with Section 68 of the Finance Act, 1994 ibid by invoking the extended period of limitations of five years under the proviso 73 (1) of the Finance Act, 1994. He also ordered the appellants to pay interest under Section 75 of the Finance Act, 1994. The adjudicating authority further imposed penalty under Sections 76 read with Section and 78 (B) of the Finance Act, 1994, and also imposed penalty under Section 77 (2) of the Finance Act, 1994 for non-filing correct/proper service tax returns.

6. Being aggrieved with the impugned order, the appellants preferred the present appeal. They stated that the adjudicating authority has confirmed the demand of service tax amounting to ₹



2,12,794/- under reverse charge mechanism in relation to Rent-A-Cab service short paid/not paid during the period from Financial year 2012-2013 to 2014-2015 u/s 73(2) of the Finance Act, 1994, read with Section 68 of the Act, by invoking extended period of limitation of five years under the proviso to Section 73(1) of the Finance Act 1994. They submitted that extended period is not invocable as there is no fraud, collusion, willful misstatement or suppression of facts with intent to evade payment of service tax, as the appellant is entitled to refund of the service tax if paid. It is prayed that the whole exercise is revenue neutral as on one hand they would be paying the service tax and on the other hand, would be claim refund of the same as they are 100% exporting of their services as EOU [Software Technology Park of India].

6.1 Regarding the alleged demand of ₹. 86,576/- on account of notice pay recovery made from their employees treating the same as covered under declared service as defined under Section 66E (e) of Finance Act, 1994. They submitted that the definition of "Service" means any activity carried out person from another for consideration... In case of notice pay recovery the employer does not do any activity. The employer does not have any option but to accept the decision of employee to leave the job. The employer does not have any choice to tolerate the act. Therefore the question of tolerating the act does not arise. So no activities is carried out by the employer and hence there is no service as defined in clause (44) of Section 65 B of the Finance Act, 1994.

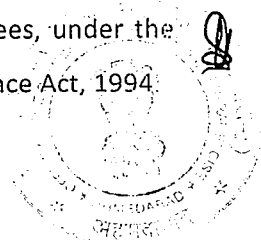
6.2 They further contested that penalty under Section 78 of the Finance Act, 1994, is not leviable as there is no fraud, collusion, willful misstatement or suppression of facts or contravention of any of the provisions of this chapter or Rules with intent to evade payment of service Tax. They further submitted regarding simultaneously imposition of penalty under Section 76 and 78 of the finance Act, 1944. They also pleaded to cancelled the penalty imposed under Section 77(2) of Finance Act, 1944 for non-filing correct/proper Service Tax return under the provision of Section 70 of the Finance Act, 1944. They also argued on revenue neutrality.

7. Personal hearing in the case was granted on 07.09.2017 wherein Shri Tushar Shah, CA, appeared on behalf of the appellants and reiterated the contents of the appeal memorandum. He also submitted additional submission. He emphasizes on revenue neutrality because 100% export of IT services. He Cited the case of "Nirlon 320 ELT 22 (S.C.)."

8. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, and oral submissions made by the appellant at the time of personal hearing. Now, let me examine the reasons of confirming the demand and the defense reply given by the appellants.

To start with, I find that the adjudicating authority has confirmed the demand of Service Tax amounting to ₹3,12,794/- and imposed the penalty. I find that there are two core issue to be decided in the present appeal.

1. Non Payment of Service Tax on recovery of notice pay from their employees, under the category of 'declared services' as envisaged under Section 66E(e) of the Finance Act, 1994.



2. service Tax short paid under reverse charge mechanism in relation to Rent-a-Cab service.

9. At the onset, I will discuss the first issue; stating that as per the definition of service as envisaged under Section 65B(44)(b) of the Finance Act, 1994, the activity was carried out by one person to another for a consideration which is tolerating the act of the employees to leave the job without giving notice for the stipulated period and allowing the employees to leave the job. In view of the above, I find that the adjudicating authority has towed to the lines as prescribed in the amendments made in the Act w.e.f. 01.07.2012. In the new system, the word 'service' has been redefined under Section 65B(44) of the Finance Act, 1994. However, CBEC, in the month of June 2012, had introduced an 'Education Guide' in light of the new system. The said guide clarifies many queries that were supposed to erupt at the time of the amendments made in the Act w.e.f. 01.07.2012. I would like to quote below a concerned paragraph from the said guide for clarification;

"2.9 Provision of service by an employee to the employer is outside the ambit of service;

2.9.1 Are all services provided by an employer to the employee outside the ambit of services?

No. Only services that are provided by the employee to the employer in the course of employment are outside the ambit of services. Services provided outside the ambit of employment for a consideration would be a service. For example, if an employee provides his services on contract basis to an associate company of the employer, then this would be treated as provision of service.

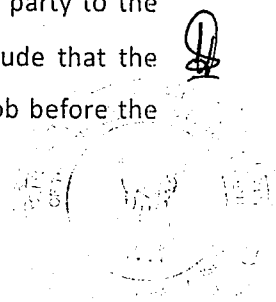
2.9.2 Would services provided on contract basis by a person to another be treated as services in the course of employment?

No. Services provided on contract basis i.e. principal-to-principal basis are not services provided in the course of employment.

2.9.3 Would amounts received by an employee from the employer on premature termination of contract of employment be chargeable to Service Tax?

No. Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would not be chargeable to Service Tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act".

In view of the above, it is now very clear that any payment made by either of the party to the other one would not be chargeable to Service Tax. Thus, from the above, I conclude that the process of payment made by the employees to the appellants, for termination of job before the

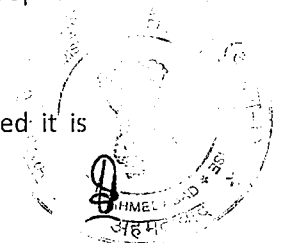


completion of the agreed upon period, is not to be treated as a service nor any act of consideration for refraining from an act or tolerating an act. Therefore, I hold that the demand of ₹.86,576/- should be set aside in the interest of justice and the appellants should be given relief from payment of Service Tax along with interest and penalty.

10. Now the second issue, I agree with the view of the adjudicating authority, as stated in the impugned order, that the said assesses had not discharged their service tax liability correctly on Rent-a-Cab services under reverse charge mechanism, they suppressed the correct value in their ST-3 returns, they failed to determine the correct value of taxable services. The invocation of extended period is justified in the present case as they failed to disclose the correct value in their ST-3 returns which was only noticed by the audit party during verification of their accounts, there was a deliberate withholding of essential information from the department by mis-statement about the said services received and amount paid thereof. The contention of the appellant that extended period is not invocable as short payment is not due to fraud, collusion, willful misstatement or suppression of facts with intend to evade payment of Service tax as they were entitled to refund of service tax if paid. This argument is not acceptable as this is the case of short/nonpayment of service tax and not refund of service tax. Refund of service tax is governed by procedures and limitations provided under the finance Act, 1994, and Rules made their under to get refund. Liability to pay service tax and refund of service tax are two different provisions and govern with the respective provisions of Service Tax Act, and Rules, therefore arguments put forth by the appellant for suppression of facts and revenue neutrality are not tenable in such situation. If hypothetically presumed that whatever they have to pay as service tax they are entitled to refund then provisions would have been made not to pay any service tax, rather than paying and claiming refund. Thus their argument for revenue neutrality does not hold water. The case cited by them on revenue neutrality i.e of NIRLON Ltd. pertains to valuation of similar goods sold at factory gate and to their sister concern, does not come to their rescue as this is not identical to the situation of the present case.

11. As regards simultaneous imposition of penalty under Section 76 and 78 of the Finance Act, 1994, the appellants have argued that same is not permissible. I agree to the argument of the appellants. An amendment was made in Section 78, w.e.f. 10.05.2008, by way of insertion of the proviso wherein it was stated that when penalty u/s 78 has been imposed, then the provision of Section 76 will not apply. However even after the amendment in both the Section in the Budget, 2015, the mutually exclusivity of the penalties has been maintained. In view of the facts and discussions hereinabove, since the period involved in the present case is after 16.05.2008 and since penalty under Section 78 has been imposed under the impugned order, I hold that imposition of penalty under Section 76 *ibid* is not sustainable in the eyes of law hence I drop the same.

12. As regards the penalty under Section 77(2) of the Finance Act 1944, is concerned it is pertinent to go through the provisions of the said section which stipulates that;



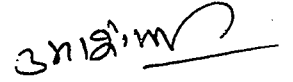
SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, —(2) Any person, who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees.

Since penalty under Section 78 has been imposed under the impugned order, I hold that imposition of penalty under Section 77(2) *ibid* is not sustainable in the eyes of law hence I drop the same.

13. In view of above, their appeal is rejected only to the extent of short-payment/ non-payment of service tax as discussed in paragraph 10 above. Regarding the issue pertaining to non-payment of Service Tax on recovery of notice pay from their employees, I allow the appeal as discussed in paragraph 9 above.

14. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

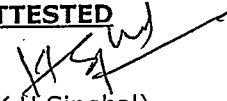
14. The appeals filed by the appellant stand disposed off in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED


(K.H. Singhal)

SUPERINTENDENT (APPEAL),
CENTRAL EXCISE, AHMEDABAD.

BY R.P.A.D.

To,
M/s QX KPO Services Pvt. Ltd.,
201 & 401, GNFC Info Tower,
S. G. Highway, Bodakdev,
Ahmedabad-380 054.

Copy To:-

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner Central Tax, GST South,, Ahmedabad-.
- 3) The Additional Commissioner, Central Tax , GST South, Ahmedabad
- 4) The Asst. Commissioner, Central Tax GST South, Div-VI, Ahmedabad (New jurisdiction).
- 5) The Asst. Commissioner (System), GST South, Hq, Ahmedabad.
- 6) Guard File.



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