

केंद्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,	1 st Floor, Central Excise Building,
केंद्रीय कर शुल्क भवन	Near Polytechnic,
सातवीं मंजिल, पॉलिटेक्निक के पास,	Ambavadi, Ahmedabad-380015
आम्बावाडी, अहमदाबाद-380015	
079-26305065	टेलीफोन नं.: 079-26305136

क फाइल संख्या : File No : **V2(ST)0221/A-II/2016-17 / 10092 & 10096**

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-123-17-18**

दिनांक Date : 20-10-2017 जारी करने की तारीख Date of Issue 21-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **AHM-SVTAX-000-ADC-020-16-17** Dated **27.10.2016** Issued by **ADC STC**, Service Tax, Ahmedabad

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

M/s. Fiverbo International 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 :-

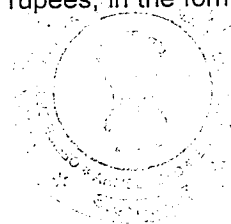
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैनटल 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 और लगाया गया जुर्माना रूपर 5 लाख या उससे कम है वहाँ रूपर 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 5 लाख या 50 लाख तक हो तो रूपर 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 50 लाख या उससे ज्यादा है वहाँ रूपर 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 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 फॉर्म 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 A2I9K 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 43 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 appeal is filed by M/s. Fivebro International Private Limited, 103/A, 10th floor, Tirthbhoomi Apartment, Near Law Garden, Ellisbridge, Ahmedabad 380 009 [for short 'appellant'] against OIO No. AHM-SVTAX-000-ADC-20-2016-17 dated 27.10.2016 passed by the Additional Commissioner of the erstwhile Service Tax Commissionerate, Ahmedabad [for short – 'adjudicating authority'].

2. The facts briefly are that during the audit of records of the appellant, it was observed that during the FY 2009-2010 to 2012-2013, they had made payments in foreign currency towards 'consultancy charges', provided by a person situated outside India. However, the appellant had not paid Service tax of Rs. 6,21,800/- under reverse charge mechanism on the said payments towards consultancy charges. A show cause notice dated 8.10.2014, was therefore, issued proposing classification of the service under Management or Business Consultants service and demanding service tax of Rs. 6,21,800/- along with interest. The show cause notice further proposed penalty on the appellant under sections 76, 77 and section 78 of the Finance Act, 1994. This notice was adjudicated vide the aforementioned impugned OIO dated 27.10.2016, wherein the adjudicating authority confirmed the demand along with interest and further proposed penalty on the appellant under sections 77 and 78 of the Finance Act, 1994.

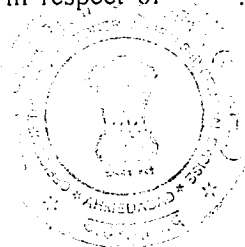
3. Feeling aggrieved the appellant has filed this appeal on the grounds that

- the department has wrongly considered amount paid to non resident person as consultancy charges; that it is salary and reimbursement of expenses to the non resident salaried person of the appellant;
- that the appellant had paid certain amount towards salary and the remaining amount towards reimbursement of expenses as incurred by salaried persons;
- that expenses classification in the books of account or in financial statement is one of the form and does not change the substance or nature of transaction in question; that the incidence of taxation must be made on the basis of economic substance of the transaction in question;
- that they would like to rely on the case of Intercontinental Consultants and Technocrats P Limited [2013(29) STR 9(Del)], wherein the Hon'ble Delhi High Court held that only the value of taxable services should be charged to service tax and all expenses incurred for the provision of taxable services that is reimbursed, should be excluded;
- that salary paid to the employee and reimbursement of expenses made to the employee has been specifically excluded from the definition of service;
- that when no service tax is payable, the question of levy of interest and penalty does not arise;
- penalty under section 78 is not imposable since there is no finding in the impugned OIO which alleges that appellant has intended to evade payment of tax; that in the absence of any finding of intent to evade, the demand and penalty cannot be imposed/confirmed.

4. Personal hearing in the matter was held on 6.10.2017 wherein Ms. Bhagyashree Bhatt and Ms. Rinkal Patel, both CAs, appeared on behalf of the appellant. They reiterated the grounds of appeal and submitted a brief of the case.

5. I have gone through the facts of the case, the impugned OIO, appeal papers, the grounds mentioned in the appeal and the oral averments made during the course of personal hearing. The question to be decided in the present appeal is whether the appellant is liable to pay service tax under the category of *Management or Business Consultants service* in respect of

[Signature]



payments made in foreign currency towards 'consultancy charges' provided by a person situated outside India.

6. Before moving on to the facts of the case, I would like to point out what I have noticed while going through the facts of the case. The appellant not only dis-honoured three summons, he also failed to avail the eight opportunity of personal hearing, granted to him over one pretext or other. The noticeable fact is that these personal hearings were granted over a period of nine months. Without appearing and seeking constant adjournments, the appellant only delayed the adjudication process. Ultimately the appellant appeared for personal hearing before the adjudicating authority on 8.9.2016.

7. I find that the department's case is based purely on their audited Balance Sheets, Profit and Loss account, which clearly depict that payments in foreign currency were made by the appellant towards 'consultancy charges'. It is based on this fact which is evident in their financial records that the Service tax was demanded in the first place. To this allegation, as is mentioned in the impugned OIO, the appellant has consistently changed his stand, every now and then, viz.

-to the audit officers the appellant stated that	'the expenses are incurred by their foreign agent on behalf of' them which are reimbursed by them'
-vide letter dated 8.5.2013, the appellant stated that	'that they had transferred the money instead of carrying money for expenses for travel of our Directors'
-vide letter dated 21.2.2014, the appellant stated that	'paid to the person situated outside India for expenses to be incurred by our Director during his international visit'
-in the defence reply dated 6.6.2016 submitted to the adjudicating authority	'amount paid in foreign currency to the non resident person is nothing but the salary to non resident employee of the company'
-in appeal papers before me	That they had paid certain amount towards salary and remaining amount towards reimbursement of expenses as incurred by salaried person.

Adding to this, is the fact that when the Range Superintendent asked for a certificate from a Chartered Accountant, on the claim of the appellant, that they had wrongly shown consultancy charges in the Balance sheet, instead of showing the same under the head of foreign travel - the appellant, surprisingly vide his letter dated 21.2.2014, requested that they may be exempt from obtaining a CA certificate, on the lines requested.

8. The appellant, I find has not approached this office with the said certificate. Since the Balance Sheet, P&L account, from which the figures have been taken by the department stands audited by the Chartered Accountant, it was imperative on the part of the appellant to have provided a CA's certificate to the effect that the same was wrongly shown in the balance sheet under the head consultancy charges instead of foreign travel. These audited Balance Sheets must have already been submitted to the ROC, Income Tax Department, etc.. Now, disputing the accounting headings before the department, without either providing a revised balance sheet or providing a CA's certificate to the effect, leads one to doubt the bonafide of the appellant. Allowing the request of the appellant to consider the expense under a different heading, without simultaneous revision of the Balance Sheet, would lead to a strange situation wherein an expenditure, is booked under different accounting head in the filings before Central

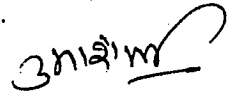
Excise and Service Tax department and before Income Tax department. Further, I feel that the appellant by putting a new story every time, not cooperating with the department, has only confirmed the allegation of the department. Even otherwise there is no documentary evidence, provided by the appellant, to substantiate his stand. I find that the expenses towards consultancy charges for the period upto 1.7.2012 are correctly classifiable under *Management or Business Consultants service* and as per Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 read with Section 66 of the Finance Act, 1994 read with Rule 3(iii) of Taxation of Services (Provided from outside India and received in India) Rules, 2006, and from 1.7.2012 since it does not fall under the negative list, and also as per Rule 2(1)(d)(i)(G) of the Service Tax Rules, 1994 read with Section 66A of the Finance Act, 1994, I find that the appellant is liable to pay service tax for payments made in foreign currency towards 'consultancy charges' provided by a person situated outside India. Accordingly, I uphold the confirmation of the demand along with interest by the adjudicating authority.

9. As far as extended period is concerned, the difficulty of the department in obtaining the records from the appellant, is already listed above. The appellant had never disclosed these facts to the department. It was only during Audit that the facts could be unearthed. I therefore, feel that the extended period is correctly invoked. Further, since the appellant willfully mis stated the facts and suppressed the facts with an intent to evade payment of Service Tax, the penalty under Section 78 has been correctly imposed. Hence, I do not find any reason to interfere with the penalties imposed on the appellant by the adjudicating authority.

10. In view of the foregoing, the appeal is rejected and the impugned OIO is upheld.

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

11. The appeal filed by the appellant stands disposed of in above terms.

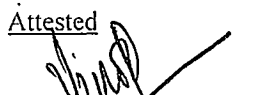


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date: 20.10.2017

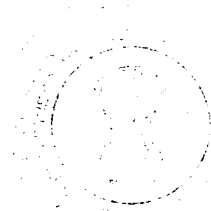
Attested


(Vinod Lukose)
Superintendent,
Central Tax(Appeals),
Ahmedabad.

By RPAD.

To,

M/s. Fivebro International Private Limited,
103/A, 10th floor, Tirthbhoomi Apartment,
Near Law Garden,
Ellisbridge,
Ahmedabad 380 009.



Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division VI, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
5. Guard File.
6. P.A.

