

केन्द्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX	
7 th Floor, Central Excise Building,	
Near Polytechnic,	
Ambavadi, Ahmedabad-380015	
आम्बावाडी, अहमदाबाद-380015	
फोन नं. 079-26305065	टेलफैक्स : 079-26305136

क फाइल संख्या : File No : **V2(ST)0263/A-II/2016-17** / 9050 to 9097
 ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-135-17-18**
 दिनांक Date : 27-10-2017 जारी करने की तारीख Date of Issue 23-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **SD-02/26 & 27/ AC/ 2016-17** Dated **09.12.2016**
 Issued by Assistant Commr **STC**, Service Tax, Ahmedabad

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

M/s. Sanidhya Infrastructure 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, 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 accompanied 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 फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उभमें 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 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 रुपए 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 होंगे।

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,

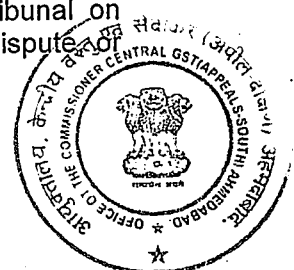
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.



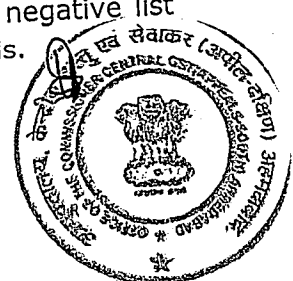
ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s. Sanidhya Infrastructure Pvt. Ltd., 606, Sakar-I, Nehru Bridge, Navrangpura, Ahmedabad-380009 (in short 'appellant') against Order-in-Original No.SD-02/26&27/AC/2016-17 dated 12.12.2016 (in short 'impugned orders') passed by the then Assistant Commissioner, Service Tax Division-II, Ahmedabad (in short 'adjudicating authority').

2. Briefly stated that during the course of audit of the records by the department, it was noticed that the appellant had incurred 'Freight Expenses' for the period 2009-10 to 2013-14 but failed to discharge service tax liability being recipient of taxable service in terms of Rule 2(1)(d)(v) of the Service Tax Rules, 1994 for which two SCNs dated 27.04.2015 and 21.04.2016 were issued for recovery of service tax amounting to Rs.2,01,319/-(Rs.1,64,193/- + Rs.37,126/-). In reply, the appellant stated that they have already paid service tax to transporter, who is having their own trucks and used for transporting construction materials to their site; that the truck owner not issued any Consignment note but raised carting bill and charged service tax from them and also produced copies of the same. The adjudicating authority vide impugned order confirmed demand of service tax of Rs.2,01,319/-(Rs.1,64,193/-+ Rs.37,126/-) alongwith interest under section 73(2) and section 75 of the Finance Act, 1994 respectively; imposed penalty of Rs.2,01,319/- (Rs.1,64,193/- + Rs.37,126/-) and Rs.3716/- under section 78 and 76ibid respectively; imposed penalty of Rs.20,000/- (Rs.10,000/-+ Rs.10,000/-) on the appellant under section 77(2)ibid with an option to pay 25% of penalty imposed under section 78ibid if confirmed demand of service tax and interest due on it is paid within 30 days of communication of impugned order.

3. Aggrieved with the impugned order, the appellant has filed the present appeal wherein, interalia, submitted that:

- (a) since the transport operator viz. Jaybhole Transport Services has charged the tax, they are not liable to pay tax otherwise it would amount to double payment of tax and rely upon case laws viz. Navyug Alloys Pvt. Ltd. Vs. CCE, Vadodara-II reported in 2009(13) STR-421(Tri. Ahmd).
- (b) in present case there is no booking agent but the service provider is truck owner and not issuing consignment note but simply issuing carting bill and charging tax on them and hence provisions as specified in Rule 2 of Service Tax Rule is not applicable and rely upon case law viz. Birla Ready Mix Vs. CCE, Noida reported in 2013(30)STR-99(Tri. Del.).
- (c) Had it been intention to tax Goods Operator Services also then Govt. had not put services by transportation of goods by road in section 66D(p) of Negative List of services. Hence, it is clear that the services of Goods Transport Operator and Goods Transport Agency are different. The intention is to tax the services of agency and not that of truck operator.
- (e) If tax is not payable on forward charge basis as service are in negative list then there cannot be tax on such service on Reverse Charge basis.



(f) the tax charged and paid to truck operator is not in dispute and hence entire transaction is revenue neutral because in any case tax is paid and no revenue loss to the govt and hence denial of said fact is not proper invoking extended period and imposing penalty.

4. Personal hearing in the matter was held on 06.10.2017. Shri.Nagesh Belsare, Chartered Accountants, appeared on behalf of the appellant and reiterated the ground of appeals and submitted that they had submitted the bills (para 4 of SCN dtd.27.04.2015) while O.I.O. says that they have not submitted the same(para 20 of O.I.O).

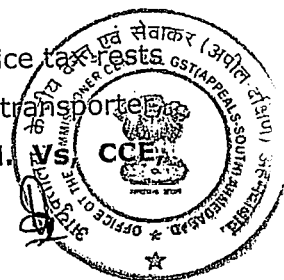
5. I have carefully gone through the appeal memorandums, submission made at the time of personal hearing and evidences available on records. I find that the main issue to be decided is whether the appellant is liable to pay service tax under GTA under reverse charge mechanism or otherwise. Accordingly, I proceed to decide the case on merits.

6. Prima facie, I find that the appellant is a service receiver and has taken services from transporter having their own truck, registered under service tax rules, who has issued carting bill and charged service tax and paid to the govt. This fact is not in dispute. But the departmental audit is of the view that liability to pay service tax under GTA rests with the appellant in view of provisions contained in Rule 2(1)(d)(v) of the Service tax Rules, 1994 read with Notifn. No.35/2004-ST dated 03.12.2004. During the adjudication process, the appellant's representative also submitted copies of carting bills issued by the transporter, ST-3 returns and challans evidencing payment of service tax by the service provider i.e. transporter for verification. This fact is evident in para 4 of the SCN dated 27.04.2015. However, this fact is strongly contested by the appellant during personal hearing held on 06.10.2017 stating that the adjudicating authority has ignored this fact in his findings vide para 20.6 of the impugned order. In this regard, I have carefully gone through the impugned order. I find that in para 20.6 on page no. 13 of the impugned order, the adjudicating authority has clearly mentioned as under:

"The contention of the assessee is not correct as they had not submitted any charts showing the amount of Service Tax charged by the transporters and also not submitted any documentary proof regarding payment of Service Tax in government account. Thus, they had failed to establish the proof of payment of Service Tax of Rs.1,64,193/- & Rs.37.126/- and hence, above service taxes are liable to be recovered from them".

I find that this findings of the adjudicating authority is contrary to the facts narrated in the SCN dated 27.04.2015.

In this regard, I find that in case of GTA, though the liability to pay service tax rests on service recipient under the law but if the same is discharged by the transporter it cannot be ignored as per case law viz. **Navyug Alloys Pvt. Ltd. vs**



vadodara-II reported in 2009(13)STR-421(Tri.Ahmd) wherein it is held as under:

"Demand(Service tax)-Person liable to pay- Demand confirmed on receipt of goods Transport Agency service- Service tax paid by transporter-Revenue contending that appellant alone liable for GTA service and payment of tax by transporters not valid-Once tax paid, same amount cannot be confirmed in respect of same services-Impugned order set aside-Section 73 of the Finance Act, 1994[para 1,2]"

Appeal allowed

Based on this judgement, similar view is taken in case of **Umasons Auto Compo Pvt. Ltd. Vs.CCE, Aurangabad reported in 2017(47)STR-377(Tri. Mumbai)** wherein it is held as under:

"Goods Transport Agency service-Demand-Recipient liability-Service tax paid by service provider is accepted by Revenue, it cannot be again demanded from the recipient of GTA service-Impugned order set aside-Section 73 of Finance Act, 1994[para 2,4,5]"

Appeal allowed

So, I find that the adjudicating authority has failed to analyze the vital issue of payment of service tax in the impugned order in view of the above case laws.

7. In view of the above discussion and findings, I set-aside the impugned order and allow the appeal by way of remand to the adjudicating authority to decide afresh within 30 days of communication of this order after following the principle of natural justice.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals filed by the appellant stands disposed of in above terms.

उमा शंकर
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested:

B.A. Patel
(B.A. Patel)
Supdt.(Appeals)
Central Tax, Ahmedabad.

BY SPEED POST TO:

M/s. Sanidhya Infrastructure Pvt. Ltd.,
606, Sakar-I, Nehru Bridge, Navrangpura,
Ahmedabad-380009.

Copy to:-

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Principal Commissioner, Central Tax, Ahmedabad South (RRA Section).
- (3) The Asstt. Commissioner, Cen. Tax Div.-VI(Vastrapur) , Ahmedabad-South.
- (4) The Asstt. Commissioner(System), Central Tax HQ, Ahmedabad-South.
(for uploading OIA on website)
- (5) Guard file
- (6) P.A. file.



