


केंद्रीय कर आयुक्त (अपील)		
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX		
केंद्रीय कर शुल्क भवन	7th Floor, Central Excise Building,	
सातवां मजिल पालिटेक्निक के पास	Near Polytechnic,	
आम्बावाडी, अहमदाबाद-380015	Ambavadi, Ahmedabad-380015	
079-26305065	टेलिफोन : 079-26305136	

क फाइल संख्या : File No : **V2(ST)019/A-II/2017-18/10581 to 10588**
 ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-158-17-18**
 दिनांक Date : 20-11-2017 जारी करने की तारीख Date of Issue 08-12-17

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-40-16-17** Dated **06.03.2017** Issued by ADC SVTAX, Service Tax, Ahmedabad

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

M/s. Amol Dicalite 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 :-

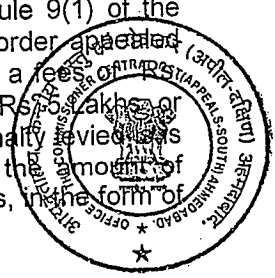
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल 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 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 is less 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 भेजी 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 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 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.



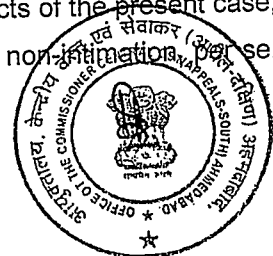
ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s. Amol Dicalite Ltd., 301, "Akshay", 53, Shrimali Society, Navrangpura, Ahmedabad-380009 (in short 'appellant') against Order – in - Original No. AHM-SYTAX-000-ADC-40-2016-17 dated 06.03.2017(in short 'impugned order') passed by the then Additional Commissioner, Service Tax, Ahmedabad (in short 'adjudication authority').

2. Briefly stated that during the course of audit of records of the appellant by the department, it was noticed that they had supplied machinery (Air Jet Looms, Beams, Beam Knotting machine etc.) on lease rent to M/s. Arvind Ltd. under three lease agreements dated 13.12.2005, 11.08.2009 and 06.07.2010 but failed to pay service tax under the category of 'supply of tangible goods service'. Hence, periodical SCN dated 29.07.2016 was issued for recovery of service tax of Rs.53,91,373/-, for the period 01.10.2014 to 30.09.2015, alongwith interest and penalty. This SCN was adjudicated by the adjudicating authority vide impugned order wherein demand of service tax of Rs.53,91,373/- alongwith interest was confirmed under Section 73(1) and 75 of the Finance Act, 1994 respectively; imposed penalty of Rs.10,000/- under Section 77(2)ibid; imposed penalty of Rs.53,91,373/- under Section 78ibid with an option to pay penalty equal to 25% if confirmed demand of service tax is paid alongwith interest on it within 30 days of receipt of the impugned order.

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

- (a) the adjudicating authority has completely ignored and not dealt with any of the submissions made by them in the impugned order.
- (b) there is no evidence or allegation in the notice that the leasee was not in the control or possession of the machinery.
- (c) it is a settled law that when the transaction is liable to sales tax, the same would not be liable to service tax.
- (d) specific submissions made by the appellant including the Affidavit of Arvind Ltd is neither considered or discussed in the impugned order.
- (e) the demand is barred by limitation. The demand is for the period from 01.10.2014 to 30.09.2015 whereas SCN is issued on 29.07.2016.
- (f) the payment of sales tax also shows a belief that the service tax is not payable.
- (g) there is no doubt or confusion in their mind as regards non applicability of service tax since the same was payable by Arvind Ltd under the said three agreements and hence not intimated or sought guidance from the department on the subject.
- (h) intention to evade tax is primary condition for invoking extended period in the facts and circumstances of the case. Every non-intimation of facts does not automatically becomes suppression. The suppression requires positive act on non-intimation despite the requirements to do so. In the facts of the present case, they believe that no tax is payable, in the circumstances, non-intimation of facts, is not suppression.



- (i) the statement dtd. 19.11.2010 of Shri Naishadh S. Desai, Manager, recorded by DGCEI, Ahmedabad clearly gives facts of giving machinery on lease known to the DGCEI and no demand is raised by DGCEI. This confirms their belief that no tax was payable.
- (j) when demand is barred by limitation and when there is no suppression, penalty u/s 78 cannot be imposed.
- (k) no penalty u/s 77 is called for since they are already registered with the deptt. and filing returns regularly.
- (l) since no tax is payable, question of interest and penalty does not arise. The matter is legal in nature and involves question of interpretation. Therefore no penalty can be imposed.

4. Personal hearing in the matter was held on 10.10.2017. Shri S.J. Vyas, Advocate, appeared on behalf of the appellant and re-iterated the grounds of appeal and submitted that M/s. Arvind Mills are in effective control of machine and in their possession.

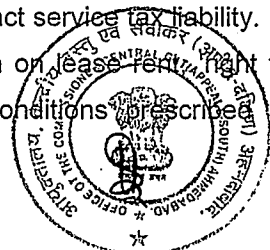
5. I have carefully gone through the appeal memorandum, submission made at the time of personal hearing and evidences available on records. I find that main issue to be decided is whether appellant is liable to pay service tax under the category of 'supply of tangible goods' or otherwise. Accordingly,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

6. At the out-set, I find that the period covered in the subject SCN dated 29.07.2016 is from 01.10.2014 to 30.09.2015. There is no dispute regarding said machinery given on lease rent to M/s. Arvind Ltd. in terms of agreement dated 13.12.2005 as amended on 11.08.2009 and 06.07.2010. With the introduction of negative list regime w.e.f. 01.07.2012, said services is covered under section 66E(f) of the Finance Act, 1994 which is reproduced below for the sake of ease:

"66E. The following shall constitute declared services, namely:-

- (a)....
- (b)....
- (c)....
- (d)....
- (e)....
- (f) ***transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods.***
- (g)....
- (h)....
- (i)...."

As per this definition, **said services are liable to service tax only when goods are transferred 'without transfer of right to use such goods'**. This is very vital part in the definition in order to decide whether said leasing is liable to service tax or otherwise. It also implies that if any tangible goods are transferred or given on rent with absolute right to use such goods, then no service tax is leviable. It also further implies that if it is transferred with any limitation of right to use it, then it would attract service tax liability. In the instant case, I find that though the goods have been given on lease rent with 'right to use' said goods is transferred with limitation in terms of conditions prescribed in



agreement dated 13.12.2005. This fact is evident from para 3(ii) of the agreement dated 13.12.2005. I find that para 3(ii) puts restriction to use said machinery for yarn processing and weaving fabrics from the yarns of the lessee only. This aspect is very well discussed by the adjudicating authority in para 4.5.1 to 4.5.8 of the impugned order and I do agree with it. Hence, it is crystal clear that complete or absolute or full 'right to use' is not transferred to lessee. I find that when the 'right to use' is not transferred absolutely, lease rent received from the lessee is liable to service tax in terms of provisions contained in said Section 66E(f)ibid.

6.1. Further, the appellant has strongly contested that since they have paid VAT on lease rent paid to the appellant, they are not liable to pay service tax in terms of Clause (d) of Article 366(29A) of the Constitution of India. In this regard, I find that this provision exists vide Section 65B(44) of the Finance Act, 1944 which is reproduced below for the sake of ease:

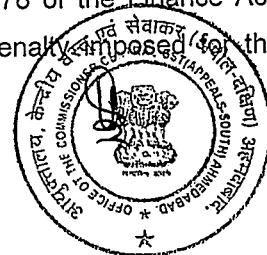
- "65B. In this Chapter, unless the context otherwise requires-**
- (44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-**
- (a) an activity which constitutes merely,-**
- (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner, or**
- (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or**
- (iii) a transaction in money or actionable claim;"**

Article 366(29A) of the Constitution provides for "Tax on sale or purchase of goods" includes-

- (a).....**
- (b).....**
- (c).....**
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.**
- (e).....**
- (f).....**
- and such transfer, delivery or supply of any goods shall be deemed to be a sale of goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."**

So, from the above, it is crystal clear that when the goods are transferred with absolute right to use, it amount to sale and accordingly VAT is payable. In the instant case, I find that merely payment of VAT does not qualify transaction to be 'sale' within the meaning defined in said Article 366(26A)(d)ibid. It is mandatory to see whether 'right to use' is also transferred absolutely alongwith the goods. As discussed in Para 6 supra, when the 'right to use' is not transferred absolutely or transferred with some condition alongwith the goods then it does not qualify for 'sale'. Hence, the said transaction does not qualify 'sale', it is not liable to VAT and as such plea of the appellant is not tenable.

6.2 As regards imposition of penalty under section 77 and 78 of the Finance Act, 1944, I find that when demand is sustainable, so does the penalty imposed. The reasons stated in para 4.6 and 5 of the impugned order.



7. In view of the above discussion and findings, I reject the appeal filed by the appellant and uphold the impugned order.

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

The appeal 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)
Superintendent(Appeals)
Central Tax, Ahmedabad.

BY SPEED POST TO:

M/s Amol Dicalite Ltd.,
301, "Akshay", 53, Shrimali Society,
Navrangpura, Ahmedabad-380009.

Copy to:

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Principal Commissioner, Central Tax, Ahmedabad-South.(RRA Sec.).
- (3) The Addl. Commissioner, Central Tax, Ahmedabad-South.
- (4) The Asstt. Commissioner, Central Tax Division-IV(Vastrapur), Ahmedabad-South.
- (5) The Asstt. Commissioner(System), Central Tax HQ, Ahmedabad-South.
(for uploading the OIA on website)
- (6) Guard file
- (7) P.A. file.

