

केन्द्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX	
7 th Floor, Central Excise Building	
Near Polytechnic	
सातवीं मंजिल, पॉलिटेक्निक के पास, अम्बावडी, अहमदाबाद-380015	
आम्बावडी, अहमदाबाद-380015	
079-26305065	टेलिफैक्स: 079-26305136

क फाइल संख्या : File No : **V2(ST)017/A-III/2017-18** / 10395 to 10400
 ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-184-17-18**
 दिनांक Date : 22-11-2017 जारी करने की तारीख Date of Issue 06-12-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **SD-06/12/AC/VinayCorp/16-17** Dated **27.01.2017** Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Vinay Corporation

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 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 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 34फ 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 रुपए से अधिक न हो

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

- (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.



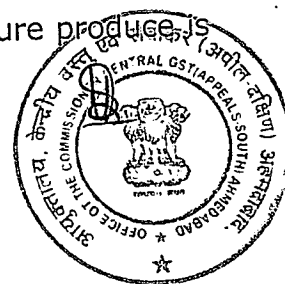
ORDER IN APPEAL

M/s. Vinay Corporation (STR No. AACF V6741R ST001), 501, Narayan Chambers, Ashram Road, Ahmedabad- 380 009 (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number SD-06/12/ AC/Vinay Corpn./2016-17 dated 27.01.2017 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax Div-VI, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellant had been receiving Commission/Adat income on the sale of Cotton Bales. The Commission was being charged by appellant to buyer over and above sale value of the invoices at certain fixed percentage under the name commission or "ADAT" (commonly known as commission). Appellant had not discharged their service tax liability on the said commission amount covered under Business auxiliary service [section 65 (105) zzb]. SCN dated 08.04.2015 for recovery of Service Tax of Rs. 7,92,114/- for the period Oct-2009 to March-2014 was issued.

3. Adjudicating Authority vide impugned OIO confirmed demand of Rs. 7,92,114/- under section 73(1) of FA 94 along with interest under Section 75. Penalty of Rs. 3,18,611/- under section 78(1) for period from 01.04.2010 to 07.04.2011 and Penalty of Rs. 4,73,503/- under section 78(1) for period from 08.04.2011 to 31.03.2014 was imposed for suppression of facts. Penalty of Rs. 10,000/- under section 77(2) for failure to self assess the tax.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 13.04.2017 before the Commissioner (Appeals-II) wherein it is contended that commission/adat received by appellant is working on principal to principal basis (not as agent) and commission shown in invoice is part of sale consideration on which VAT is paid, therefore service tax can not be levied. Appellant had further contended that, if it is not part of sale, then it is exempted as cotton bales are agriculture produce. In pre-negative period said service (i.e commission earned on agriculture produce as agent) was exempted vide notification No. 13/2003-ST dated 20.06.2003 (as amended by 08/2004 dt. 09.07.2004) and in post negative period service provided by commission agent for sale or purchase of agriculture produce is covered under negative list of section 66D.



5. Personal hearing in the case was granted on 14.11.2017. Shri R. M. Bagatiya, CA, appeared before me and reiterated the grounds of appeal and submitted copy of OIA No. AHM-SVTAX-000APP-275-16-17 dated 28.03.2017.

DISUSSION AND FINDINGS

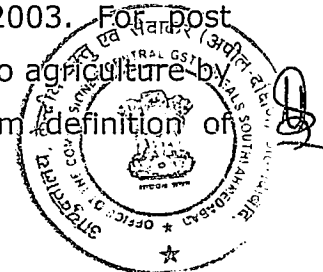
6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing.

Appellant had relied upon decision given in following OIO where in identical issue is decided in favor of assessee.-

- a. M/s Jaydeep Cotton Fibres Pvt. Ltd. passed by Commissioner, C. Ex., Rajkot, Gujarat
- b. Mitesh Cotton Co. passed by The Additional Commissioner , Service Tax, HQ, Ahmedabad
- c. M/s Kasturbhai Sanabhai, passed by The Asst. Commissioner , Service Tax, Div-III, Ahmedabad

7. Appellant has stated but has not produced any concert evidence to substantiate that they are acting on principal to principal basis. I agree with the adjudicating authority that if they were acting on principal to principal basis, then there was no need to show commission separately on invoice. I am of view that paying VAT on commission does not absolve them from payment of service tax on commission income shown separately on invoice if said commission is not exempted in service tax. I am of same view as of adjudicating authority that appellant had clubbed commission with sale value and VAT as VAT rate is lower then Service tax rate. I am not able to understand what was the need of showing commission separately when sale price includes profit margin in case of principal to principal transaction.

8. I find that appellant; in course of sale-purchase of cotton bales is acting as commission agent. Appellant has argued that it is reimbursement of expense. Cotton bales are agriculture produce. Any produce of agriculture on which either no further processing is done or such processing is done as is usually done by cultivator which does not alter its essential characteristic but makes it marketable for primary market is agriculture produce. Any service rendered in agriculture sector by cultivator was not taxable in pre-negative era by virtue of Notification 13/2003- ST dated 20.06.2003. For post negative period that is from 01.07.2012 said service related to agriculture by cultivator is included in negative list which is evident from definition of



agriculture produce given u/s 65B(5). Therefore commission agent service rendered by appellant in pre-negative or post negative period is taxable.

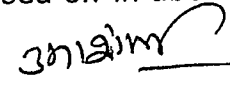
9. Now coming to imposition of penalty under Section 78 of FA, 1994. The adjudicating authority has imposed the said penalty on the grounds of suppression with intent to evade payment of duty. In the present case, non payment of service tax by the appellant was unearthed during the course of Audit and subsequent inquiry undertaken by the Department. Had it not been detected by the Department, the said non payment of service tax would have gone unnoticed. Further at no point of time such non-payment of duty has been disclosed to department. Hence, the adjudicating authority was justified in invoking extended period of limitation and for imposition of penalty under Section Section 78 of FA, 1994. I therefore uphold the imposition of penalty under Section Section 78 of FA, 1994.

10. I hold that whole demand and penalty is sustainable. I up-held said demand and penalty imposed under sectional 78 and 77of FA Act, 1994.

10. In view of above, I up-held OIO and appeal filed by the appellants is rejected.

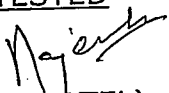
11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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


(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED


(R.R. PATEL)

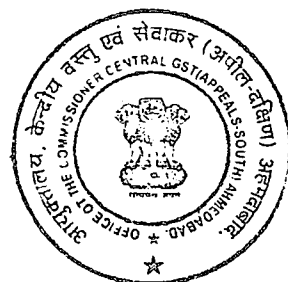
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

To,

M/s. Vinay Corporation,
501, Narayan Chambers,
Ashram Road,
Ahmedabad- 380 009

Copy to:

1) The Chief Commissioner, Central Excise, Ahmedabad.



- 2) The Commissioner, GST North ,Ahmedabad-
- 3) The Additional Commissioner, GST North, Ahmedabad
- 4) The Asst. Commissioner, GST North, Ahmedabad.
- 5) The Asst. Commissioner(System), GST North, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

