# केंद्रीय कर आयुक्त (अपील)

**O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,**

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
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रजिस्टर्ड डाक ए.डी. द्वारा

7533 to 37

क फाइल संख्या : File No : V2(ST)/87/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-293-2017-18**
दिनाँक Date : **29-01-2018** जारी करने की तारीख Date of Issue 6/2/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Deputy Commissioner, केन्द्रीय कर, Ahmedabad-South द्वारा जारी मूल आदेश सं **SD-05/11/DKJ/DC/2017-18** दिनाँक: **16/06/2017,** से सृजित

Arising out of Order-in-Original No. **SD-05/11/DKJ/DC/2017-18** दिनाँक: **16/06/2017** issued by Deputy Commissioner, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

**M/s Shyamprakash Spinning Mills.Ltd**
**Ahmedabad**

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person a aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

**Revision application to Government of India :**

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

... 2 ...

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क क़ा भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

**इस 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।**

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. Shyamprakash Spinning Mills Ltd., 18 & 111, New Cloth Market, O/S Raipur Gate, Ahmedabad GPO, Ahmedabad-38001 (hereinafter referred to as 'the said appellant') against Order-in-Original NoSD-05/11/DKJ/DC/2017-18 dated 16.06.2017 (in short 'the impugned order') passed by the Dy. Commissioner, Service Tax, Division-V, Ahmedabad (in short 'the adjudicating authority').

2. The issue in brief is that the appellant were engaged in providing of services classified under the category of "Business Auxiliary Service" and were registered with the department. Based on an enquiry, it was observed that the appellant had leased out machineries to a party under leave and Licence arrangement for which they charged rent termed as 'Lease Charges'. The lease agreements reflect that the machineries are installed by the appellant in the factory premises of the parties. For that the VAT was collected from the party on the lease charges and paid by the appellant but no service tax was being discharged. During the period from April, 2011 to March, 2015, the appellant had collected lease charges to the tune of Rs. 78,73,320/- on which service tax amounting to Rs. 9,28,337/- was not paid. The lease agreements revealed that the machineries were leased by the appellants and even after leasing out it continued to be their property and the ownership lied with the appellant without transferring the effective control of the machineries and the rent had been received from the party for use of the premises and machineries. This falls under the category of service named "Supply of Tangible goods for use Service" under Section 65 (105) zzzzj) of Chapter V of the Finance Act. The CBEC vide its DO F. No. 334/1/2008-TRU dtd. 29.02.2008 has also clarified the scope of services taxable under this category according to which proposal was to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. The supply of goods on which VAT /sales tax is paid as deemed sale of goods is not covered under this category. Since in the above transaction, no sale tock place and the effective control and ownership remained with the appellant, they were liable to pay service tax. Accordingly, they were serviced upon a show cause notice dtd. 20.12.2006 demanding service tax of Rs. 9,28,337/- with interest and proposed imposition of penalties under various sections of the Finance Act. After considering defence arguments and case records, the adjudicating authority confirmed demand of service tax of Rs. 9,28,337/- under proviso

to Section 73(1) of the Finance Act, 1994; ordered for recovery of interest u/s 75 ibid, imposed penalties u/s 77(1)(a), 77(2) and equal penalty under Section 78 of the Finance Act vide the impugned order.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal on the following grounds that:

(a) The adjudicating authority has not given opportunity of personal hearing thereby violating the basic principle of natural justice;

(b) The communications were sent to wrong address i.e. their old address whereas they have shifted to new address so they could not receive any communication regarding personal hearing;

(c) The definition of the term 'service' specifically excludes 'deemed sales' and therefore it is amply clear that deemed sales are outside the scope of service and hence not liable to service tax;

(d) The term "sale" as contained in Section 2(23)(d) of Gujarat Value Added Tax, 2003 indicates that wherein the right to use goods is transferred, it will be considered as 'sale' and the TRU letter D.O. dtd. 29.02.2008 has clarified that supply of tangible goods for use and leviable to VAT/Sales Tax as deemed sale of goods is not covered under the scope of the proposed service;

(e) In the instant case, the possession and effective control over the goods lies with the party and the right to use the plant and machinery has been granted to them in entirety;

(f) They seek support from the decision of the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Limited vs. Union of India reported in 2006 (2) STR-161 (SC) in which while discussing the necessary ingredients of 'transfer the right to use the goods', it was held that among other things, the owner cannot again transfer the same right to others on having transferred the right to use the goods during the period;

(g) The adjudicating authority has erred in not taking into account reference and instruction from the latest circular No. 198/08/2016-ST dtd. 17.08.2016 issued by the CBEC in which it was required that the terms of the contract must be studied carefully vis-à-vis the criter4ia laid down by the Supreme Court in order to determine whether service tax liability will arise in a given case. In their case in clause VI(2) of the 'Leave & License Agreement', it is clearly stipulated that the party has been allowed quiet and peaceful possession of the premises and machineries during the entire period of licence without any interruption, among others, by the appellant or any other person. So

their case falls in the category set by the Hon'ble Supreme Court in the above case;

(h) The clause VI.I of the 'Leave & License Agreement' has been misinterpreted by the adjudicating authority as by not allowing the party to make any structural additions or alterations in the premises does not mean they have not transferred right to use. The premises is not a part of the 'Leave & License Agreement';

(i) All the clauses of a given agreement have to be read and interpreted in entirety and meanings should not be concluded on random basis;

(j) In view of the above, there is no short or no payment of service tax by the appellant and further they rely on the following citations in their support:

a) Commissioner VAT Vs. International Travel House Ltd. –Delhi HC dtd. 08.09.2009

b) Rashtriya Ispat Nigam Ltd. Vs. CTO -1990(77)STC-182

c) State of Andhra Pradesh Vs. Rashtriya Ispat Nigam Ltd.-2002(126)STc-114

d) State Bank of India Vs. State of Andhra Pradesh -1988(70)STC-215(AP)

e) Ahuja Goods Agency Vs. State of Uttar Pradesh -1997(106)ST-540

f) Laxmi SV Inc. Vs.ACTO,-2001(124)STC-426 Larnataka

g) Atwood Oceanics Pacific Ltd. Vs.CST,Ahd-2012(12)TMI-CESTAT(Tri.Ahd.)

h) Trizetto India Pvt. Ltd. Vs.CCE-Pune-III-2015(5)TMI-453

4. Personal hearing in the matter was held on 22.01.2018 in which Ms. Richa Ankit Gandhi appeared before me and reiterated the grounds of appeal and stated that PH was not received and VAT has been paid and contract copy would be submitted.

5. I have carefully gone through the facts of the case, the appellant's grounds of appeal in the appeal memorandum, oral and written submissions made by them at the time of personal hearing and other evidences available on records. I find that the main issue to be decided, interalia, is whether appellant is liable to pay service tax or otherwise.

6 At the outset, I find that Clause I of the lease Agreement dtd. 25.01.2010 has been reproduced in the show cause notice. The relevant portion of the Clause I is very significant as below:

"the licensor hereby grants in favour of the licensee *the license* to use the premises and machineries for a period of Five Years.....On expiry of

the said term, the *Licensor shall have an option* to renew this Agreement for a maximum of further term." (emphasis supplied)

From plain reading of the above relevant part of the Clause I of the agreement, it is obvious that the effective control is with the appellant and this license is for specific period of time subject to renewal.

Clause IV (E) of the lease Agreement dtd. 25.01.2010 specifically puts the conditions for use and further disposal of the leased plant and machinery. Clause VII of the lease Agreement dtd. 25.01.2010 clearly stipulates that either party shall be entitled to terminate the license at any time by giving one month's notice. It is to be noticed that when there is sale involved, the ownership and all rights of use and disposal get transferred to the person whom the goods have been sold but in the instant case, it speaks about termination of lease based on certain conditions. From these clauses and stipulations of the agreement, it is very clear that in the instant case, the overall control remains with the said appellant. This is the main quality which qualifies it to the service and eligibility for service tax as proposed in the impugned order.

Now while going through the definition of the service, we find that it has been provided as under:

Section 65(105)(zzzzj) of Finance Act, 1994 defines taxable service in relation to supply of tangible goods as under —

"Any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances"

The service has been made taxable service by Finance Act, 2008 w.e.f. 16.5.2008.

To be a taxable service, the definition envisages the following basic conditions -

(1) Service can be provided by any person to any other person.

(2) Services should be provided in relation to tangible goods.

(3) Tangible goods shall include machinery, equipment and appliances.

(4) The purpose of such supply shall be to use such goods.

(5) Supply of such goods shall be without transferring right of possession and effective control of such goods.

(6) Goods with ***transfer of possession and control*** shall be sales and not covered under taxable service. (emphasis supplied).

The objective of supply of tangible goods service is to tax those services which are provided in relation to supply of tangible goods without

transferring right of possession and effective control of the subject tangible goods. The movable assets if given on hire would therefore, attract service tax. Thus, lease and hire, both have now come under the service tax net. I also hold accordingly.

7. Now I take up the contention raised by the appellant that they had changed their address and therefore could not receive communications about personal hearing. From the copies of the show cause notice dtd. 20.12.2016, their defence reply dtd. 20.02.2017 to the show cause notice, their appeal memorandum all have same address i.e. 18 & 111, New Cloth Market. So I find their argument that they did not receive the communications about the personal hearing, completely unacceptable and therefore reject the argument that the impugned order is in violation of principle of natural justice. In view of the specific findings, I find that the case laws cited by the appellant in their support are not relevant here.

8 As regards imposition of penalty under Section 77 ibid, I find the appellant had failed to file the Service Tax returns for the relevant period and also failed to pay Service Tax and for other violations of the provisions of the Act as discussed in the impugned order. Therefore, I find that penalty imposed under section 77(1)(a)ibid is justified. As regards imposition of penalty under Section 78 ibid, I find that the act done by the appellant in the instant case contains all the ingredients elaborated under the said Section. Therefore, I find that penalty imposed under Section 78 ibid is justified.

9 The appeal is disposed of in above terms.
अपीलकर्ता द्वारा दर्ज की गयी अपील का निपटारा उपरोक्त तरीके से किया जाता है !

(उमा शंकर)
केंद्रीय कर आयुक्त (अपील्स)
अहमदाबाद
दिनांक:

सत्यापित

(धर्मेंद्र उपाध्याय)
अधीक्षक (अपील्स),
केंद्रीय कर, अहमदाबाद

**By R.P.A.D.**

To:

M/s. Shyamprakash Spinning Mills Ltd.,
18 & 111,
New Cloth Market,
O/S Raipur Gate,
Ahmedabad GPO,
Ahmedabad-38001

**Copy to:-**

(1) The Chief Commissioner, CGST, Ahmedabad Zone,
(2) The Commissioner, CGST, Ahmedabad (South),
(3) The Dy./Astt. Commissioner, CGST, Div.-VII, Ahmedabad (South),
(4) The Dy./Astt. Commissioner(Systems),CGST, Ahmedabad (South),
(5) Guard File,
(6) P.A.File.