
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015 टेलीफोन : 079-26305065	 7 th Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015 टेलीफैक्स : 079 - 26305136
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/02/RA/A-II/2017-18 / 11870 1191
 Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-313-2017-18
 दिनांक Date : 31-01-2018 जारी करने की तारीख Date of Issue 24/2/2018

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

ग Arising out of Order-in-Original No. STC/13/KM/AC/D-III/16-17 दिनांक: 10/01/2017 issued by
 Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Paavan Rameshbhai Trivedi
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 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 पूर्वोक्त 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 प्रक्रिया के दौरान हुई हो।

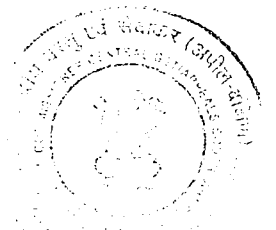
(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(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 ...

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(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 मामलों 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 का 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 ड्यूटी क्रेडिट 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 दिनांक 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 रुपये या उससे कम हो तो रुपये 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.

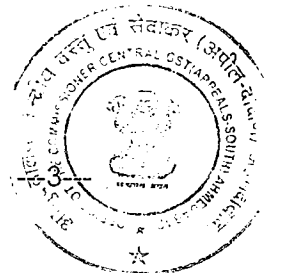
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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 मेटल हॉस्पिटल कम्पाउण्ड, मेघानी 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. Registrar 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 आदेश 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 है।

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 notwithstanding the fact that the one appeal to the Appellate 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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.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 is 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 अपील 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 appeal has been filed by the department (*appellant*, in short) against the Order-in-Original No.STC/13/KM/AC/D-III/2016-17 dated 10.01.2017 (henceforth, "*impugned order*") passed by the Assistant Commissioner, Service Tax, Division-III, Ahmedabad (henceforth, "*adjudicating authority*") in the case of Paavan Rameshbhai Trivedi, Pritam Nagar First Slope, Opp.-UCO Bank, Ellisbridge, Ahmedabad 380006 (henceforth, "*respondent*")

2. The facts giving rise to this appeal are that in a preventive action, the respondent, a service tax registrant under the category "Tour operator services", was found to have under-declared the value of taxable services in the ST-3 returns, thereby causing non-payment of service tax during the period *Oct-2003 to Mar-2008* of Rs.3,04,569/- for providing 'tour operator services', Rs.28,785/- for providing 'rent a cab services' and Rs.3,337/- for providing 'business auxiliary services'. A show cause notice was therefore issued on 20.04.2009 for recovery of service tax not paid which was decided in the impugned order wherein adjudicating authority dropped the demand raised against tour operator services, but confirmed that raised under rent a cab services and business auxiliary services. The adjudicating authority also ordered recovery of interest and imposed penalties under section 77 and 78 of the Finance Act, 1994. The department's appeal is against dropping of demand of Rs.3,04,569/- and also for not imposing any penalty under section 76 of the Finance Act, 1994.

3. The main grounds of appeal, in brief, are as follows-

3.1 The adjudicating authority has relied on the Gujarat High Court's order in the case of Gandhi Travels, Vadodara in Tax Appeal No.1065/2007, wherein department's appeal was dismissed on monetary grounds and not on merits and hence the issue did not reach finality.

3.2 The respondent was fulfilling the conditions of 'contract carriage permit' and not of 'stage carriage permit' and hence was providing taxable service under tour operator service; that point to point services provided by using vehicles having contract carriage permits were squarely covered under the definition of taxable service of tour operator.

3.3 Appellant states that once a vehicle is granted contract carriage permit, it becomes a tourist vehicle and the use of such vehicle for the purposes other than contract carriage will not alter classification or characteristic feature as a tourist vehicle. Appellant relies on following decisions -



- Pandit Motor Service v. CCE, Jaipur [2007(8) STR 344 (Trib.-Del.)]
- Secy. Federation of Bus Operators Association of Tamil Nadu v. UOI [2006(2) STR 411 (Trib.-Mad.)]
- Sri Pandiyan Travels v. CCE, Chennai-II [2006(3) STR 151 (Mad.)]
- L V Sankeshwar v. Superintendent of C.Ex., Jayanagar [2006(4) STR 257 (Kar.)]

3.4 Appellant has also relied on CBEC OM F.No.354/180/2005-TRU dated 20.09.2007 to state that transport of passengers from one point to another in a tourist vehicle registered under contract carriage permit issued by the appropriate transport authority is treated as tour operator and service tax is leviable.

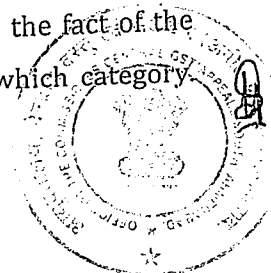
3.5 With regard to penalty under section 76, appellant states that penalty under section 76 was mandatory for failure to pay service tax for the period prior to 10.05.2008; that adjudicating authority has failed to give any reasons for not imposing penalty under section 76.

4. The respondent has neither filed any written submissions nor turned up for personal hearing on any of THREE opportunities granted on 07.11.2017, 18.12.2017 & 11.01.2018.

5. In absence of any submissions from the respondent, I proceed to decide the appeal on the basis of grounds urged in the appeal. There are two issues before me; first, whether respondent was liable to pay service tax under the category of tour operator service and second, whether respondent is liable to pay penalty in terms of section 76 of the Finance Act, 1994.

5.1 As per impugned order, the buses had contract carriage permits issued by the State Regional Transport Authority under section 74 of the Motor Vehicle Act, 1988 and not under sub-section 9 of section 88, hence the buses are not tourist vehicles as defined under sub-section 43 of section 2 of the Motor Vehicle Act, 1988. According to adjudicating authority, the issue was squarely covered in the CESTAT order in the case of CCE, Vadodara v. Gandhi Travels wherein department's appeal was dismissed. The CESTAT decision in the case of CCE, Mumbai v. Benzy Travels in appeal no.ST-606/2011 & ST/609/2011 is another decision relied by the adjudicating authority to hold that demand of Rs.3,04,569/- raised under tour operator service had no merit.

5.1.1 At the outset, I will like to discuss the case law which has been relied upon by the original authority. Each case of this nature is to be evaluated on its own facts. In such cases, there is very small legal point involvement, mostly it is the fact of the case, which will decide whether transport service will fall under which category

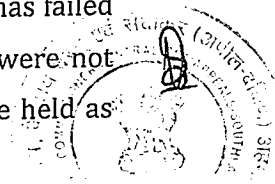


The case law, unless the facts are identical, is of no value. I note that dispute is about levy of service tax on point to point transport of passengers in the luxury buses having 'contract carriage permit' during the period Oct-2003 to Mar-2008 under the category of 'tour operator's services'. During the period under dispute, the taxable service of tour operator was defined under section 65(105)(n) of the Finance Act, 1994 as *any service provided or to be provided to any person, by a tour operator in relation to a tour*. Further, 'tour operator' was defined under section 65(115) of the Finance Act, 1994 as *a person engaged in the business of planning, scheduling, organising or arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours in a **tourist vehicle** covered by a permit granted under the Motor Vehicles Act, 1988 (59 of 1988) or the rules made thereunder*.

5.1.2 Therefore, a person operating tours in a tourist vehicle covered under a permit granted under the Motor Vehicles Act, 1988 (59 of 1988) or the rules made there-under qualified as a tour operator. In other words, to levy service tax, tours must have been conducted in the 'tourist vehicle' which, in terms of section 65(114) of the Finance Act, 1994, had a meaning assigned to it in clause (43) of section 2 of the Motor Vehicles Act, 1988. According to clause (43) of section 2 of the Motor Vehicles Act, 1988, *a tourist vehicle means a **contract carriage** constructed or adapted and equipped and maintained in accordance with such specifications as may be prescribed*.

5.1.3 From the above, it is clear that a contract carriage needed to be adapted, equipped and maintained in accordance with the specifications prescribed (in rule 128 of the Central Motor Vehicles Rules) to make it a tourist vehicle and obtain necessary permissions to operate as tourist vehicle. The adjudicating authority has not given any findings to conclude that the vehicles were not adapted, equipped or maintained to make them tourist vehicles. Also, there is no evidence produced by the respondent that the vehicles were not adapted or equipped to make them tourist vehicles. In fact, the respondent should have produced some positive evidence to prove this fact as was done in the case of **Commissioner of C.Ex. & Cus., Vadodara-II v. Gandhi Travels** [2007(6) STR 430 (Trib.-Ahmd.)], where respondent had produced the certificate issued by the State Transport Authority that the vehicles in question were not covered under section 2(43) of the Motor Vehicles Act as 'tourist vehicle', and on the basis of that it was held that respondent had no tax liability.

5.1.4 Therefore, though there is no denying the fact that a contract carriage should have been certified as a tourist vehicle to levy service tax, the respondent has failed to produce any certificate from the transport authorities that the buses were not tourist vehicles. In absence of such a certificate, the respondent cannot be held as



- **not** liable to service tax and consequently, the adjudicating authority's order dropping the demand of Rs.3,04,569/- needs to be set aside. The appeal in this regard therefore succeeds and respondent is liable to pay the service tax of Rs.3,04,569/- alongwith applicable interest and equal penalty under section 78 of the Finance Act, 1994.

5.2 With regard to penalty under section 76 of the Finance Act, 1994, there is no discussion in the impugned order. As per appellant, penalty under section 76 was mandatory for the period prior to 10.05.2008 (the date from which simultaneous penalties under section 76 and 78 became specifically inapplicable in terms of proviso inserted in section 78).

5.2.1 In this regard, I find that in terms of section 78B introduced by the Finance Act, 2015, in the show cause notices pending adjudication as on 14.05.2015, amended penalty provisions of section 76 and 78 would apply. The present matter being such a case, amended penalty provisions are to be applied. As per amended provisions, section 78 applies where service tax was not levied or paid or short levied or short paid or erroneously refunded by reason of fraud or collusion or willful misstatement or suppression of fact or contravention of any provisions of the Finance Act and rules made there-under and section 76 would apply in cases *other than* such cases. After these amendments, therefore, the penalties of section 76 and 78 clearly became mutually exclusive. I note that in the impugned order, equal penalty under section 78 has been imposed, and therefore, by virtue of amended provisions of section 76 and section 78 read with section 78B, penalty under section 76 becomes inapplicable. Resultantly, I do not find the respondent liable to pay any penalty under section 76 *ibid*.

6. In view of foregoing discussion and findings, the appeal is partly allowed.

7. 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.

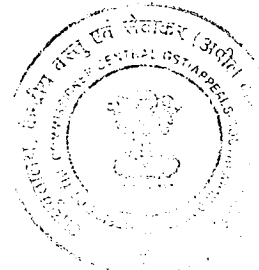
उमाशंकर
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date: 31/1/2018

Attested

S. Hudda
(Sanwamal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad



By R.P.A.D.

To,

Paavan Rameshbhai Trivedi,
Pritam Nagar First Slope, Opp.-UCO Bank,
Ellisbridge, Ahmedabad 380006

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - South.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax, Division-VII, Ahmedabad- South.
5. Guard File.
6. P.A.

